

WTO Analytical Index

The *WTO Analytical Index* is the authoritative guide to the interpretation and application of findings and decisions of WTO panels, the WTO Appellate Body and other WTO bodies. These official reports are part of the trade dispute settlement system, which is administered by the WTO and which rules on trade disputes brought by its 149 Members. The book assists anyone working with WTO disputes to make a link between the findings for each case and specific articles in the WTO Agreements. This is a unique work produced by the Legal Affairs Division of the WTO Secretariat with inputs from other Divisions of the Secretariat and the Appellate Body Secretariat.

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

WTO Analytical Index

Guide to Law and Practice

SECOND EDITION

VOLUME I

World Trade Organization, 2007

Disclaimer

This publication is intended to facilitate understanding of the cited cases but does not constitute an official or authoritative interpretation by the WTO Secretariat or WTO Members of these cases or the WTO agreements referred to therein.

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Foreword

This second edition of the *WTO Analytical Index* has been prepared by the Legal Affairs Division of the WTO Secretariat with contributions from other divisions of the Secretariat and the Appellate Body Secretariat. The material contained in this edition covers developments in WTO law and practice through the end of December 2004. In this second edition, of particular note is that the scope of the Chapter on the *Understanding on Rules and Procedures Governing the Settlement of Disputes* has been extended and a number of tables have been added. In addition, greater use has been made of subheadings throughout the book; this is reflected in each chapter's table of contents. As has always been the case, our aim with this publication is to assist readers as much as possible in their research on WTO law and practice.

I wish to thank all those individuals who have helped in the researching, drafting, editing and proof-reading of this work.

Suggestions for improvements are welcome and should be addressed to the Legal Affairs Division of the WTO Secretariat.

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I. OVERVIEW OF SCOPE AND ORGANIZATION

A. SCOPE

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

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

B. ORGANIZATION OF MATERIALS

3. The material is organized into 22 chapters with a separate chapter for each of the Agreements. Within each chapter, there are sections organized on an article by article basis.

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

to be found following the text(s) of the Article concerned.

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

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

II. EDITORIAL CONVENTIONS

A. ABBREVIATIONS

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

B. OTHER CONVENTIONS

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

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

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

¹ GATT Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) (“GATT Analytical Index”).

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

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

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

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

14. Because this work is both for general distribution and for use by Members of the WTO, references are pro-

vided to some documents which are still subject to restriction. The rules on document restriction and de-restriction are discussed in the Chapter on the *WTO Agreement*.

C. DOCUMENT SERIES, DOCUMENT REFERENCES, AND DOCUMENT SOURCES

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

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

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

III. MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

A. AGREEMENTS

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

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

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

B. WTO BODIES

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

IV. WTO DOCUMENTS³

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

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

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

V. GATT DISPUTES

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

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

<i>Greece – Import Taxes</i>	<i>Special Import Taxes Instituted by Greece</i> Working Party Report, adopted 3 November 1952, BISD 1S/48
<i>Greece – Phonograph Records</i>	<i>Greece – Increase in Bound Duty</i> Group of Experts Report, 9 November 1956, unadopted, L/580
<i>Greece – USSR Tariff Quotas</i>	<i>Greece – Preferential Tariff Quotas to the USSR</i> Working Party Report, adopted 2 December 1970, BISD 18S/179
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<i>Jamaica – Margins of Preference</i>	<i>Jamaica – Margins of Preference</i> Panel Report, adopted 2 February 1971, BISD 18S/183
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<i>Japan – Alcoholic Beverages I</i>	<i>Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages</i> Panel Report, adopted 10 November 1987, BISD 34S/83
<i>Japan – Leather (Canada)</i>	<i>Japan’s Measures on Imports of Leather</i> Panel Report, adopted 10 November 1980, BISD 27S/118
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<i>Korea – Beef (NZ)</i>	<i>Republic of Korea – Restrictions on Imports of Beef – Complaint by New Zealand</i> Panel Report, adopted 7 November 1989, BISD 36S/234
<i>Korea – Beef (US)</i>	<i>Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States</i> Panel Report, adopted 7 November 1989, BISD 36S/268
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<i>New Zealand – Finnish Transformers</i>	<i>New Zealand – Imports of Electrical Transformers from Finland</i> Panel Report, adopted 18 July 1985, BISD 32S/55
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<i>Norway – Textiles</i>	<i>Norway – Restrictions on Imports of Certain Textile Products</i> Panel Report, adopted 18 June 1980, BISD 27S/119
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<i>Spain – Soyabean Oil</i>	<i>Spain – Measures Concerning the Domestic Sale of Soyabean Oil – Recourse to Article XXIII:2 by the United States</i> Panel Report, 17 June 1981, unadopted, L/5142
<i>Spain – Unroasted Coffee</i>	<i>Spain – Tariff Treatment of Unroasted Coffee</i> Panel Report, adopted 11 June 1981, BISD 28S/102
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US – Fur Felt Hats	<i>Report of the Intersessional Working Party on the complaint of Czechoslovakia concerning the Withdrawal by the United States of a Concession under the terms of Article XIX</i> Report, adopted 22 October 1951, GATT/CP/106
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US – Magnesium	<i>United States – Measures Affecting the Export of Pure and Alloy Magnesium from Canada</i> Panel Report, 9 August 1993, unadopted, SCM/174
US – Malt Beverages	<i>United States – Measures Affecting Alcoholic and Malt Beverages</i> Panel Report, adopted 19 June 1992, BISD 39S/206
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US – Nicaraguan Trade	<i>United States – Trade Measures Affecting Nicaragua</i> Panel Report, 13 October 1986, unadopted, L/6053
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US – Norwegian Salmon CVD	<i>Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway</i> Panel Report, adopted 28 April 1994, BISD 41S/II/576
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<i>US – Spring Assemblies</i>	<i>United States – Imports of Certain Automotive Spring Assemblies</i> Panel Report, adopted 26 May 1983, BISD 30S/107
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<i>US – Sugar Quota</i>	<i>United States – Imports of Sugar from Nicaragua</i> Panel Report, adopted 13 March 1984, BISD 31S/67
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<i>US – Swedish Steel Plate</i>	<i>United States – Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden</i> Panel Report, 24 February 1994, unadopted, ADP/117 and Corr.1
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<i>US – Tobacco</i>	<i>United States Measures Affecting the Importation, Internal Sale and Use of Tobacco</i> Panel Report, adopted 4 October 1994, BISD 41S/I/131
<i>US – Tuna (EEC)</i>	<i>United States – Restrictions on Imports of Tuna</i> Panel Report, 16 June 1994, unadopted, DS29/R
<i>US – Tuna (Mexico)</i>	<i>United States – Restrictions on Imports of Tuna</i> Panel Report, 3 September 1991, unadopted, BISD 39S/155
<i>US – Vitamin B12</i>	<i>Panel on Vitamins</i> Panel Report, adopted 1 October 1982, BISD 29S/110
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VI. WTO DISPUTES

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<i>Argentina – Footwear (EC)</i>	<i>Argentina – Safeguard Measures on Imports of Footwear</i> Panel Report, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:I
<i>Argentina – Hides and Leather</i>	<i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> Panel Report, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:II
<i>Argentina – Hides and Leather (Article 21.3)</i>	<i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS155/10, 31 August 2001, DSR 2001:XII
<i>Argentina – Preserved Peaches</i>	<i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> Panel Report, WT/DS238/R, adopted 15 April 2003, DSR 2003:III
<i>Argentina – Textiles and Apparel</i>	<i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> Panel Report, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, DSR 1998:III
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<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	<i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> Panel Report, WT/DS126/RW and Corr.1, adopted 1 February 2000, DSR 2000:III
<i>Australia – Salmon</i>	<i>Australia – Measures Affecting Importation of Salmon</i> Panel Report, WTDS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII

<i>Australia – Salmon (Article 21.3)</i>	<i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS18/9, 23 February 1999, DSR 1999:I
<i>Australia – Salmon (Article 21.5 – Canada)</i>	<i>Australia – Measures Affecting Importation of Salmon– Recourse to Article 21.5 of the DSU by Canada</i> Panel Report, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV
<i>Brazil – Aircraft</i>	<i>Brazil – Export Financing Programme for Aircraft</i> Panel Report, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, DSR 1999:III
<i>Brazil – Aircraft (Article 21.5 –Canada)</i>	<i>Brazil – Export Financing Programme for Aircraft– Recourse by Canada to Article 21.5 of the DSU</i> Panel Report, WT/DS46/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS46/AB/RW, DSR 2000:VIII and DSR 2000:IX
<i>Brazil – Aircraft (Article 21.5 – Canada II)</i>	<i>Brazil – Export Financing Programme for Aircraft</i> Panel Report, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001,:X
<i>Brazil – Aircraft (Article 22.6 – Brazil)</i>	<i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> Decision by the Arbitrators, WT/DS46/ARB, 28 August 2000, DSR 2002:I
<i>Brazil – Desiccated Coconut</i>	<i>Brazil – Measures Affecting Desiccated Coconut</i> Panel Report, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, DSR 1997:I
<i>Canada – Aircraft</i>	<i>Canada – Measures Affecting the Export of Civilian Aircraft</i> Panel Report, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	<i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> Panel Report, WT/DS70/RW, adopted 4 August 2000, as upheld by the Appellate Body Report, WT/DS70/AB/RW, DSR 2000:IX
<i>Canada – Aircraft Credits and Guarantees</i>	<i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> Panel Report, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III
<i>Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)</i>	<i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> Decision by the Arbitrator, WT/DS222/ARB, 17 February 2003, DSR 2003:III
<i>Canada – Autos</i>	<i>Canada – Certain Measures Affecting the Automotive Industry</i> Panel Report, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VI and DSR 2000:VII
<i>Canada – Autos (Article 21.3)</i>	<i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X
<i>Canada – Dairy</i>	<i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> Panel Report, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, WT/DS103/AB/R and Corr.1, WT/DS113/AB/R and Corr.1, DSR 1999:V and DSR 1999:VI
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	<i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the Untied States</i> Panel Report, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by the Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	<i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the Untied States</i> Panel Report, WT/DS103/RW2, WT/DS113/RW2, adopted 18 December 2001, as modified by the Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2, DSR 2003:I
<i>Canada – Patent Term</i>	<i>Canada – Term of Patent Protection</i> Panel Report, WT/DS170/R, adopted 12 October 2000, as upheld by the Appellate Body Report, WT/DS170/AB/R, DSR 2000:X and DSR 2000:XI
<i>Canada – Patent Term (Article 21.3)</i>	<i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS170/10, 28 February 2001, DSR 2001:V

<i>Canada – Periodicals</i>	<i>Canada – Certain Measures Concerning Periodicals</i> Panel Report, WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I
<i>Canada – Pharmaceutical Patents</i>	<i>Canada – Patent Protection of Pharmaceutical Products</i> Panel Report, WT/DS114/R, adopted 7 April 2000, DSR 2000:V
<i>Canada – Pharmaceutical Patents (Article 21.3)</i>	<i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS114/13, 18 August 2000, DSR 2002:I
<i>Canada – Wheat Exports and Grain Imports</i>	<i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> Panel Report, WT/DS276/R, adopted 27 September 2004, as upheld by the Appellate Body Report, WT/DS276/AB/R
<i>Chile – Alcoholic Beverages</i>	<i>Chile – Taxes on Alcoholic Beverages</i> Panel Report, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I
<i>Chile – Alcoholic Beverages (Article 21.3)</i>	<i>Chile – Taxes on Alcoholic Beverages Products – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V
<i>Chile – Price Band System</i>	<i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> Panel Report, WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R, DSR 2002:VIII
<i>Chile – Price Band System (Article 21.3)</i>	<i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS207/13, 17 March 2003, DSR 2003:III
<i>EC – Asbestos</i>	<i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> Panel Report, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, DSR 2001:VII and DSR 2001:VIII
<i>EC – Bananas III</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> Panel Report, WT/DS27/R/[. . .], adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II
<i>EC – Bananas III (Ecuador)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Ecuador</i> Panel Report, WT/DS27/R/EQU, adopted 25 September 1997, DSR 1997:III, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II
<i>EC – Bananas III (Ecuador) (Article 22.6 – EC)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> Decision by the Arbitrators, WT/DS27/ARB/EQU, 24 March 2000, DSR 2000:V
<i>EC – Bananas III (Guatemala and Honduras)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Guatemala and Honduras</i> Panel Report, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, DSR 1997:II, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II
<i>EC – Bananas III (Mexico)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Mexico</i> Panel Report, WT/DS27/R/MEX, adopted 25 September 1997, DSR 1997:II, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II
<i>EC – Bananas III (US)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States</i> Panel Report, WT/DS27/R/USA, adopted 25 September 1997, DSR 1997:II, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II
<i>EC – Bananas III (US) (Article 22.6 – EC)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999, DSR 1999:II
<i>EC – Bananas III (Article 21.3)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS27/15, 7 January 1998, DSR 1998:I
<i>EC – Bananas III (Article 21.5 – EC)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities</i> Panel Report, WT/DS27/RW/EEC and Corr.1, adopted 6 May 1999, DSR 1999:II
<i>EC – Bananas III (Article 21.5 – Ecuador)</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> Panel Report, WT/DS27/RW/EQU, adopted 6 May 1999, DSR 1999:II
<i>EC – Bed Linen</i>	<i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i>

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<i>EC – Bed Linen (Article 21.5 – India)</i>	<i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> Panel Report, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW, DSR 2003:III and DSR 2003:IV
<i>EC – Butter</i>	<i>European Communities – Measures Affecting Butter Products</i> Panel Report, WT/DS72/R, 24 November 1999
<i>EC – Computer Equipment</i>	<i>European Communities – Customs Classification of Certain Computer Equipment</i> Panel Report, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by the Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V
<i>EC – Hormones (Canada)</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada</i> Panel Report, WT/DS48/R/CAN, adopted 13 February 1998, DSR 1998:II, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I
<i>EC – Hormones (Canada) (Article 22.6 – EC)</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 2.6 of the DSU</i> Decision by the Arbitrators, WT/DS48/ARB, 12 July 1999, DSR 1999:III
<i>EC – Hormones (US)</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States</i> Panel Report, WT/DS26/R/USA, adopted 13 February 1998, DSR 1998:III, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I
<i>EC – Hormones (US) (Article 22.6 – EC)</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> Decision by the Arbitrators, WT/DS26/ARB, 12 July 1999, DSR 1999:III
<i>EC – Hormones (Article 21.3)</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V
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Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)

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5. Article XVI:6	67	<i>Recognizing</i> further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development,	
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arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations,

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

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

Agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. Legal relevance of the Preamble

(a) Environmental context

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

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

(b) Integrated WTO system

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

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

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

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

3. For the purpose of interpreting the meaning of “exhaustible natural resources” in paragraph (g) of

Article XX of the *GATT 1994* in *US – Shrimp*, the Appellate Body referred to the Preamble:

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

‘The Parties to this Agreement,

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

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

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

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

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

¹ Appellate Body Report on *US – Gasoline*, p. 30.

² Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.

³ Appellate Body Report on *US – Shrimp*, paras. 129–131.

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

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

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

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

(d) Special needs of developing countries

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

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

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

"The preamble to the WTO Agreement recognises

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

This overarching concern of the WTO Agreement finds ample reflection in the *SCM Agreement*. Article 27 of that Agreement recognizes that 'subsidies may play an important role in economic development programmes of developing country Members' and provides substantial special and differential treatment for developing countries, including in respect of export subsidies."⁶

2. Relationship with other WTO Agreements

(a) GATT 1994

(i) Article XX(g)

7. See paragraphs 3–4 above.

(ii) Article XXIV

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

"At the conclusion of the Uruguay Round Members reiterated the same general objective and principles in the GATT 1994 Understanding on Article XXIV:

'Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;'

and in the Preamble to the WTO Agreement:

'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of *discriminatory treatment* in international commerce ...' (emphasis added)

We also recall the Singapore Ministerial Declaration:

'7. ... We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade

⁴ Appellate Body Report on *US – Shrimp*, paras. 152, 153 and 155.

⁵ Panel Report on *India – Quantitative Restrictions*, para. 7.2.

⁶ Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.47, fn 49.

agreements are complementary to it and consistent with its rules’

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

(b) SCM Agreement

9. See paragraph 6 above.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I

Establishment of the Organization

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

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article I

10. The World Trade Organization (WTO) was established at the conclusion of the Uruguay Round of multilateral trade negotiations. The name “World Trade Organization” was established at the meeting of the Trade Negotiating Committee on 15 December 1993.⁸

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

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II

Scope of the WTO

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Article II:2

(a) Single undertaking

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

⁷ Panel Report on *Turkey – Textiles*, paras. 9.161–9.163.

⁸ GATT doc. MTN.TNC/40.

⁹ GATT doc. MTN.TNC/W/146, p. 4.

¹⁰ Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 12–13.

¹¹ (footnote original) *WTO Agreement*, Articles XI, XII, XIII, XIV and XV, respectively.

¹² Appellate Body Report on *Brazil – Desiccated Coconut*, p. 12.

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

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

2. Article II:4

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

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III

Functions of the WTO

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

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. Article III:1

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

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

2. Article III:2

(a) “forum for negotiations among its Members”

(i) *1996 Singapore Ministerial Conference*

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

“We, the Ministers, have met in Singapore . . . as called for in Article IV of the Agreement Establishing the World Trade Organization, to further strengthen the WTO as a forum for negotiation, the continuing liberalization of trade within a rule-based system, and the multilateral review and assessment of trade policies, and in particular to:

- assess the implementation of our commitments under the *WTO Agreements* and decisions;
- review the ongoing negotiations and Work Programme;
- examine developments in world trade; and
- address the challenges of an evolving world economy.

. . . Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the *WTO*

¹³ (*footnote original*) WTO Agreement, Article II:2.

¹⁴ (*footnote original*) We have recently confirmed this principle in our Report in *Korea – Dairy*, para. 81. See also Appellate Body Reports on *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; and *India – Patents (US)*, fn. 25.

¹⁵ Appellate Body Report on *Argentina – Footwear (EC)*, para. 81.

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

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

(ii) *1998 Geneva Ministerial Conference*

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

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

- (a) recommendations concerning:
 - (i) the issues, including those brought forward by Members, relating to implementation of existing agreements and decisions;
 - (ii) the negotiations already mandated at Marrakesh, to ensure that such negotiations begin on schedule;
 - (iii) future work already provided for under other existing agreements and decisions taken at Marrakesh;
- (b) recommendations concerning other possible future work on the basis of the work programme initiated at Singapore;
- (c) recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries;
- (d) recommendations arising from consideration of other matters proposed and agreed to by Members concerning their multilateral trade relations.

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

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

(iii) *Doha Ministerial Conference*

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

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

3. Article III:3

- (a) “Shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes”

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

¹⁶ WT/MIN(96)/DEC paras. 1 and 19.

¹⁷ WT/MIN(98)/DEC/1, paras. 9–11.

¹⁸ WT/MIN(01)/DEC/1

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

4. Article III:4

(a) “Shall administer the Trade Policy Review Mechanism”

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

5. Article III:5

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

(i) *General*

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

23. The agreement between the WTO and the IMF was signed on 9 December 1996.²¹

24. The agreement between the WTO and the World Bank was signed on 28 April 1997.²²

(ii) *Observer status*

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

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

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

“The 1994 Declaration on Coherence is a Ministerial decision that articulates the objective of promoting increased cooperation between the WTO and the IMF in order to encourage greater coherence in global economic policy-making. This objective is more explicitly recognized in the treaty language of the *WTO Agreement* in Article III:5, which states:

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

In furtherance of the WTO’s mandate to ‘cooperate, as appropriate’ with the IMF, the *Agreement Between the*

IMF and the WTO was concluded in 1996.²⁴ This Agreement provides for specific means of administrative cooperation between the two organizations. It provides for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF in certain specified circumstances, and grants to each organization observer status in certain of the other’s meetings.²⁵

The *Agreement Between the IMF and the WTO*, however, does *not* modify, add to or diminish the rights and obligations of Members under the *WTO Agreement*, nor does it modify individual States’ commitments to the IMF. It does not provide any substantive rules concerning the resolution of possible conflicts between obligations of a Member under the *WTO Agreement* and obligations under the Articles of Agreement of the IMF or any agreement with the IMF. However, paragraph 10 of the *Agreement Between the IMF and the WTO* contains a direction to the staff of the IMF and the WTO Secretariat to *consult on ‘issues of possible inconsistency between measures under discussion’*.

In the 1994 Declaration on the Relationship of the WTO with the IMF, Ministers reaffirmed that, unless otherwise provided for in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, ‘the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the *WTO Agreement*, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.’ We note that certain provisions of the GATT 1994, such as Articles XII, XIV, XV and XVIII, permit a WTO Member, in certain specified circumstances relating to exchange matters and/or balance of payments, to be excused from certain of its obligations under the GATT 1994. However, Article VIII contains no such exception or permission.”²⁶

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

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

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

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

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

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

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

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

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

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

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

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

(i) *General*

29. The Managing Director of the IMF, the President of the World Bank and the Director-General of the WTO jointly issued a report on Coherence²⁸ on 21 October 1998, pursuant to paragraph 5 of the Geneva Ministerial Declaration.

30. The General Council authorized the Chairman to hold special informal meetings regarding coherence issues, on 15 and 16 February 1999, pursuant to the request of either the delegations or the Director-General.²⁹ The General Council held additional meetings on 13 May 2003³⁰ and 22 October 2004³¹ and discussed issues on coherence.

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

(ii) *Annual reports*

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

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV *Structure of the WTO*

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference

shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

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

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

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

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

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

²⁷ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 85.

²⁸ The text of the report can be found in WT/GC/13.

²⁹ WT/GC/M/35, section 3.

³⁰ WT/GC/M/79.

³¹ WT/GC/M/89.

³² WT/TF/COH/S/3–6, 8 and 10.

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

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

Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

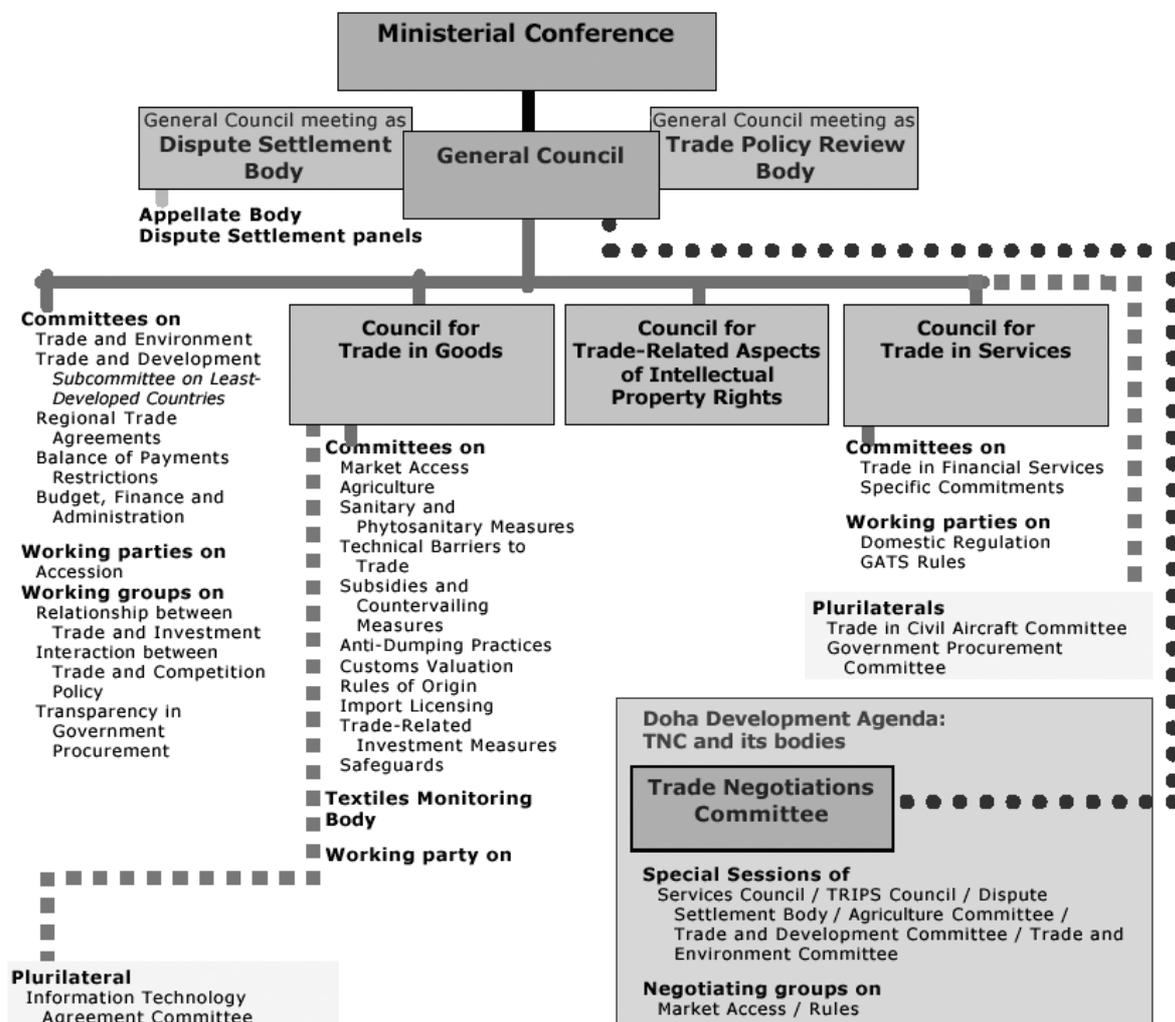
8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

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

WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, Textiles Monitoring Body, and plurilateral committees.



Key

- Reporting to General Council (or a subsidiary)
- Reporting to Dispute Settlement Body
- Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
- Trade Negotiations Committee reports to General Council

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

1. Article IV:1

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

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

(i) 1996 Singapore Ministerial Conference

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

(ii) 1998 Geneva Ministerial Conference

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

(iii) 1999 Seattle Ministerial Conference

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

(iv) 2001 Doha Ministerial Conference

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

- Declaration on the TRIPS Agreement and Public Health³⁹
- Decision on “Implementation-Related Issues and Concerns”,⁴⁰
- Decision on “Procedures for Extensions under Article 27.4 of the SCM Agreement⁴¹ for Certain Developing Country Members”,⁴²
- Decision on the “ACP-EC Partnership Agreement”,⁴³

- Decision on the “Transitional Regime for the EC Autonomous Tariff Rate Quota Regime on Imports of Bananas”.⁴⁴

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

(v) 2003 Cancun Ministerial Conference

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

- (b) “The Ministerial Conference shall carry out the functions of the WTO”

(i) Competencies of the Ministerial Conference

41. In addition to general powers under Article IV:1, the Ministerial Conference has specific powers under other Articles of the *WTO Agreement*, including: the power to appoint a Director-General⁴⁶, to adopt an authoritative interpretation of the Multilateral Trade Agreements⁴⁷, to grant a waiver⁴⁸, to adopt amendments⁴⁹, and to decide on accessions.⁵⁰

³³ WT/MIN(96)/DEC.

³⁴ WT/MIN(96)/DEC/16.

³⁵ WT/DEC(98)/DEC/1.

³⁶ WT/DEC(98)/DEC/2.

³⁷ See all documents related to the Ministerial Conference WT/MIN(99)/

³⁸ WT/MIN(01)/DEC/1.

³⁹ WT/MIN(01)/DEC/2. See also Section LXXVIII of the Chapter on the *TRIPS Agreement*.

⁴⁰ WT/MIN(01)/17.

⁴¹ For further analysis, see Section XXVII.B.4 of the Chapter on the SCM Agreement.

⁴² G/SCM/39.

⁴³ WT/MIN(01)/15. This decision refers to a waiver granted until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States, without being required to extend the same preferential treatment to like products of any other member, subject to the terms and conditions set out in this document. See also Article IX, para. 3 below.

⁴⁴ WT/MIN(01)/16.

⁴⁵ WT/MIN(03)/20

⁴⁶ With respect to the appointment of the Director-General, see Section VII.B of this Chapter.

⁴⁷ With respect to the authoritative interpretations of the Multilateral Trade Agreements, see paras. 159–160 of this Chapter.

⁴⁸ With respect to waivers, see Section X.B.3 of this Chapter.

⁴⁹ With respect to the adoption of amendments, see the provisions of Article X.

⁵⁰ With respect to accession, see Section XIII.B.2 of this Chapter.

*(ii) Competencies under other Agreements*GATS

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

TRIPS

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

GATT 1994

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

(iii) Working parties

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

- (a) Working Group on the Relationship between Trade and Investment⁵³;
 - (b) Working Group on the Interaction between Trade and Competition Policy⁵⁴;
 - (c) Working Group on Transparency in Government Procurement⁵⁵;
 - (d) Working Parties on Accession⁵⁶; and
 - (e) Working Party on Preshipment Inspection⁵⁷;
 - (f) Working Group on Trade, Debt and Finance⁵⁸; and
 - (g) Working Group on Trade and the Transfer of Technology.⁵⁹
- (c) “Ministerial Conference shall . . . take decisions on all matters under any of the Multilateral Trade Agreements”

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

- (a) Ministerial Declaration adopted in Singapore⁶⁰;
- (b) Ministerial Declaration on Trade in Information Technology Products adopted in Singapore⁶¹;
- (c) Ministerial Declaration adopted in Geneva⁶²;

(d) Ministerial Declaration on electronic commerce adopted in Geneva⁶³;

(e) Ministerial Declarations adopted in Doha⁶⁴;

(f) Ministerial Declaration on the TRIPS Agreement and Public Health adopted in Doha⁶⁵;

(g) Decision on Implementation-Related Issues and Concerns, adopted in Doha⁶⁶;

(h) Decision on Procedures for Extensions under Article 27.4 of the SCM Agreement for Certain Developing Country Members, adopted in Doha⁶⁷;

(i) Decision on the ACP-EC Partnership Agreement, adopted in Doha⁶⁸; and

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

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

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

(e) Rules of procedure

48. The General Council adopted the rules of procedure for the Ministerial Conference at its meeting of 31 January 1995.⁷⁰ The General Council amended these rules on 25 July 1996.

⁵¹ See Chapter on the *GATS*, Article XII.

⁵² See Chapter on the *TRIPS Agreement*, Article 64.3.

⁵³ Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 20.

⁵⁴ Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 20.

⁵⁵ Established at the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 21.

⁵⁶ See Section XIII.B(3) of this Chapter.

⁵⁷ See paragraph 8 of the Chapter on the Preshipment Inspection Agreement.

⁵⁸ Established at the Doha Ministerial Conference, WT/MIN(01)/DEC/1, para. 36.

⁵⁹ Established at the Doha Ministerial Conference, WT/MIN(01)/DEC/1, para. 37.

⁶⁰ WT/MIN(96)/DEC.

⁶¹ WT/MIN(96)/DEC/16.

⁶² WT/MIN(98)/DEC/1.

⁶³ WT/MIN(98)/DEC/2.

⁶⁴ WT/MIN(01)/DEC/1.

⁶⁵ WT/MIN(01)/DEC/2.

⁶⁶ WT/MIN(01)/17.

⁶⁷ G/SCM/39.

⁶⁸ WT/MIN(01)/15.

⁶⁹ WT/MIN(01)/16.

⁷⁰ WT/GC/M/1, section 4.I. The text of the adopted rules of procedure can be found in WT/L/28. The rules of procedure were amended in accordance with the amendment to the guidelines on observer status for international intergovernmental organizations, which is annexed to the Rules of Procedure as Annex 3. The text of the amended Rules of Procedure can be found in WT/L/161.

2. Article IV:2

(a) “there shall be a General Council”

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

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

(i) *General*

50. The General Council is charged with the power to form cooperation agreements with intergovernmental organizations and non-governmental organizations⁷¹, adopt staff and financial regulations⁷², and adopt the budget.⁷³

Circulation and derestriction of documents

51. On 14 May 2002, the General Council adopted a new decision abrogating the decision of 18 July 1996.⁷⁴ Paragraph 4 of this decision states that “[t]he Decision of the General Council of 18 July 1996 on Procedures for the Circulation and Derestriction of WTO documents, as contained in WT/L/160/Rev.1, shall be abrogated as of the date of adoption of the present decision, but will remain in effect for documents circulated prior to that date.”⁷⁵

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

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

53. The General Council approved the first set of guidelines for appointment of officers to WTO bodies on 31 January 1995. These guidelines were proposed by the Chairman of the GATT 1947 CONTRACTING PARTIES and approved by the Preparatory Committee for the World Trade Organization.⁷⁷ These guidelines were reviewed on 11 December 2002.⁷⁸

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

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

(a) Committee on Trade and Development – 15 November 1995⁷⁹;

(b) Committee on Balance-of-Payments Restrictions – 13 and 15 December 1995⁸⁰; and

(c) Committee on Regional Trade Agreements⁸¹ – 2 October 1996.⁸²

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

(a) *General*

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

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

56. The DSB adopted its own rules of procedure⁸⁵ on 10 February 1995. The DSB follows, *mutatis mutandis*, the rules of procedure for the General Council⁸⁶ with

⁷¹ With respect to cooperation agreements with international intergovernmental organizations concluded by the General Council, see paras. 22 and 134–135 of this Chapter.

⁷² With respect to staff and financial regulations adopted by the General Council, see paras. 143–146 and 152 of this Chapter.

⁷³ With respect to the adoption of the budget by the General Council, see Section VIII.B.1 of this Chapter.

⁷⁴ WT/GC/M/13, Section 9(b). The text of the decision can be found in WT/L/160/Rev.1

⁷⁵ WT/L/452.

⁷⁶ WT/GC/M/1, section 4.I. The text of the adopted rules of procedure can be found in WT/L/28. At its meeting of 3 April 1995, the General Council amended the rules of procedure with regard to Chapter V – Officers, WT/GC/M/3, section 1. On 25 July 1996, the rules of procedure were further amended in accordance with the amendment to the guidelines on observer status for international intergovernmental organizations, which is annexed to the Rules of Procedure as Annex 3. The text of the amended Rules of Procedure can be found in WT/L/161.

⁷⁷ WT/GC/M/1, section 4.I(h). The text of the approved guidelines can be found in WT/L/31.

⁷⁸ The text of the reviewed guidelines can be found in WT/L/510.

⁷⁹ WT/GC/M/8, section 4(c). The text of the adopted rules of procedure can be found in WT/COMTD/6. The rules of procedure follow, *mutatis mutandis*, the rules of procedure established for meetings of the General Council with certain special provisions.

⁸⁰ WT/GC/M/9, section 1(b). The text of the adopted rules of procedure can be found in WT/BOP/10. The rules of procedure follow, *mutatis mutandis*, the rules of procedure established for meetings of the General Council with certain special provisions.

⁸¹ With respect to the establishment of the Committee on Regional Trade Agreement under Article IV:7, see para. 117.

⁸² WT/GC/M/14, section 3. The text of the adopted rules of procedure can be found in WT/REG/1. The rules of procedure follow, *mutatis mutandis*, the rules of procedure for the General Council with certain special provisions.

⁸³ See Chapter on the *DSU*, Article 2.1.

⁸⁴ The powers referred to are found in Articles 6, 16, 21 and 22 of the *DSU*.

⁸⁵ WT/DSB/M/1, section 1.

⁸⁶ WT/L/161.

certain exceptions. The DSB adopted Chapter V of the rules of procedure concerning officers on 25 April 1995.⁸⁷ For the text of the Rules of Procedure, see Section XXXV of the Chapter on the *DSU*.

(c) Special Session of the Dispute Settlement Body

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

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

(a) Country reviews

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

59. The TPRB conducted 197 reviews⁸⁸ between its formation and 31 December 2004. The reviews covered 114 Members, counting the European Union as one Member.

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

60. At its meeting of 6 June 1995, the TPRB adopted the rules of procedure⁸⁹ following *mutatis mutandis*, the rules of procedures for the General Council⁹⁰ with certain exceptions.

5. Article IV:5

(a) “Council for Trade in Goods”

(i) *Functions*

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

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

- (i) To receive notifications of state trading enterprises – Article 1;
- (ii) To receive counter-notifications of state trading enterprises – Article 4;

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

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

(b) *Agreement on Textiles and Clothing*

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

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

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

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

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

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

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

(d) *Customs Valuation Agreement*

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

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

(e) *Agreement on Safeguards*

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

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

⁸⁷ WT/DSB/M/4, section 1. The text of the adopted rules of procedure can be found in WT/DSB/9.

⁸⁸ The minutes of the meetings are numbered WT/TPR/M/1–109.

⁸⁹ WT/TPR/6.

⁹⁰ WT/L/161.

concessions (Article 8.2) and other obligations; and

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

(f) *GATT 1994*

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

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

(ii) *Rules of procedure*

63. The General Council approved the rules of procedure and the relevant addendum for meetings of the Council for Trade in Goods at its meeting of 31 July 1995.⁹³

(b) “Council for Trade in Services”

(i) *Functions*

64. The Council for Trade in Services⁹⁴ oversees the functioning of the *General Agreement on Trade in Services (GATS)*. The Agreement specifically sets forth the following:

- (a) Under Article XXIV of the *GATS*, powers “to facilitate the operation of this Agreement and further its objectives”, including the power to create subsidiary bodies (a variant of this latter power is in Article VI:4 of *GATS*); and
- (b) Under Article V:7 of the *GATS*, power to make recommendations to parties to economic integration agreements.⁹⁵

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

(ii) *Rules of procedure*

66. The General Council approved the rules of procedure for the Council on Trade in Services at its meeting of 15 November 1995.⁹⁷

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

(i) *Functions*

67. The Council for Trade-Related Aspects of Intellectual Property Rights⁹⁸ oversees the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights”; the Agreement specifically sets forth the following:

- (a) To keep under review application of the provisions of Section 3 (Geographical Indications) of the Agreement – Article 24.2;
- (b) To receive notification on laws and regulations, final judicial decisions and administrative rulings of general application pertaining to the TRIPS agreement made effective by a Member – Article 63.2;
- (c) to grant extensions of the implementation period to least-developed countries under Article 66.1; and
- (d) to monitor the operation of the Agreement and Members’ compliance thereunder, pursuant to Article 68.

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

(ii) *Rules of procedure*

69. The General Council approved the rules of procedure for the Council for Trade-Related Aspects of Intellectual Property Rights on 15 November 1995.¹⁰⁰

⁹¹ Doc. JOB(01)/124/Rev. 1.

⁹² G/C/W/34, 62, 62/Rev.1, 98, 98/Rev.1, 129, 159, 241, 302, 433, 472 and 501.

⁹³ WT/GC/M/6, section 3. The text of the adopted rules of procedure can be found in WT/L/79.

⁹⁴ Refer to the text on the Council for Trade in Services for further commentary.

⁹⁵ In this regard, see also Chapter on *GATS*, Section VII.B.

⁹⁶ S/C/W/12, 31, 67, 128, 128/Rev.1, 174, 197, 220, 227 and 230.

⁹⁷ WT/GC/M/8, section 4(a). The text of the adopted rules of procedures can be found in S/L/15.

⁹⁸ Refer to the text on the TRIPS Council for further commentary.

⁹⁹ The text of the reports can be found in IP/C/W/16, 16/Rev.1, IP/C/8, 12, 15, 19, 22, 23, 27, 27/Add.1, 30 and 32.

¹⁰⁰ WT/GC/M/8, section 4(b). The text of the adopted rules of procedure can be found in IP/C/1.

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

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

6. Article IV:6

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

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

- (a) Working Party on State Trading Enterprises¹⁰¹;
- (b) Working Group on Notification Obligations and Procedures¹⁰²; and
- (c) ten working parties on various regional trade agreements.¹⁰³

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

- (a) Committee on Market Access;
- (b) Committee on Agriculture¹⁰⁴;
- (c) Committee on Sanitary and Phytosanitary Measures¹⁰⁵;
- (d) Committee on Technical Barriers to Trade¹⁰⁶;
- (e) Committee on Subsidies and Countervailing Measures¹⁰⁷;
- (f) Committee on Anti-Dumping Practices¹⁰⁸;
- (g) Committee on Customs Valuation¹⁰⁹;

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

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

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

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

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

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

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

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

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

(h) Committee on Rules of Origin¹¹⁰;

(i) Committee on Import Licensing¹¹¹;

(j) Committee on Trade-Related Investment Measures¹¹²;

(k) Committee on Safeguards¹¹³; and

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

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

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

- (a) Committee on Market Access – 1 December 1995¹¹⁴;
- (b) Committee on Agriculture – 22 May 1996¹¹⁵;
- (c) Committee on Sanitary and Phytosanitary Measures – 11 June 1997¹¹⁶;
- (d) Committee on Technical Barriers to Trade – 1 December 1995¹¹⁷;
- (e) Committee on Subsidies and Countervailing Measures – 22 May 1996¹¹⁸;
- (f) Committee on Anti-Dumping Practices – 22 May 1996¹¹⁹;
- (g) Committee on Customs Valuation – 1 December 1995¹²⁰;
- (h) Committee on Rules of Origin – 1 December 1995¹²¹;

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

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

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

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

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

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

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

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

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

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

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

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

- (i) Committee on Import Licensing – 1 December 1995¹²²;
- (j) Committee on Trade-Related Investment Measures – 1 December 1995¹²³;
- (k) Committee on Safeguards – 22 May 1996.¹²⁴

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

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

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

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

- (a) Committee on Trade in Financial Services;
- (b) Committee on Specific Commitments;
- (c) Working Party on Domestic Regulation;
- (d) Working Party on GATS Rules; and
- (e) Working Party on Professional Services.
- (d) “the [TRIPS Council] shall establish subsidiary bodies as required”

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

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

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

- (a) Committee on Trade and Development¹²⁶;
- (b) Committee on Balance-of-Payments Restrictions¹²⁷;
- (c) Committee on Budget, Finance and Administration¹²⁸;
- (d) Committee on Market Access¹²⁹;
- (e) Committee on Trade and Environment¹³⁰; and
- (f) Committee on Regional Trade Agreements.¹³¹

- (a) Committee on Trade and Development
 - (i) *Establishment and terms of reference*

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

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

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

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

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

5. To provide guidelines for, and to review periodically, the technical cooperation activities of the WTO¹³⁴ as they relate to developing country Members.

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

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

¹²² G/C/M/7, section 2. The text of the approved rules of procedures can be found in G/L/147.

¹²³ G/C/M/7, section 2. The text of the approved rules of procedure can be found in G/L/151.

¹²⁴ G/C/M/10, section 1(iii). The text of the approved rules of procedure can be found in G/L/145.

¹²⁵ WT/L/125/Rev.1, Annex III.

¹²⁶ WT/GC/M/1, section 7.A(1).

¹²⁷ WT/GC/M/1, section 7.A(1).

¹²⁸ WT/GC/M/1, section 7.A(2).

¹²⁹ See also the Negotiating Group on Market Access in paras. 107–111 of this Chapter.

¹³⁰ See also the Special Session of the Committee on Trade and Development in paras. 79–83 of this Chapter.

¹³¹ WT/GC/M/5, section 11.

¹³² (*footnote original*) It is understood that matters relating to activities in other multilateral agencies will come under the guidance of the General Council.

¹³³ (*footnote original*) The Committee would give consideration, *inter alia*, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the “Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries” and Article XVI of the Agreement on Agriculture.

¹³⁴ (*footnote original*) The technical cooperation activities referred to in this provision do not include technical assistance for accession negotiations.

¹³⁵ WT/L/46. The adopted terms of reference were prepared by the Sub-Committee on Institutional, Procedural and Legal Matters at its meeting of 18 November 1994. PC/IPL/4.

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

(ii) *Rules of procedure and observer status*

81. The General Council approved the rules of procedure for the Committee on Trade and Development¹³⁷, on 15 November 1995. The rules were adopted by the committee on 5 July 1995.¹³⁸

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

(iii) *Reporting*

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

(iv) *Activities*

Establishment of the Sub-Committee on Least-Developed Countries

84. The Committee on Trade and Development adopted the decision establishing the Sub-Committee on Least-Developed Countries¹⁴¹ on 5 July 1995 with the following terms of reference:

“(a) to give particular attention to the special and specific problems of least-developed countries;

(b) to review periodically the operation of the special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of the least-developed country Members;

(c) to consider specific measures to assist and facilitate the expansion of the least-developed countries’ trade and investment opportunities, with a view to enabling them to achieve their development objectives;¹⁴² and,

(d) to report to the Committee on Trade and Development for consideration and appropriate action.”¹⁴³

85. The Sub-Committee on Least-Developed Countries adopted its rules of procedure on 17 October 1995.¹⁴⁴

Work Programme for Least-Developed Countries

86. Pursuant to paragraph 42 of the Doha Declaration the Sub-Committee on Least-Developed Countries was mandated to report to the General Council on an agreed work programme for least-developed countries.¹⁴⁵ With respect to the mandate of the Doha Declaration and the negotiations on least-developed countries, see paragraphs 42–43 of the Doha Declaration in Section XXVII.A below. The work programme for least-developed countries was adopted by the Sub-Committee on Least-Developed Countries on 12 February 2002.¹⁴⁶

Technical cooperation

87. The Committee on Trade and Development adopted the Guidelines for WTO Technical Cooperation on 15 October 1996.¹⁴⁷ On 13 December 1996, the Singapore Ministerial Conference adopted the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries¹⁴⁸, prepared by the Committee on Trade and Development. The Plan of Action “offers a comprehensive approach and includes measures relating to the implementation of the Decision in Favour of Least-Developed Countries¹⁴⁹, as well as in the areas of capacity-building and market access from a WTO perspective.”¹⁵⁰

88. Also, on the basis of a recommendation by the Committee on Trade and Development¹⁵¹, the Singapore Ministerial Conference agreed to “organize a meeting with UNCTAD and the International Trade Centre in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assist these countries enhance their trading opportunities.”¹⁵² On 27–28 October 1997, the High-Level Meeting on Integrated Initiatives for Least-Developed Countries’ Trade Development was organized jointly by the WTO, UNCTAD and ITC, with the participation of the IMF, UNDP and World Bank.¹⁵³ At this High-Level Meeting, Members

¹³⁶ WT/MIN(01)/DEC/1, para 51.

¹³⁷ WT/GC/M/8, section 4(c). The text of the adopted rules of procedure can be found in WT/COMTD/6.

¹³⁸ WT/COMTD/M/2, para. 4.

¹³⁹ WT/COMTD/W/22 and its revisions.

¹⁴⁰ These reports are numbered WT/SPEC/17, WT/COMTD/9, 13, 15, 22, 28, 33, 33/Corr.1, 44, 46, 48 and 50.

¹⁴¹ WT/COMTD/M/2, para. 3.

¹⁴² (*footnote original*) The Sub-Committee would give consideration, *inter alia*, to any report that the Committee on Agriculture may decide to refer to it following paragraph 6 of the “Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries” and Article XVI of the Agreement on Agriculture.

¹⁴³ WT/COMTD/W/8.

¹⁴⁴ WT/COMTD/LLDC/1.

¹⁴⁵ WT/MIN(01)/DEC/1, para 42.

¹⁴⁶ WT/COMTD/LDC/11.

¹⁴⁷ WT/COMTD/M/12, para. 4. The text of the adopted guidelines can be found in WT/COMTD/8.

¹⁴⁸ WT/MIN(96)/DEC, para. 14. The text of the Plan of Action can be found in WT/MIN(96)/14.

¹⁴⁹ This Decision is referenced in Section XXII of this Chapter.

¹⁵⁰ WT/MIN(96)/14, para. 3.

¹⁵¹ At its meeting of 15 and 31 October 1996, the Committee on Trade and Development adopted the report to the General Council (WT/COMTD/9) which contains the recommendation to hold such a high-level meeting. WT/COMTD/M/12, Section B. Accordingly, at its meeting of 7, 8 and 13 November 1996, the General Council adopted that report for adoption by the Singapore Ministerial Conference. WT/GC/M/16, Section 8(c)(iv).

¹⁵² WT/MIN(96)/DEC, para. 14.

¹⁵³ The text of the report of this Meeting can be found in WT/LDC/HL/23.

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

89. In 2000, pursuant to the mandate in paragraph 88 above¹⁵⁷, the Sub-Committee on Least-Developed Countries conducted the review of all options for improving market access for least-developed countries presented in the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries, and reported it to the Committee on Trade and Development.¹⁵⁸ In addition, pursuant to that mandate, the six core international agencies of the Integrated Framework, i.e. IMF, ITC, UNCTAD, UNDP, World Bank and WTO, conducted the review of the Integrated Framework.¹⁵⁹ In order to implement the decision by the heads of the six core agencies for the Integrated Framework to revamp the Integrated Framework, the Sub-Committee on Least-Developed Countries adopted the Integrated Framework Pilot Scheme.¹⁶⁰ The Pilot scheme included (i) the recommendation on the establishment of a trust fund¹⁶¹, and, (ii) the proposal on the establishment of the Integrated Framework Steering Committee and the Inter-Agency Working Group.¹⁶²

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

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

92. At its meeting of 9–10 February 2004, the Integrated Framework Working Group adopted its work

programme in the wake of the second evaluation of the Integrated Framework.¹⁶⁵ The work programme was subsequently approved by the IF Steering Committee at its 11th Session on 13 February 2004.¹⁶⁶ The Integrated Framework Working Group aims to achieve, *inter alia*, the following by 31 December 2005:

- (a) “Encourage effective follow-up to the Diagnostic Trade Integration Study (DTIS) in those countries where the studies have been completed¹⁶⁷, as outlined in document WT/LDC/SWG/IF/13. Bilateral and multilateral development partners are urged to work with committed IF partner governments to respond to the trade-related technical assistance priorities identified in the DTIS and its Action Matrix;
- (b) undertake new DTIS in countries that have demonstrated clear and strong commitment to mainstream trade into national development plans . . .”

Favourable and more preferential treatment for developing countries

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

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

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

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

¹⁵⁷ WT/LDC/HL/1/Rev.1, para. 6.

¹⁵⁸ WT/COMTD/33, para. 28.

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

¹⁶⁰ WT/LDC/SWG/IF/13.

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

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

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

¹⁶⁴ WT/IFSC/5.

¹⁶⁵ WT/IFSC/7.

¹⁶⁶ WT/IFSC/M/10

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

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

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

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

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

96. As part of the Work Programme adopted by the Sub-Committee on Least-Developed Countries on 28 February 2002¹⁷², it was agreed that the focus would be on: (i) the identification and examination of market access barriers to products of least-developed countries in desired markets; (ii) annual reviews in the Sub-Committee on Least-Developed Countries of market access improvements, market access measures taken by Members; and (iii) examination of possible additional measures for improvement of market access, including elimination of barriers to exports and further improvement of preferential access schemes such as the GSP.¹⁷³

97. As of 31 December 2004, the WTO maintains, beyond the specific provisions contained in the *WTO Agreement*, two additional legal instruments concerning favourable and more preferential treatment for developing countries: (i) the Enabling Clause¹⁷⁴ and (ii) the Waiver on Preferential Tariff Treatment for Least-Developed Countries.¹⁷⁵ With respect to the activities of the Committee on Trade and Development, and the Sub-Committee on Least-Developed Countries concerning the Enabling Clause and the Waiver on Preferential Tariff Treatment for Least-Developed Countries respectively, see Section II.D.3 of the Chapter on the *GATT 1994*.

(v) *Reference to GATT practice*

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

(b) Committee on Balance-of-Payments Restrictions

(i) *Establishment and terms of reference*

99. The General Council established the BOPs Committee¹⁷⁶ on 31 January 1995, with the following terms of reference:

“(a) to conduct consultations, pursuant to Article XII:4, Article XVIII:12 and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, on all restrictive import measures taken or maintained for balance-of-payments purposes and, pursuant to Article XII:5 of the General

Agreement on Trade in Services, on all restrictions adopted or maintained for balance-of-payments purposes on trade in services on which specific commitments have been undertaken; and,

(b) to carry out any additional functions assigned to it by the General Council.”¹⁷⁷

(ii) *Rules of procedure*

100. The General Council approved the rules of procedure for the BOPs Committee at its meeting of 13 and 15 December 1995.¹⁷⁸

(iii) *Reporting*

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

(iv) *Activities*

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

(c) Committee on Budget, Finance and Administration

(i) *Establishment and terms of reference*

103. The General Council established the BFA Committee¹⁷⁹ at its meeting of 31 January 1995, with the following terms of reference:

“(i) To examine any questions arising in connection with the audited accounts, proposals for the budgets of the WTO and [of the International Trade Centre UNCTAD/WTO, and]¹⁸⁰ the financing thereof.

(ii) To study any financial and administrative questions which may be referred to it by the Ministerial Conference

of Korea, Malaysia, Mauritius, Morocco, New Zealand, Norway, Poland, Singapore, Slovak Republic, Slovenia, Switzerland, Thailand, Turkey and United States. See

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

¹⁷⁰ WT/MIN(01)/DEC/1, para 42.

¹⁷¹ WT/MIN(01)/17.

¹⁷² See para 109 of this Chapter.

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

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

¹⁷⁵ WT/L/304.

¹⁷⁶ WT/GC/M/1, section 7.A(1).

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

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

¹⁷⁹ WT/GC/M/1, section 7.A(1).

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

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

(ii) *Rules of procedure*

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

(iii) *Reporting*

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

(iv) *Activities*

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

(d) *Committee on Market Access*

(i) *Establishment and terms of reference*

107. The General Council established the Committee on Market Access¹⁸³ on 31 January 1995, with the following terms of reference:

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

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

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

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

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

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

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

(ii) *Rules of procedure*

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

(iii) *Reporting*

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

(iv) *Activities*

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

111. With regard to the Integrated Data Base (IDB) and the Consolidated Tariff Schedules (CTS) database, the Committee on Market Access decided that providing broader access to the information in the IDB and the CTS database would contribute to the effective delivery of market access-related technical assistance to developing and least developed countries. In order to achieve this, it adopted a dissemination policy¹⁸⁸ which draws upon the IDB dissemination practices¹⁸⁹ focused on the accessibility of IDB and CTS information via the Internet and on the distribution of CD-ROMs.

(e) *Committee on Trade and Environment*

(i) *Establishment and terms of reference*

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

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

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

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

¹⁸¹ The adopted terms of reference were agreed for proposal by the Sub-Committee on Institutional, Procedural and Legal Matters at its meeting of 21 October 1994. PC/IPL/2.

¹⁸² WT/BFA/1, para. 4.

¹⁸³ WT/GC/M/1, section 7.A(2).

¹⁸⁴ The terms of reference were agreed for proposal by the Subcommittee on Institutional, Procedural and Legal Matters at its meeting of 18 November 1994. PC/IPL/M/9, para. 8.

¹⁸⁵ G/C/M/7. The text of the adopted rules of procedure can be found in G/L/148.

¹⁸⁶ The reports are contained in documents G/L/50, 132, 215, 284, 331, 431 and 486.

¹⁸⁷ The reports are numbered G/MA/1, 4, 57, 58, 59, 60, 61, 62, 71, 107 and 111–116/Corr.1, 117, 149, 151, and 154.

¹⁸⁸ G/MA/115.

¹⁸⁹ G/MA/IDB/3.

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

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

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

(ii) *Rules of procedure*

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

(iii) *Reporting*

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

(iv) *Activities*

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

(f) *Committee on Regional Trade Agreements*

(i) *Establishment and terms of reference*

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

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

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

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

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

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

(ii) *Rules of procedure*

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

(iii) *Reporting*

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

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

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

¹⁹¹ WT/L/161.

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

¹⁹³ WT/CTE/1–11.

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

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

¹⁹⁶ WT/L/127, para. 1.

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

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

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

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

(iv) Activities

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

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

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

Procedures for the examination of RTAs

124. The following procedures apply to the examination of RTAs notified to the WTO²⁰³:

- The notification of an agreement (together with its text) is considered by the Council for Trade in Goods (if the RTA is notified under Article XXIV of the *GATT 1994*), the Council for Trade in Services (if the RTA is notified under *GATS* Article V) or the Committee on Trade and Development (if the RTA is notified under the Enabling Clause). If examination of the agreement is provided for, the relevant body adopts the terms of reference for the examination and transfers the examination task to the CRTA.²⁰⁴
- Initial information on the agreement is distributed as a formal document. That information may either be conveyed by the Parties in the form of a Standard Format or take the form of a factual presentation of the RTA prepared by the Secretariat on its own responsibility, on the basis of an established outline and in consultation with the Parties to the agreement²⁰⁵ (see paragraph 123 above). This is the initial step of what is called the “factual” examination.

- During (at least one or two) CRTA regular sessions, there is an exchange of oral questions and replies on the examined RTA, as well as more general statements by the parties and other Members. Detailed minutes are produced on each meeting devoted to the RTA examination, and published as formal documents.
- Between each of those meetings, usually a round of additional written questions and replies takes place. These are also published as a formal document.
- Once the CRTA feels that the factual part of the examination has been concluded, the Secretariat is requested to draft a report on the examination, as the basis for consultations among Members.

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

(g) Trade Negotiations Committee (TNC)

126. The Doha Ministerial Declaration²⁰⁷ provided that the overall conduct of the negotiations shall be supervised by the TNC under the authority of the General Council. The TNC was also mandated to establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.²⁰⁸ Accordingly, at its first meeting held on 28 January and 1 February 2002²⁰⁹, and on the basis of proposals made by the Chairman of the General Council, the TNC appointed the Director-General in an *ex officio* capacity to chair the TNC until the deadline established in the Doha Declaration for concluding the negotiations, i.e. 1 January 2005 (see paragraph 45 of the Doha Declaration in Section XXVII.A below).

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

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

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

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

²⁰⁵ This option has been introduced on an experimental basis.

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

²⁰⁷ WT/MIN(01)/DEC/1.

²⁰⁸ WT/MIN(01)/DEC/1, para. 46.

²⁰⁹ TN/C/M/1.

127. At the TNC's first meeting, Members also agreed to a comprehensive structure comprising a number of groups and bodies to organize the negotiations. According to this arrangement, each negotiating body would be responsible for the work on one or more²¹⁰ of the topics listed in the Work Programme of the Doha Declaration (see paragraphs 12–44 of the Doha Declaration in Section XXVII.A below). The TNC established the following Special Sessions and Negotiating Groups to carry out the work under the Doha mandate:

- Special Session of the Committee on Agriculture²¹¹;
- Special Session of the Council for Trade in Services²¹²;
- Negotiating Group on Market Access²¹³;
- Special Session of the Council for TRIPS²¹⁴;
- Negotiating Group on Rules²¹⁵;
- Special Session of the Dispute Settlement Body²¹⁶;
- Special Session of the Committee on Trade and Environment²¹⁷;
- Special Session of the Committee on Trade and Development.

8. Article IV: 8

(a) Bodies provided for under Plurilateral Trade Agreements

(i) *International Dairy Council*

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

(ii) *International Meat Council*

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

(iii) *Committee on Trade in Civil Aircraft*

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

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

(iv) *Committee on Government Procurement*

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

133. The Committee on Government Procurement reports to the General Council on an annual basis, from its inception in 1996.²¹⁹

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V

Relations with Other Organizations

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. Article V:1

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Observer status

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

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

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

the TRIPS Council is charged with establishing appropriate arrangements for cooperation with WIPO bodies.

2. Article V:2

- (a) “may make appropriate arrangements . . . with non-governmental organizations”
- (i) *Guidelines for Arrangements on Relations with Non-Governmental Organizations*

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

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

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

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

²²³ WT/GC/M/18.

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

²²⁵ WT/L/161.

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

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

²²⁸ WT/GC/M/29, 35, 45, 57.

(ii) Procedure to provide observer capacity

139. The General Council agreed to allow non-governmental organizations to attend the Ministerial Conference as observers at its meeting of 18 July 1996²²⁹, and in subsequent Ministerial Conferences (Geneva, Seattle, Doha and Cancun).²³⁰

VII. ARTICLE VI**A. TEXT OF ARTICLE VI**

Article VI
The Secretariat

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE VI**1. Article VI:1****(a) WTO Secretariat**

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

2. Article VI:2**(a) "the Ministerial Conference shall appoint the Director-General"**

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

(a) Mr Peter Sutherland – from 1 January 1995 to 30 April 1995²³¹;

(b) Mr Renato Ruggiero – from 1 May 1995 to 30 April 1999²³²;

(c) Mr Mike Moore – from 1 September 1999 to 31 August 2002²³³; and

(d) Dr Supachai Panitchpakdi – from 1 September 2002 to 31 August 2005.²³⁴

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

142. At its meeting of 22 July 1999, the General Council resolved that, "in order to improve and strengthen the current rules and procedures [for the appointment of the Director-General], a comprehensive set of rules and procedures for such appointments shall be elaborated and adopted by the end of September 2000."²³⁵ The General Council approved the comprehensive set of procedures²³⁶ for the appointment of the Director-General at its meeting on 10–12 and 20 December 2002.²³⁷ These procedures would apply in their entirety to the appointment of the next Director-General.

3. Article VI:3

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

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

²²⁹ WT/GC/M/13, section 11(b). See WT/L/162 for the text of the guidelines.

²³⁰ WT/GC/M/65, 66, 68 and 78.

²³¹ Mr Sutherland, as former Director-General to the GATT 1947, served as the first Director-General pursuant to Article XVI:2 of the *WTO Agreement*.

²³² At its meeting on 24 March 1995, the General Council appointed Mr Ruggiero as the Director-General. See WT/GC/M/2, p. 1.

²³³ At its meeting of 22 July 1999, the General Council appointed Mr Moore as the Director-General. See WT/GC/M/46, in particular, p. 18. The text of the adopted decision can be found in WT/L/308.

²³⁴ At its meeting of 22 July 1999, the General Council also appointed Dr Panitchpakdi as the Director-General to succeed to Mr Moore. See WT/GC/M/46, in particular, p. 18. The text of the adopted decision can be found in WT/L/308.

²³⁵ WT/L/308, last paragraph.

²³⁶ Issued as WT/GC/W/482 and 482/Rev.1.

²³⁷ WT/GC/M/77. The text of the procedures were subsequently issued as WT/L/509. In addition, the General Council approved modified Conditions of Service issued as WT/GC/67.

²³⁸ MTN.TNC/45(MIN).

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

144. The General Council adopted decisions regarding the terms of service applicable to the WTO staff²⁴⁰ at its meetings of 30 October 1995, 7, 8 and 13 November 1996, 7 February 1997, 30 June–1 July 1997, and 24 April 1998. The General Council agreed to establish the Working Group on Conditions of Service Applicable to the Staff of the WTO Secretariat²⁴¹ on 7 February 1997.

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

4. Article VI:4

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

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

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII

Budget and Contributions

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

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

- (a) the scale of contributions apportioning the expenses of the WTO among its Members; and
- (b) the measures to be taken in respect of Members in arrears.

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

1. Article VII:1

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

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

- (b) “the Committee on Budget, Finance & Administration shall . . . make recommendations”

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

²³⁹ MTN.TNC/45(MIN), last paragraph.

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

²⁴¹ WT/L/205.

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

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

²⁴⁴ For budgetary and financial reports proposed by the Director-

General: WT/BFA/23, WT/BFA/25 – 1995; WT/BFA/W/15, WT/BFA/W/19 – 1996; WT/BFA/W/25, WT/BFA/W/26 – 1997; WT/BFA/W/33, WT/BFA/W/34 – 1998; WT/BFA/W/42 – 1999; WT/BFA/W/57 – 2000; WT/BFA/W/97 – 2002; WT/BFA/W/114 – 2003; and WT/BFA/W/128 – 2004.

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

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

2. Article VII:2

- (a) “Committee on Budget, Finance and Administration shall propose . . . financial regulations”

149. At its meeting of 15 November 1995, the General Council adopted the WTO Financial Regulations and Financial Rules²⁴⁷ on the basis of the recommendation of the Joint WTO/GATT Committee on Budget, Finance and Administration.²⁴⁸ The BFA Committee regularly reviews the scale of contributions assessed to the Members and has made a decision on “inactive Members.”²⁴⁹

- (b) “provisions setting out the scale of contributions”

150. At its meeting of 29 June 1995, the Joint WTO/GATT Committee on Budget, Finance and

Administration recommended to the General Council a new methodology²⁵⁰ for calculation of the assessment of Members’ contributions to the WTO budget.²⁵¹ The General Council approved the recommendations on 15 November 1995.²⁵² On 9 August 2000, the BFA Committee submitted draft recommendations modifying the original calculation methodology.²⁵³

- (c) Doha Development Agenda Global Trust Fund

151. Following the guidelines set by the Doha Ministerial Conference²⁵⁴, the BFA Committee developed a plan to ensure long-term funding for WTO technical assistance at an overall level no lower than that of the year 2001. A draft recommendation was presented on 3 December 2003.²⁵⁵

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

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

²⁴⁸ WT/BFA/13, L/7649, Section VII.

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

- “(a) a Member be designated as an Inactive Member if, at the end of a financial year, the full contributions for three or more years, commencing with the year 1989*, are unpaid;
- (b) the list of Inactive Members be notified to the General Council by the Committee on Budget, Finance and Administration at the beginning of each calendar year with a recommendation that these Members be urged to liquidate their arrears;
- (c) assessments for Inactive Members for a given year be placed in a separate account and not counted as part of the anticipated revenue of the WTO for that year;

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

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

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

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

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

²⁵¹ WT/BFA/6, L/7633.

²⁵² WT/GC/M/8, section 7(a).

²⁵³ WT/BFA/W/50/Rev.2.

²⁵⁴ WT/MIN(01)/DEC/1, para.40.

²⁵⁵ WT/BFA/W/107.

3. Article VII:3

- (a) “The General Council shall adopt the financial regulations and the annual budget estimate”

152. The General Council adopted the BFA Committee’s proposed financial regulations²⁵⁶ on 15 November 1995. On 15 December 2000, the General Council approved guidelines²⁵⁷ with respect to “Voluntary Contributions, Gifts, or Donations from Non-Governmental Donors²⁵⁸ to be reviewed by January 2003.²⁵⁹ Pursuant to paragraph 9 of the Guidelines, the Committee on Budget, Finance and Administration started the review in October 2002 and continued discussions in the course of 2003. At its meeting of 1 April 2004, the Committee further discussed the item and, on the basis of comments made, decided to revert to an amended text.²⁶⁰

4. Article VII:4

- (a) “Each Member shall . . . contribute to the WTO . . .”

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

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII

Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.
2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.
3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.
4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.
5. The WTO may conclude a headquarters agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

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

(a) General

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

2. Article VIII:4

155. Under this provision, Members are bound by the obligation to grant “similar” privileges and immunities to the WTO as those laid down in the Convention on the Privileges and Immunities of the Specialized Agencies 1947²⁶², whether or not the Member in question is a party to that Convention.

3. Article VIII:5

(a) Headquarters Agreement

156. The Headquarters Agreement²⁶³ and the Infrastructure Agreement²⁶⁴ between the World Trade Organization and the Swiss Confederation was approved by the General Council on 31 May 1995.²⁶⁵

²⁵⁶ WT/GC/M/8, section 7(c). The text of the adopted Financial Regulations can be found in WT/L/156.

²⁵⁷ WT/L/386.

²⁵⁸ In compliance with these guidelines and in particular with paragraph 4 of WT/L/386, the Secretariat submitted document WT/BFA/W/56 that described a donation from Friedrich-Ebert-Stiftung (FES), a German-based non-profit foundation. The Committee decided that the Director-General could accept the donation in kind from the Friedrich-Ebert-Stiftung (FES) estimated at CHF 115,000 in order to facilitate the participation of developing country journalists in a series of two half-day seminars designed to familiarize these journalists with current WTO issues and build their capacity to write on WTO topics as described in document WT/BFA/W/56. (WT/BFA/53).

²⁵⁹ WT/L/386, para. 9.

²⁶⁰ WT/BFA/W/111 and 111/Rev.1.

²⁶¹ Staff Regulation 1.6.

²⁶² See G.A. Res. 179(III) of 21 November 1947, United Nations Treaty Series; 33 U.N.T.S., p. 261.

²⁶³ The text of the Headquarters Agreement can be found in WT/GC/1 and Add.1.

²⁶⁴ The text of the Infrastructure Agreement can be found in WT/GC/2.

²⁶⁵ WT/GC/M/4, section 5, and WT/L/69.

(b) Transfer of assets

157. Pursuant to the decision adopted by the Preparatory Committee for the World Trade Organization on 8 December 1994²⁶⁶, the Preparatory Committee, the CONTRACTING PARTIES to GATT 1947 and the Executive Committee of ICITO entered into the Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the Interim Commission of the International Trade Organization and the GATT to the World Trade Organization.²⁶⁷

X. ARTICLE IX**A. TEXT OF ARTICLE IX**

Article IX
Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.¹ Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States² which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.³

(footnote original) ¹ The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

(footnote original) ² The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

(footnote original) ³ Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

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

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral

Trade Agreements, provided that any such decision shall be taken by three fourths⁴ of the Members unless otherwise provided for in this paragraph.²⁶⁸

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

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths⁴ of the Members.

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

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

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

1. Article IX:1

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

158. The General Council adopted the decision on “Decision-Making Procedures Under Articles IX and XII of the *WTO Agreement*” on 15 November 1995.²⁶⁹ See also paragraph 163 below.

2. Article IX:2

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

(i) *Statements by the Appellate Body*

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

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

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

“As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO ‘recognize’ that the dispute settlement system ‘serves to preserve the rights and

obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’ emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.²⁷²

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the ‘exclusive authority’ to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements.²⁷³”²⁷⁴

(b) Requests for authoritative interpretations

161. The first request for an authoritative interpretation of the Multilateral Trade Agreements was made on 21 January 1999²⁷⁵ in relation to Articles 3.7, 21.5, 22.2, 22.6, 22.7 and 23 of the *DSU*. Although the General Council was requested to hold a meeting to deal with these interpretation issues,²⁷⁶ no such meeting was ever held.²⁷⁷

162. The *TRIPS Agreement* has been interpreted in regard to its specific relationship with the public health sector by the Ministerial Conference in Doha although without making reference to Article IX:2. The Declaration on the *TRIPS Agreement* and Public Health²⁷⁸, adopted on 14 November 2001, states that the *TRIPS Agreement* “does not and should not prevent Members from taking measures to protect public health . . . , in particular, to promote access to medicines for all.” For such purpose, the *TRIPS Agreement* provides flexibility in its interpretation.²⁷⁹

²⁶⁹ WT/L/93. Refer to the text on Article XII of the *WTO Agreement*.

²⁷⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 12–15. In this regard, see excerpt referenced in para. 30, of the Chapter on the *DSU*.

²⁷¹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 13.

²⁷² (footnote original) The “matter in issue” is the “matter referred to the DSB” pursuant to Article 7 of the *DSU*.

²⁷³ (footnote original) *Japan – Taxes on Alcoholic Beverages*, AB-1996–2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

²⁷⁴ Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 19–20.

²⁷⁵ WT/GC/W/133.

²⁷⁶ WT/GC/W/143.

²⁷⁷ With respect to the attempt to amend Articles 21.5 and 22 of the *DSU*, see paras 65–66 of the *DSU*. Also, with respect to the jurisprudence on this issue, see excerpts referenced in the Chapter on the *DSU*.

²⁷⁸ WT/MIN(01)/DEC/2.

²⁷⁹ WT/MIN(01)/DEC/2, para. 5. See also Section LXXVIII of the Chapter on the *TRIPS Agreement*.

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

(a) Decision-making procedures for granting a waiver

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

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

(i) Interpretation of waivers

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

“The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only ‘the provisions of paragraph 1 of Article I of the *General Agreement* . . . to the extent necessary’ to do what is ‘required’ by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the *GATT 1994* or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, although Articles I and XIII of the *GATT 1994* are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.”²⁸³

The Panel’s interpretation of the Lomé Waiver as including a waiver from the *GATT 1994* obligations relating to the allocation of tariff quotas is difficult to reconcile with the limited *GATT* practice in the interpretation of waivers, the strict disciplines to which waivers are subjected under the *WTO Agreement*, the history of the negotiations of this particular waiver and the limited

GATT practice relating to granting waivers from the obligations of Article XIII.

There is little previous *GATT* practice on the interpretation of waivers. In the panel report in *United States – Sugar Waiver*, the panel stated:

‘The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in ‘exceptional circumstances’, that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly.’²⁸⁴

Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.

With regard to the history of the negotiations of the Lomé Waiver, we have already noted that the CONTRACTING PARTIES limited the scope of the waiver by replacing ‘preferential treatment *foreseen* by the Lomé Convention’ with ‘preferential treatment *required* by the Lomé Convention’ (emphasis added). This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lomé Waiver.

Finally, we note that between 1948 and 1994, the CONTRACTING PARTIES granted only one waiver of Article XIII of the *GATT 1947*.²⁸⁵ In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly.”²⁸⁶

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

(b) Waivers granted

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

²⁸⁰ WT/GC/M/8, section 3. The text of the adopted procedures can be found in WT/L/93.

²⁸¹ WT/L/93, first paragraph.

²⁸² Panel Report on *EC – Bananas III*, para. 7.107.

²⁸³ Appellate Body Report on *EC – Bananas III*, para. 183.

²⁸⁴ (footnote original) Panel Report on *US – Sugar Waiver*, para. 5.9.

²⁸⁵ (footnote original) Waiver Granted in Connection with the European Coal and Steel Community, Decision of 10 November 1952, BISD 1S/17, para. 3.

²⁸⁶ Appellate Body Report on *EC – Bananas III*, paras. 184–187.

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

4. Article IX:5

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

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X *Amendments*

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilat-

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

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

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

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

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

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

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

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

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. Article X:1

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

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

2. Article X:8

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

(i) *Annex 2: Dispute Settlement Understanding*

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

170. The Doha Declaration mandated negotiations on improvements and clarifications of the *DSU* with the aim of reaching an agreement by May 2003.²⁸⁷ The Declaration states in paragraph 47 that the negotiations on the *DSU* are not part of the single undertaking (see Section XXVII.A below).

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

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

(ii) *Annex 3: TPRM*

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

3. Article X:9

(a) Additions to Plurilateral Trade Agreements

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

(b) Deletions of Plurilateral Trade Agreements

175. The *International Bovine Meat Agreement* and the *International Dairy Agreement* were deleted from Annex 4 by decisions of the General Council. With respect to the deletion of these Agreements, see the Chapters on these Agreements, paragraphs 6 and 10, respectively.

4. Article X:10

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

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

- (a) *Agreement on Trade in Civil Aircraft* – Article 9.5;
- (b) *Agreement on Government Procurement* – Article XXIV:9;
- (c) *International Dairy Agreement* – Article VIII:4 (See paragraph 175 above); and
- (d) *International Bovine Meat Agreement* – Article VI:4 (See paragraph 175 above).

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

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

Article XI

Original Membership

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

1. General

(a) Members

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

(b) Observers

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

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

²⁸⁷ See also WT/MIN(01)/DEC/1, para. 30.

²⁸⁸ TN/DS/1–11.

²⁸⁹ TN/DS/9.

²⁹⁰ WT/GC/M/81.

²⁹¹ TN/DS/10.

²⁹² WT/GC/M/87. (Draft decision contained in WT/GC/W/535 and Corr.1).

²⁹³ TN/DS/4, para. 6.

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

2. Article XI:1

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

181. The General Council adopted the decision proposed by the Preparatory Committee for the World Trade Organization concerning the finalization of negotiations on schedules on goods and services of certain contracting parties to *GATT 1947* eligible to be original Members of the WTO²⁹⁴ on 1 January 1995.

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

183. The Agreement entered into force for the following 76 original Members on 1 January 1995: Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei Darussalam, Canada, Chile, Costa Rica, Côte d’Ivoire, Czech republic, Denmark, Dominica, European Communities²⁹⁶, Finland, France, Gabon, Germany, Ghana, Greece, Guyana, Honduras, Hong Kong²⁹⁷, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Kenya, Korea, Kuwait, Luxembourg, Macau²⁹⁸, Malaysia, Malta, Mauritius, Mexico, Morocco, Myanmar, Namibia, Netherlands (for the Kingdom in Europe and for the Netherlands Antilles), New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Portugal, Romania, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Tanzania, Thailand, Uganda, United Kingdom, United States, Uruguay, Venezuela and Zambia.

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

3. Article XI:2: Least-developed countries

185. Pursuant to the Ministerial Decision on Measures in Favour of Least-Developed Countries, the General Council approved schedules on goods and services of 20

least-developed country Members²⁹⁹ at its meeting of 31 May 1995. Further, the General Council approved the schedule on goods and services of the Solomon Islands at its meeting of 13 and 15 December 1995.³⁰⁰ As regards the establishment and activities of the Committee on LDCs, see Section V.B.7(a) above.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII *Accession*

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. General

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

(a) Observer status for applicants for accession

187. The General Council decided to grant observer status to governments whose accession process had already begun at its meeting of 31 January 1995³⁰² as was the practice under GATT (also see paragraph 180

²⁹⁴ WT/GC/M/1, section 4.I(f). The text of the adopted decision can be found in WT/L/30.

²⁹⁵ With respect to the accession, see paras. 187–192 of this Chapter.

²⁹⁶ Note that the text of the Agreement identifies the original Member as the European Communities.

²⁹⁷ Since 1 July 1997, when sovereignty over Hong Kong reverted to China, this separate customs territory has been known as “Hong Kong, China”.

²⁹⁸ Since 20 December 1999, when sovereignty over Macau reverted to China, this separate customs territory has been known as “Macau, China”.

²⁹⁹ WT/GC/M/4, section 2. The text of the approval can be found in WT/L/70.

³⁰⁰ WT/GC/M/9, section 1(i).

³⁰¹ MTN.TNC/40

³⁰² WT/GC/M/1, section 2.

above).³⁰³ Section XXVI below enumerates observers to WTO bodies as at 31 December 2004.

(b) Accession working parties under GATT 1947

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

(c) Least-developed countries

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

190. Pursuant to paragraph 42 of the Doha Ministerial Declaration, the Sub-Committee on Least-Developed Countries established a work programme (see Section V.B.7(a) above) which included a mandate from ministers to “facilitate and accelerate negotiations with acceding Least-Developed Countries.”³⁰⁶ On 10 December 2002, the General Council adopted a decision to facilitate and accelerate negotiations for the accession of LDCs through simplified and streamlined procedures. The Decision set down guidelines in the following broad areas: Market Access³⁰⁷, WTO Rules³⁰⁸, Process³⁰⁹ and Trade-Related Technical Assistance and Capacity Building.³¹⁰

2. Article XII:1

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

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

192. For WTO practice on accession procedures, see the Note by the Secretariat, dated 24 March 1995.³¹¹

3. Article XII:2

(a) Decision-making procedures on accession

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

(b) Working parties on accession

(i) Establishment

194. The General Council established working parties on accession on behalf of the Ministerial Conference.³¹² Since 1 January 1995, the General Council has established 23 Working Parties³¹³ on accession for the following applicants: Viet Nam³¹⁴, Seychelles³¹⁵, Tonga³¹⁶, Vanuatu³¹⁷, Kazakstan³¹⁸, Kyrgyz Republic³¹⁹, Oman³²⁰, Georgia³²¹, Azerbaijan³²², Andorra³²³, Laos³²⁴, Samoa³²⁵, Lebanon³²⁶, Bosnia and Herzegovina³²⁷, Bhutan³²⁸, Cape Verde³²⁹, Yemen³³⁰ and the Federal Republic of Yugoslavia³³¹, Bahamas³³², Tajikistan³³³, Former Yugoslav Republic of Macedonia³³⁴, Armenia³³⁵, and Ethiopia³³⁶.

195. Of the working parties on accession carried over from GATT 1947, 19 accessions have been completed as at 31 December 2004, including: Ecuador³³⁷, Bulgaria³³⁸,

³⁰³ See GATT Analytical Index, pp. 1017–1028.

³⁰⁴ WT/GC/M/1, section 4.I(g). At the same meeting, the General Council applied this treatment to Belarus. WT/GC/M/1, section 4.I(g).

³⁰⁵ WT/LDC/HL/23, the section dealing with Thematic Round Table A, para. II(b). With respect to the High-Level Meeting generally, see para. 88.

³⁰⁶ See WT/COMTD/LDC/11 Section (f) para. 18(iii).

³⁰⁷ WT/COMTD/LCD/12, WT/L/508, Section I.

³⁰⁸ WT/L/508, Section II.

³⁰⁹ WT/L/508, Section III.

³¹⁰ WT/L/508, Section IV.

³¹¹ WT/ACC/1.

³¹² WT/ACC/1, para. 5.

³¹³ This figure includes only Working Parties on accession established after 1 January 1995. Several Working Parties on accession were established before 1995 by the GATT 1947 Council. These Working Parties were transformed from GATT Working Parties to WTO Working Parties by a decision of the General Council on 31 January 1995. In this regard, see para. 188 of this Chapter.

³¹⁴ WT/GC/M/1, section 3.

³¹⁵ WT/GC/M/5, section 2(a).

³¹⁶ WT/GC/M/8, section 1.

³¹⁷ WT/GC/M/5, section 2(b).

³¹⁸ WT/GC/M/10, section 1.

³¹⁹ WT/GC/M/11, section 1.

³²⁰ WT/GC/M/12, section 1.

³²¹ WT/GC/M/13, section 2.

³²² WT/GC/M/21, section 2.

³²³ WT/GC/M/23, section 2.

³²⁴ WT/GC/M/26, section 2.

³²⁵ WT/GC/M/29, section 1.

³²⁶ WT/GC/M/40, section 2.

³²⁷ WT/GC/M/45, section 1(a).

³²⁸ WT/GC/M/48, section 3(a).

³²⁹ WT/GC/M/57, section 3.

³³⁰ WT/GC/M/57, section 4.

³³¹ WT/GC/M/63, section 2.

³³² WT/GC/M/66, section 3.

³³³ WT/GC/M/66, section 4.

³³⁴ WT/GC/M/76, section 1.

³³⁵ WT/GC/M/77, section 1.

³³⁶ WT/GC/M/78, section 2.

³³⁷ WT/GC/M/6. The Working Party was established in October of 1992 and the accession protocol accepted on 31 July 1995. The text of the decision can be found in WT/ACC/ECU/5.

³³⁸ WT/GC/M/14. The Working Party was established in November 1986 and February 1990 and the accession protocol accepted on 2 October 1996. The text of the decision can be found in WT/ACC/BGR/6.

Mongolia³³⁹, Panama³⁴⁰, Kyrgyz Republic³⁴¹, Latvia³⁴², Estonia³⁴³, Jordan³⁴⁴, Georgia³⁴⁵, Albania³⁴⁶, Oman³⁴⁷, Croatia³⁴⁸ and Lithuania,³⁴⁹ Armenia,³⁵⁰ Cambodia,³⁵¹ Former Yugoslav Republic of Macedonia,³⁵² Moldova,³⁵³ Nepal,³⁵⁴ and Chinese Taipei³⁵⁵. 7 of the working parties on accession carried over from the GATT 1947 were still active as at 31 December 2004, including: Algeria, Belarus, the Russian Federation, Saudi Arabia, Sudan, Ukraine and Uzbekistan.³⁵⁶

(ii) *Terms of reference*

196. The General Council sets the following terms of reference for a working party on accession: “to examine the application for accession to the WTO under Article

XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession”.³⁵⁷

(c) Accession decisions adopted by the WTO

197. The General Council, acting on behalf of the Ministerial Conference, has adopted 24 accession decisions, and thus the *WTO Agreement* has entered into force for: Ecuador³⁵⁸, Qatar³⁵⁹, Grenada³⁶⁰, Saint Kitts and Nevis³⁶¹, Papua New Guinea³⁶², United Arab Emirates³⁶³, Mongolia³⁶⁴, Republic of Panama³⁶⁵, Bulgaria³⁶⁶, Latvia³⁶⁷, Kyrgyz Republic³⁶⁸, Estonia³⁶⁹, Georgia³⁷⁰, Jordan³⁷¹, Albania³⁷², Croatia³⁷³, Oman³⁷⁴, Lithuania³⁷⁵, Moldova³⁷⁶, China³⁷⁷, Chinese Taipei³⁷⁸, Former Yugoslav Republic of Macedonia³⁷⁹, Armenia³⁸⁰,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁵⁵ WT/ACC/TPKM/18. The Working Party was established on 1 October 1992 and the accession protocol accepted on 11

November 2001. The text of the decision can be found in WT/L/43.

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

³⁵⁷ WT/ACC/1, para. 5.

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

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

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

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

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

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

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

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

³⁶⁶ WT/ACC/BGR/6. Decision dated 2 October 1996. Entry into force 1 December 1996.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and Nepal³⁸¹. Qatar, Saint Kitts and Nevis, Grenada, Papua New Guinea and the United Arab Emirates were GATT contracting parties, but finalized their schedules in 1995, and thus acceded to the WTO instead of becoming original Members.

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

(a) Agreement on Government Procurement

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

199. As at 31 December 2004, there were five accessions to the *Agreement on Government Procurement*: the Kingdom of the Netherlands for Aruba³⁸², Liechtenstein³⁸³, Singapore³⁸⁴, Hong Kong³⁸⁵ and Iceland³⁸⁶.

(b) Other Plurilateral Trade Agreements

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

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

Article XIII

Non-Application of Multilateral Trade Agreements between Particular Members

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

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. Article XIII:1

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

201. As at 31 December 2004, three Members had invoked this Article with respect to other Members. The United States invoked Article XIII:1 with respect to Romania³⁸⁷, Mongolia³⁸⁸, Kyrgyz Republic³⁸⁹, Georgia³⁹⁰, Moldova³⁹¹ and Armenia³⁹². As at 31 December 2004, the United States had revoked its invocation with respect to Romania³⁹³, Mongolia³⁹⁴, the Kyrgyz Republic³⁹⁵ and Georgia.³⁹⁶

202. El Salvador³⁹⁷ invoked Article XIII with respect to China on 5 November 2001.

203. Turkey³⁹⁸ invoked Article XIII with respect to Armenia on 29 November 2001.

XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

Article XIV

Acceptance, Entry into Force and Deposit

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

³⁸¹ WT/LET/449. Decision dated 12 September 2003. Entry into force 14 October 2003.

³⁸² GPA/2. Decision dated 27 February 1996. The instrument of accession was deposited on 25 September 1996 and entered into force on 25 October 1996. WT/Let/111 and GPA/7.

³⁸³ GPA/3. Decision dated 27 February 1996. The instrument of accession was deposited on 19 August 1997 and entered into force on 18 September 1997. WT/Let/166 and GPA/17.

³⁸⁴ GPA/6. Decision dated 20 September 1996. The instrument of accession was deposited on 20 September 1997 and entered into force on 20 October 1997. WT/Let/179 and GPA/18.

³⁸⁵ GPA/9. Decision dated 9 December 1996. The accession instrument was deposited on 20 May 1997 and entered into force on 19 June 1997. WT/Let/141 and GPA/14.

³⁸⁶ GPA/43. Decision dated 29 September 2000. The instrument of accession was deposited on 29 March 2001 and entered into force 28 April 2001 (WT/Let/388 and GPA/48).

³⁸⁷ WT/L/11. The United States informed the Director-General on 30 December 1994 and formally invoked Article XIII:1 27 January 1995. WT/L/11.

³⁸⁸ WT/L/159.

³⁸⁹ WT/L/275.

³⁹⁰ WT/L/318.

³⁹¹ WT/L/395.

³⁹² WT/L/505.

³⁹³ WT/L/203.

³⁹⁴ WT/L/306.

³⁹⁵ WT/L/363.

³⁹⁶ WT/L/385.

³⁹⁷ WT/L/429.

³⁹⁸ WT/L/501.

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

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

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

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

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

1. Transition from GATT 1947 to the WTO

204. The Preparatory Committee for the World Trade Organization adopted Decisions on the transitional co-existence of the *GATT 1947* and the *WTO Agreement*³⁹⁹ on 8 December 1994. The General Council also adopted a decision to avoid procedural and institutional duplication at its meeting of 31 January 1995.⁴⁰⁰

205. In addition, the Preparatory Committee adopted Decisions to deal with cases of withdrawal from or termination of certain agreements associated with the *GATT 1947*⁴⁰¹ on 8 December 1994. The General Council similarly adopted a decision for invocations of pro-

visions for delayed application and reservations under the *Customs Valuation Agreement* by developing countries.⁴⁰²

206. Pursuant to the Decision adopted on 8 December 1994 (see paragraph 204 above)⁴⁰³, the General Council adopted a Decision on participation of certain signatories of the Final Act (who were eligible to become original Members of the WTO) at its meeting of 31 January 1995.⁴⁰⁴ See also Section II on Institutions and Procedure of the GATT Analytical Index.

2. Article XIV:1

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

207. The *WTO Agreement* entered into force on 1 January 1995.⁴⁰⁵

3. Article XIV:3

(a) Notifications of acceptance of the WTO Agreement

(i) Acceptance before 1 January 1995

208. Pursuant to Article XIV:3, the Director-General of the WTO issued notifications of acceptance for the following States and separate customs territories: Antigua and Barbuda⁴⁰⁶, Argentina⁴⁰⁷, Australia⁴⁰⁸, Austria⁴⁰⁹, Bahrain⁴¹⁰, Bangladesh⁴¹¹, Barbados⁴¹², Belgium⁴¹³,

³⁹⁹ The text of the adopted decisions can be found in PC/11, PC/12, PC/13 and PC/15.

⁴⁰⁰ WT/GC/M/1, section 4.I(e). The text of the adopted decision can be found in WT/L/29.

⁴⁰¹ The text of the decision relating to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade can be found in PC/14. Also, the text of the decision relating to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade can be found in PC/16.

⁴⁰² WT/GC/M/1, section 11. See also Chapter on the *Agreement on Customs Valuation*, para. 20.

⁴⁰³ The text of the adopted decision can be found in PC/10.

⁴⁰⁴ WT/GC/M/1, section 4.I(b). The text of the adopted decision can be found in WT/L/27.

⁴⁰⁵ W/Let/1. The Preparatory Committee for the World Trade Organization, on 8 December 1994, "confirmed 1 January 1995 as the date of entry into force of the *WTO Agreement*." PC/M/10, para. 4.

⁴⁰⁶ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁰⁷ Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁰⁸ Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁰⁹ Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁰ Accepted 27 July 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹¹ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹² Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹³ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

Belize⁴¹⁴, Brazil⁴¹⁵, Brunei Darussalam⁴¹⁶, Canada⁴¹⁷, Chile⁴¹⁸, Costa Rica⁴¹⁹, Côte d'Ivoire⁴²⁰, Czech Republic⁴²¹, Denmark⁴²², Dominica⁴²³, European Community⁴²⁴, Finland⁴²⁵, France⁴²⁶, Gabon⁴²⁷, Germany⁴²⁸, Ghana⁴²⁹, Greece⁴³⁰, Guyana⁴³¹, Honduras⁴³², Hong Kong⁴³³, Hungary⁴³⁴, Iceland⁴³⁵, India⁴³⁶, Indonesia⁴³⁷, Ireland⁴³⁸, Italy⁴³⁹, Japan⁴⁴⁰, Kenya⁴⁴¹, Korea⁴⁴², Kuwait⁴⁴³, Luxembourg⁴⁴⁴, Macau⁴⁴⁵, Malaysia⁴⁴⁶, Malta⁴⁴⁷, Mauri-

tius⁴⁴⁸, Mexico⁴⁴⁹, Morocco⁴⁵⁰, Myanmar⁴⁵¹, Namibia⁴⁵², Netherlands⁴⁵³, New Zealand⁴⁵⁴, Nigeria⁴⁵⁵, Norway⁴⁵⁶, Pakistan⁴⁵⁷, Paraguay⁴⁵⁸, Peru⁴⁵⁹, Philippines⁴⁶⁰, Portugal⁴⁶¹, Romania⁴⁶², Saint Lucia⁴⁶³, Saint Vincent and the Grenadines⁴⁶⁴, Senegal⁴⁶⁵, Singapore⁴⁶⁶, Slovak Republic⁴⁶⁷, South Africa⁴⁶⁸, Spain⁴⁶⁹, Sri Lanka⁴⁷⁰, Suriname⁴⁷¹, Swaziland⁴⁷², Sweden⁴⁷³, Tanzania⁴⁷⁴, Thailand⁴⁷⁵,

⁴¹⁴ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁵ Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁶ Accepted 16 November 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁷ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁸ Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴¹⁹ Accepted 26 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁰ Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²¹ Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²² Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²³ Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁴ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1. Note that the Agreement refers to the "European Communities" in Article XI, but only "the European Community" officially accepted the WTO Agreement.

⁴²⁵ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁶ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁷ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁸ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴²⁹ Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁰ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³¹ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³² Accepted 16 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³³ Accepted 3 October 1994. The notification was issued 27 January 1995. WT/LET/1. Since 1 July 1997, when sovereignty over Hong Kong reverted to China, this separate customs territory has been known as "Hong Kong, China".

⁴³⁴ Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁵ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁶ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁷ Accepted 2 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁸ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴³⁹ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁰ Accepted 27 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴¹ Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴² Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴³ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁴ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁵ Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1. Since 20 December 1999, when sovereignty over Macau reverted to China, this separate customs territory has been known as "Macau, China".

⁴⁴⁶ Accepted 6 September 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁷ Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁸ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁴⁹ Accepted 31 August 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁰ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵¹ Accepted 29 November 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵² Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵³ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁴ Accepted 7 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁵ Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁶ Accepted 7 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁷ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁸ Accepted 30 November 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁵⁹ Accepted 21 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁰ Accepted 19 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶¹ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶² Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶³ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁴ Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁵ Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁶ Accepted 17 October 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁷ Accepted 23 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁸ Accepted 2 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁶⁹ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁰ Accepted 6 July 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷¹ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷² Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷³ Accepted 22 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁴ Accepted 6 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁵ Accepted 28 December 1994. The notification was issued 27 January 1995. WT/LET/1.

Uganda⁴⁷⁶, United Kingdom⁴⁷⁷, United States⁴⁷⁸, Uruguay⁴⁷⁹, Venezuela⁴⁸⁰ and Zambia.⁴⁸¹

(ii) *Acceptance after 1 January 1995*

209. The notification requirement is the same for countries accepting before or after 1 January 1995. However, under Article XIV:1, acceptances after 1 January 1995 enter into force on the 30th day following the date of such acceptance. Thus, the notifications of acceptance for these countries also indicate the date of entry into force of the Agreement. The following countries accepted the *WTO Agreement* after 1 January 1995: Trinidad and Tobago⁴⁸², Zimbabwe⁴⁸³, Dominican

Republic⁴⁸⁴, Jamaica⁴⁸⁵, Turkey⁴⁸⁶, Tunisia⁴⁸⁷, Cuba⁴⁸⁸, Israel⁴⁸⁹, Colombia⁴⁹⁰, El Salvador⁴⁹¹, Burkina Faso⁴⁹², Egypt⁴⁹³, Botswana⁴⁹⁴, Central African Republic⁴⁹⁵, Djibouti⁴⁹⁶, Guinea Bissau⁴⁹⁷, Lesotho⁴⁹⁸, Malawi⁴⁹⁹, Mali⁵⁰⁰, Maldives⁵⁰¹, Mauritania⁵⁰², Togo⁵⁰³, Poland⁵⁰⁴, Switzerland⁵⁰⁵, Guatemala⁵⁰⁶, Burundi⁵⁰⁷, Sierra Leone⁵⁰⁸, Cyprus⁵⁰⁹, Slovenia⁵¹⁰, Mozambique⁵¹¹, Liechtenstein⁵¹², Nicaragua⁵¹³, Bolivia⁵¹⁴, Guinea⁵¹⁵, Madagascar⁵¹⁶, Cameroon⁵¹⁷, Fiji⁵¹⁸, Haiti⁵¹⁹, Benin⁵²⁰, Rwanda⁵²¹, Solomon Islands⁵²², Chad⁵²³, the Gambia⁵²⁴, Angola⁵²⁵, Niger⁵²⁶, Zaire⁵²⁷, the Republic of the Congo⁵²⁸, Panama⁵²⁹, Latvia⁵³⁰, Kyrgyz Republic⁵³¹,

⁴⁷⁶ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁷ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁸ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁷⁹ Accepted 29 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁸⁰ Accepted 30 December 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁸¹ Accepted 15 April 1994. The notification was issued 27 January 1995. WT/LET/1.

⁴⁸² Accepted 30 January 1995. Entry into force 1 March 1995. The notification was issued 14 February 1995. WT/LET/7.

⁴⁸³ Accepted 3 February 1995. Entry into force 5 March 1995. The notification was issued 14 February 1995. WT/LET/7.

⁴⁸⁴ Accepted 7 February 1995. Entry into force 9 March 1995. The notification was issued 14 February 1995. WT/LET/7.

⁴⁸⁵ Accepted 7 February 1995. Entry into force 9 March 1995. The notification was issued 14 February 1995. WT/LET/7.

⁴⁸⁶ Accepted 24 February 1995. Entry into force 26 March 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁸⁷ Accepted 21 March 1995. Entry into force 20 April 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁸⁸ Accepted 24 February 1995. Entry into force 26 March 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁸⁹ Accepted 22 March 1995. Entry into force 21 April 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁹⁰ Accepted 31 March 1995. Entry into force 30 April 1995. The notification was issued 7 April 1995. WT/LET/12.

⁴⁹¹ Accepted 7 April 1995. Entry into force 7 May 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁹² Accepted 4 May 1995. Entry into force 3 June 1995. The notification was issued 22 May 1995. WT/LET/1/Rev.2.

⁴⁹³ Accepted 31 May 1995. Entry into force 30 June 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁴ Accepted 30 December 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁵ Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁶ Accepted 30 March 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁷ Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁸ Accepted 21 December 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁴⁹⁹ Accepted 3 January 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰⁰ Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰¹ Accepted 12 October 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰² Accepted 15 April 1994. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰³ Accepted 19 April 1995. Entry into force 31 May 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰⁴ Accepted 1 June 1995. Entry into force 1 July 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰⁵ Accepted 1 June 1995. Entry into force 1 July 1995. The notification was issued 15 June 1995. WT/LET/19.

⁵⁰⁶ Accepted 21 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.

⁵⁰⁷ Accepted 23 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.

⁵⁰⁸ Accepted 23 June 1995. Entry into force 23 July 1995. The notification was issued 28 June 1995. WT/LET/24.

⁵⁰⁹ Accepted 30 June 1995. Entry into force 30 July 1995. The notification was issued 5 July 1995. WT/LET/26.

⁵¹⁰ Accepted 30 June 1995. Entry into force 30 July 1995. The notification was issued 5 July 1995. WT/LET/26.

⁵¹¹ Accepted 27 July 1995. Entry into force 26 August 1995. The notification was issued 23 August 1995. WT/LET/29.

⁵¹² Accepted 2 August 1995. Entry into force 1 September 1995. The notification was issued 23 August 1995. WT/LET/29.

⁵¹³ Accepted 4 August 1995. Entry into force 3 September 1995. The notification was issued 23 August 1995. WT/LET/29.

⁵¹⁴ Accepted 13 August 1995. Entry into force 14 September 1995. The notification was issued 23 August 1995. WT/LET/29.

⁵¹⁵ Accepted 25 September 1995. Entry into force 25 October 1995. The notification was issued 13 October 1995. WT/LET/31.

⁵¹⁶ Accepted 18 October 1995. Entry into force 17 November 1995. The notification was issued 23 October 1995. WT/LET/33.

⁵¹⁷ Accepted 13 November 1995. Entry into force 13 December 1995. The notification was issued 20 November 1995. WT/LET/41.

⁵¹⁸ Accepted 15 December 1995. Entry into force 14 January 1996. The notification was issued 19 December 1995. WT/LET/47.

⁵¹⁹ Accepted 31 December 1995. Entry into force 30 January 1996. The notification was issued 8 January 1996. WT/LET/52.

⁵²⁰ Accepted 23 January 1996. Entry into force 22 February 1996. The notification was issued 25 January 1996. WT/LET/60.

⁵²¹ Accepted 22 April 1996. Entry into force 22 May 1996. The notification was issued 30 April 1996. WT/LET/77.

⁵²² Accepted 26 June 1996. Entry into force 26 July 1996. The notification was issued 1 July 1996. WT/LET/97.

⁵²³ Accepted 19 September 1996. Entry into force 19 October 1996. The notification was issued 24 September 1996. WT/LET/110.

⁵²⁴ Accepted 23 September 1996. Entry into force 23 October 1996. The notification was issued 24 September 1996. WT/LET/110.

⁵²⁵ Accepted 24 October 1996. Entry into force 23 November 1996. The notification was issued 29 October 1996. WT/LET/116.

⁵²⁶ Accepted 13 November 1996. Entry into force 13 December 1996. The notification was issued 15 November 1996. WT/LET/121.

⁵²⁷ Now known as the Democratic Republic of Congo. Accepted 2 December 1996. Entry into force 1 January 1997. The notification was issued 5 December 1996. WT/LET/128.

⁵²⁸ Accepted 25 February 1997. Entry into force 24 April 1997. The notification was issued 30 April 1997. WT/LET/139.

⁵²⁹ Accepted 7 August 1997. Entry into force 6 September 1997. The notification was issued 2 October 1996. WT/LET/161.

⁵³⁰ Accepted 14 October 1998. Entry into force 10 February 1999. The notifications were issued 11 November 1998 and 13 January 1999. WT/LET/246 and WT/LET/281.

⁵³¹ Accepted 20 November 1998. Entry into force 20 December 1998. The notifications were issued 11 and 25 November 1998. WT/LET/245 and WT/LET/262.

Estonia⁵³², Jordan⁵³³, Georgia⁵³⁴, Albania⁵³⁵, Croatia⁵³⁶, Oman⁵³⁷, Lithuania⁵³⁸ and Moldova⁵³⁹, China⁵⁴⁰ and Chinese Taipei⁵⁴¹, Armenia⁵⁴², Cambodia⁵⁴³, Former Yugoslav Republic of Macedonia⁵⁴⁴, and Nepal⁵⁴⁵.

4. Article XIV:4

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

(i) *International Dairy Agreement*

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

(ii) *International Bovine Meat Agreement*

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

(iii) *Agreement on Civil Aircraft*

212. Acceptance of the *Agreement on Civil Aircraft* is governed by the provisions of Article 9 of that Agree-

ment. It states: "This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community".⁵⁵⁰

(iv) *Agreement on Government Procurement*

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

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV Withdrawal

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

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

⁵³² Accepted 14 October 1999. Entry into force 13 November 1999. The notification was issued 18 October 1999. WT/LET/313.

⁵³³ Accepted 12 March 2000. Entry into force 11 April 2000. The notifications were issued 12 January and 14 March 2000. WT/LET/323 and WT/LET/333.

⁵³⁴ Accepted 15 May 2000. Entry into force 14 June 2000. The notification was issued 17 May 2000. WT/LET/341.

⁵³⁵ Accepted 9 August 2000. Entry into force 8 September 2000. The notifications were issued 19 July and 11 August 2000. WT/LET/347 and WT/LET/353.

⁵³⁶ Accepted 31 October 2000. Entry into force 30 November 2000. The notifications were issued 19 July and 31 October 2000. WT/LET/348 and WT/LET/359.

⁵³⁷ Accepted 10 October 2000. Entry into force 9 November 2000. The notification was issued 10 October 2000. WT/LET/357 and WT/LET/369.

⁵³⁸ Accepted 8 December 2000. Entry into force 31 May 2001. The notifications were issued 1 May 2000 and 31 May 2001. WT/LET/364 and WT/LET/393.

⁵³⁹ Accepted 26 June 2001. Entry into force 26 July 2001. The notifications were issued 11 May 2001 and 28 June 2001. WT/LET/395 and WT/LET/399.

⁵⁴⁰ Accepted 11 November 2001. Entry into force 11 December 2001. The notification was issued 11 November 2001. WT/L/408.

⁵⁴¹ Accepted 11 November 2001. Entry into force 1 January 2002. The notification was issued 12 November 2001. WT/L/409 and WT/LET/411.

⁵⁴² Accepted 10 December 2002. Entry into force 5 February 2003. The notification was issued on 19 December 2002. WT/LET/434 and WT/LET/436.

⁵⁴³ Accepted 11 September 2003. Entry into force 13 October 2004. The notification was issued on 14 October 2003. WT/LET/450 and WT/LET/480.

⁵⁴⁴ Accepted 15 October 2002. Entry into force 4 April 2003. The notification was issued on 21 October 2002. WT/LET/430 and WT/LET/439.

⁵⁴⁵ Accepted 11 September 2003. Entry into force 23 April 2004. The

notification was issued on 14 October 2003. WT/LET/449 and WT/LET/464.

⁵⁴⁶ The following governments accepted the *International Dairy Agreement* prior to its deletion from Annex 4: Argentina, Brazil, Bulgaria, Chad, European Community, Finland, Hungary, Japan, New Zealand, Norway, Romania, Sweden, Switzerland and Uruguay.

⁵⁴⁷ WT/L/251.

⁵⁴⁸ The following governments accepted the *International Bovine Meat Agreement* prior to its deletion from Annex 4: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, Chad, Colombia, the European Community, Finland, Hungary, Japan, New Zealand, Norway, Paraguay, Romania, South Africa, Sweden, Switzerland, Tunisia, the United States and Uruguay.

⁵⁴⁹ WT/L/252.

⁵⁵⁰ There are 30 Signatories to the Agreement to date (31 December 2004): Bulgaria, Canada, the European Communities, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Egypt, Estonia, Georgia, Japan, Latvia, Lithuania, Macau, Malta, Norway, Romania, Switzerland, Chinese Taipei and the United States. Those WTO Members with observer status in the Committee are: Argentina, Australia, Bangladesh, Brazil, Cameroon, China, Colombia, the Czech Republic, Finland, Gabon, Ghana, Hungary, India, Indonesia, Israel, the Republic of Korea, Mauritius, Nigeria, Oman, Poland, Russian Federation, Saudi Arabia, Singapore, the Slovak Republic, Sri Lanka, Trinidad and Tobago, Tunisia and Turkey. In addition, the IMF and UNCTAD are also observers.

⁵⁵¹ As at 31 December 2004, the following governments had accepted the *Agreement on Government Procurement*: Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, United States.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XV

1. Article XV:1

- (a) “Any member may withdraw from this Agreement”

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

2. Article XV:2

- (a) “Withdrawal from a Plurilateral Trade Agreement”

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

XVII. ARTICLE XVI

A. TEXT OF ARTICLE XVI

Article XVI

Miscellaneous Provisions

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

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

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

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

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

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

B. INTERPRETATION AND APPLICATION OF
ARTICLE XVI

1. Article XVI:1

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

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

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

(b) Status of bilateral agreements

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

(c) Status of subsequent agreements

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

⁵⁵² This issue is related to that of “legitimate expectation”. See Section III.B(c)(xii) of the Chapter on the *DSU*.

⁵⁵³ Appellate Body Report on *Japan – Alcoholic Beverages II*, pg. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above, see Appellate Body Report on *India – Patents (US)*, para. 35.

⁵⁵⁴ Appellate Body Report on *EC – Poultry*, para. 80.

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

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

(d) Status of unadopted panel reports

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

“We are not persuaded that ‘the past GATT practice is clear. The three working party reports cited by the Panel did not arise in the context of dispute settlement cases brought pursuant to Article XXIII of the GATT 1947, unlike some working party reports in GATT history that resulted from complaints made under Article XXIII.’⁵⁵⁶ We also note that these three working party reports did not result in the CONTRACTING PARTIES giving a ruling or making recommendations, pursuant to Article XXIII:2 of the GATT 1994, on whether a variance in the type of duty applied by a contracting party from the type of duty provided for in its Schedule constituted an infringement of Article II:1 of the GATT 1947.⁵⁵⁷ The Panel also referred to the report of the *Panel on Newsprint* that did not, on its facts, deal with the application by a contracting party of a specific duty rather than an *ad valorem* duty provided for in its Schedule.⁵⁵⁸ Finally, the Panel relied extensively on the *unadopted* panel report in *Bananas II*. In our Report in *Japan – Taxes on Alcoholic Beverages*⁵⁵⁹, we agreed with that panel that ‘*unadopted* panel reports have no legal status in the GATT or WTO system . . . , although we believe that a panel could nevertheless find useful guidance in the rea-

soning of an unadopted panel report that it considered to be relevant’. In the case before us, the Panel’s use of the *Bananas II* panel report appears to have gone beyond deriving ‘useful guidance’ from the reasoning employed in that unadopted panel report. The Panel, in fact, *relies* upon the *Bananas II* panel report.”⁵⁶⁰

(e) Status of decisions by GATT 1947 Council

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

“We recognize that, as ‘decisions’ within the meaning of Article XVI:1 of the *WTO Agreement*, the adopted panel reports in the *Tax Legislation Cases*, together with the 1981 Council action, could provide ‘guidance’ to the WTO.”⁵⁶¹

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

“Article XVI:1 of the *WTO Agreement* on its face is not limited to decisions in the form of ‘legal instruments’,

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

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

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

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

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

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

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

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

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

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

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

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

(f) Status of adopted panel reports

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

“Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”⁵⁶⁴ In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*

For these reasons, we do not agree with the Panel’s conclusion in paragraph 6.10 of the Panel Report that ‘panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case’ as the phrase ‘subsequent practice’ is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel’s conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute ‘other decisions of the CONTRACTING PARTIES to GATT 1947’ for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

However, we agree with the Panel’s conclusion in that same paragraph of the Panel Report that *unadopted* panel reports ‘have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members’. Likewise, we agree that ‘a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.’⁵⁶⁵

(g) Status of panel findings that are not appealed

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

“[A] panel finding that has not been specifically appealed in a particular case should not be considered

to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal.”⁵⁶⁶

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

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

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

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

2. Article XVI:2

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

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

⁵⁶² Panel Report on *US – FSC*, para. 7.77.

⁵⁶³ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14.

⁵⁶⁴ (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

⁵⁶⁵ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 14–15. See also Panel Report on *US – Wool Shirts and Blouses*, para. 7.15.

⁵⁶⁶ Appellate Body Report on *Canada – Periodicals*, fn. 28.

⁵⁶⁷ Panel Report on *US – FSC*, para. 7.78.

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

3. Article XVI:4

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

228. In *US – 1916 Act (Japan)*, the Appellate Body upheld the Panel’s findings of violation⁵⁶⁸ that a breach of any provision of any annexed agreement gives rise to a violation of Article XVI:4 of the *WTO Agreement*.

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

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

“As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the *WTO Agreement* and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations:

(a) In GATT jurisprudence, to give one example, legislation providing for tax discrimination against imported products was found to be GATT inconsistent even before it had actually been applied to specific products and thus before any given product had actually been discriminated against.

(b) Article XVI:4 of the *WTO Agreement* explicitly confirms that legislation as such falls within the scope of possible WTO violations. It provides as follows:

‘Each Member shall ensure the conformity of its *laws, regulations and administrative procedures* with its obligations as provided in the annexed Agreements’ (emphasis added).

The three types of measures explicitly made subject to the obligations imposed in the *WTO Agreements* – ‘laws, regulations and administrative procedures’ – are measures that are applicable generally; not mea-

asures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under *WTO Agreements*, expands the type of measures made subject to these obligations.

(c) Recent WTO panel reports confirm, too, that legislation as such, independently from its application in a specific case, can be inconsistent with WTO rules.

Legislation may thus breach WTO obligations. This must be true, too, in respect of Article 23 of the *DSU*. This is so, in our view, not only because of the above-mentioned case law and Article XVI:4, but also because of the very nature of obligations under Article 23.”⁵⁷⁰

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

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

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

232. However, the Appellate Body disagreed and reversed the Panel’s finding:⁵⁷³

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

⁵⁶⁸ Appellate Body Report on *US – 1916 Act*, paras. 134–135.

⁵⁶⁹ Panel Report on *US – 1916 Act (Japan)*, paras. 6.287; as regards the *Anti-Dumping Agreement* see also: Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.93 as confirmed by the respective Appellate Body Report at para. 302.

⁵⁷⁰ Panel Report on *US – Section 301 Trade Act*, paras. 7.41–7.42.

⁵⁷¹ Appellate Body Report on *U.S. – Hot-Rolled Steel from Japan*, paras.

⁵⁷² Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.157.

⁵⁷³ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161.

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

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

4. Article XVI:5

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

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

- (a) *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* – Article 21 and paragraph 2 of Annex III;
- (b) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* – Article 18.2;
- (c) *Agreement on Technical Barriers to Trade* – Article 15.1;
- (d) *Agreement on Subsidies and Countervailing Measures* – Article 32.2; and
- (e) *TRIPS* – Article 72.

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

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

236. The following Agreements provide for reservations:

- (a) *Agreement on Civil Aircraft* – Article 9.2.1;
- (b) *Agreement on Government Procurement* – Article XXIV:4;
- (c) *International Dairy Agreement* – Article VIII:1(b); and
- (d) *International Bovine Meat Agreement* – Article VI:1(b).

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

5. Article XVI:6

(a) Registration of the Agreement

238. The *WTO Agreement* was registered on 1 June 1995⁵⁷⁶ in accordance with Article 102 of the United Nations Charter.⁵⁷⁷

XVIII. EXPLANATORY NOTES

A. TEXT OF EXPLANATORY NOTES

Explanatory Notes

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

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

B. INTERPRETATION AND APPLICATION OF THE EXPLANATORY NOTES

No jurisprudence or decision of a competent WTO body.

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

A. TEXT

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

⁵⁷⁴ Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 157–158.

⁵⁷⁵ Panel Report on *US – Offset Act (“Byrd Amendment”)* paras. 300–302.

⁵⁷⁶ Registration Number 31874.

⁵⁷⁷ Article 102 of the United Nations Charter provides:

- “1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into effect shall as soon as possible be registered by the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

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

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

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

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

5. The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow

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

B. INTERPRETATION AND APPLICATION

239. In *Argentina – Textiles and Apparel*, the Appellate Body upheld the Panel's finding "that there is nothing in the . . . Declaration on Coherence which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994."⁵⁷⁸ Also see paragraph 26 above.

XX. DECLARATION ON THE RELATIONSHIP OF THE WORLD TRADE ORGANIZATION WITH THE INTERNATIONAL MONETARY FUND

A. TEXT

Ministers,

Noting the close relationship between the CONTRACTING PARTIES to the GATT 1947 and the International Monetary Fund, and the provisions of the GATT 1947 governing that relationship, in particular Article XV of the GATT 1947;

Recognizing the desire of participants to base the relationship of the World Trade Organization with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund;

Hereby reaffirm that, unless otherwise provided for in the Final Act, the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the

⁵⁷⁸ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.

B. INTERPRETATION AND APPLICATION

240. In *Argentina – Textiles and Apparel*, the Appellate Body upheld the Panel's finding "that there is nothing in the Agreement Between the IMF and the WTO ... which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994."⁵⁷⁹

XXI. DECISION ON THE ACCEPTANCE OF AND ACCESSION TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

A. TEXT

Ministers,

Noting that Articles XI and XIV of the Agreement Establishing the World Trade Organization (hereinafter referred to as "*WTO Agreement*") provide that only contracting parties to the GATT 1947 as of the entry into force of the *WTO Agreement* for which schedules of concessions and commitments are annexed to GATT 1994 and for which schedules of specific commitments are annexed to the General Agreement on Trade in Services (hereinafter referred to as "*GATS*") may accept the *WTO Agreement*;

Noting further that paragraph 5 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred to as "*Final Act*" and "*Uruguay Round*" respectively) provides that the schedules of participants which are not contracting parties to GATT 1947 as of the date of the Final Act are not definitive and shall be subsequently completed for the purpose of their accession to GATT 1947 and their acceptance of the *WTO Agreement*;

Having regard to paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries which provides that the least-developed countries shall be given an additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the *WTO Agreement*;

Recognizing that certain participants in the Uruguay Round which had applied GATT 1947 on a *de facto* basis and became contracting parties under Article XXVI:5(c) of the GATT 1947 were not in a position to submit schedules to GATT 1994 and the GATS;

Recognizing further that some States or separate customs territories which were not participants in the Uruguay Round may become contracting parties to GATT 1947 before the entry into force of the *WTO Agreement* and that States or customs territories should

be given the opportunity to negotiate schedules to GATT 1994 and the GATS so as to enable them to accept the *WTO Agreement*;

Taking into account that some States or separate customs territories which cannot complete the process of accession to GATT 1947 before the entry into force of the *WTO Agreement* or which do not intend to become contracting parties to GATT 1947 may wish to initiate the process of their accession to the WTO before the entry into force of the *WTO Agreement*;

Recognizing that the *WTO Agreement* does not distinguish in any way between WTO Members which accepted that Agreement in accordance with its Articles XI and XIV and WTO Members which acceded to it in accordance with its Article XII and wishing to ensure that the procedures for accession of the States and separate customs territories which have not become contracting parties to the GATT 1947 as of the date of entry into force of the *WTO Agreement* are such as to avoid any unnecessary disadvantage or delay for these States and separate customs territories;

Decide that:

1. (a) Any Signatory of the Final Act
 - to which paragraph 5 of the Final Act applies, or
 - to which paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries applies, or
 - which became a contracting party under Article XXVI:5(c) of the GATT 1947 before 15 April 1994 and was not in a position to establish a schedule to GATT 1994 and the GATS for inclusion in the Final Act, and any State or separate customs territory
 - which becomes a contracting party to the GATT 1947 between 15 April 1994 and the date of entry into force of the *WTO Agreement* may submit to the Preparatory Committee for its examination and approval a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments to the GATS.
- (b) The *WTO Agreement* shall be open for acceptance in accordance with Article XIV of that Agreement by contracting parties to GATT 1947 the schedules of which have been so submitted and approved before the entry into force of the *WTO Agreement*.
- (c) The provisions of subparagraphs (a) and (b) of this paragraph shall be without prejudice to the

⁵⁷⁹ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

right of the least-developed countries to submit their schedules within one year from 15 April 1994.

2. (a) Any State or separate customs territory may request the Preparatory Committee to propose for approval by the Ministerial Conference of the WTO the terms of its accession to the *WTO Agreement* in accordance with Article XII of that Agreement. If such a request is made by a State or separate customs territory which is in the process of acceding to GATT 1947, the Preparatory Committee shall, to the extent practicable, examine the request jointly with the Working Party established by the CONTRACTING PARTIES to GATT 1947 to examine the accession of that State or separate customs territory.

(b) The Preparatory Committee shall submit to the Ministerial Conference a report on its examination of the request. The report may include a protocol of accession, including a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments for the GATS, for approval by the Ministerial Conference. The report of the Preparatory Committee shall be taken into account by the Ministerial Conference in its consideration of any application by the State or separate customs territory concerned to accede to the *WTO Agreement*.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXII. DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES

A. TEXT

Ministers,

Recognizing the plight of the least-developed countries and the need to ensure their effective participation in the world trading system, and to take further measures to improve their trading opportunities;

Recognizing the specific needs of the least-developed countries in the area of market access where continued preferential access remains an essential means for improving their trading opportunities;

Reaffirming their commitment to implement fully the provisions concerning the least-developed countries contained in paragraphs 2(d), 6 and 8 of the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries;

Having regard to the commitment of the participants as set out in Section B (vii) of Part I of the Punta del Este Ministerial Declaration;

1. Decide that, if not already provided for in the instruments negotiated in the course of the Uruguay Round,

notwithstanding their acceptance of these instruments, the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least-developed countries shall be given additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization.

2. Agree that:

(i) Expeditious implementation of all special and differential measures taken in favour of least-developed countries including those taken within the context of the Uruguay Round shall be ensured through, inter alia, regular reviews.

(ii) To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging. Consideration shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries.

(iii) The rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries. To this effect, sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees.

(iv) In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII of GATT 1947 and the corresponding provision of GATT 1994, special consideration shall be given to the export interests of least-developed countries.

(v) Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximize the benefits from liberalized access to markets.

3. Agree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries.

B. INTERPRETATION AND APPLICATION

1. Least-Developed Countries (LDCs) in the Doha Round

241. The Doha Declaration⁵⁸⁰ launched a comprehensive round of negotiations. The Work Programme for the negotiations includes provisions for LDCs.⁵⁸¹ As regards the Sub-Committee on LDCs, see Section V.B.7(a) above. As regards accession of LDCs, see Section XIII.B.1(c) above.

XXIII. UNDERSTANDING IN RESPECT OF WAIVERS OF OBLIGATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. TEXT

Members hereby agree as follows:

1. A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.

2. Any waiver in effect on the date of entry into force of the WTO Agreement shall terminate, unless extended in accordance with the procedures above and those of Article IX of the WTO Agreement, on the date of its expiry or two years from the date of entry into force of the WTO Agreement, whichever is earlier.

3. Any Member considering that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of:

- (a) the failure of the Member to whom a waiver was granted to observe the terms or conditions of the waiver, or
- (b) the application of a measure consistent with the terms and conditions of the waiver

may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding.”

B. INTERPRETATION AND APPLICATION

242. With respect to the WTO practice on waivers, see Section X.B.3 above .

243. As regards Members' invocation of provisions of Article XXIII (as elaborated and applied by the DSU) in response to the nullification or impairments of benefits accruing to Members under *GATT 1994*, see Section XXIV of the Chapter on the *GATT 1994*.

XXIV. ACCESSIONS UNDER ARTICLE XXXIII OF THE GATT 1994

Contracting Party	Date
Albania	8 September 2000
Armenia	5 February 2003
Bulgaria	1 December 1996
Cambodia	13 October 2004
China	11 December 2001
Croatia	30 November 2000
Ecuador	21 January 1996
Estonia	13 November 1999
Former Yugoslav Republic of Macedonia	4 April 2003
Georgia	14 June 2000
Grenada	22 February 1996
Jordan	11 April 2000
Kyrgyz Republic	20 December 1998
Latvia	10 February 1999
Lithuania	31 May 2001
Moldova	26 July 2001
Mongolia	29 January 1997
Nepal	23 April 2004
Oman	9 November 2000
Panama	6 September 1997
Papua New Guinea	9 June 1996
Qatar	13 January 1996
Saint Kitts and Nevis	21 February 1996
Chinese Taipei	1 January 2002
United Arab Emirates	10 April 1996

XXV. WTO MEMBERSHIP

Government	Effective Date of Membership
Albania	8 September 2000
Angola	23 November 1996
Antigua and Barbuda	1 January 1995
Argentina	1 January 1995
Armenia	5 February 2003
Australia	1 January 1995
Austria	1 January 1995
Bahrain	1 January 1995
Bangladesh	1 January 1995
Barbados	1 January 1995
Belgium	1 January 1995
Belize	1 January 1995
Benin	22 February 1996
Bolivarian Republic of Venezuela	1 January 1995
Bolivia	12 September 1995
Botswana	31 May 1995
Brazil	1 January 1995
Brunei Darussalam	1 January 1995
Bulgaria	1 December 1996
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cambodia	13 October 2004
Cameroon	13 December 1995
Canada	1 January 1995

⁵⁸⁰ WT/MIN(01)/DEC/1.

⁵⁸¹ WT/MIN(01)/DEC/1, paras. 42–43.

Table (cont.)

Government	Effective Date of Membership
Central African Republic	31 May 1995
Chad	19 October 1996
Chile	1 January 1995
China	11 December 2001
Colombia	30 April 1995
Congo	27 March 1997
Costa Rica	1 January 1995
Côte d'Ivoire	1 January 1995
Croatia	30 November 2000
Cuba	20 April 1995
Cyprus	30 July 1995
Czech Republic	1 January 1995
Democratic Republic of the Congo	1 January 1997
Denmark	1 January 1995
Djibouti	31 May 1995
Dominica	1 January 1995
Dominican Republic	9 March 1995
Ecuador	21 January 1996
Egypt	30 June 1995
El Salvador	7 May 1995
Estonia	13 November 1999
European Communities	1 January 1995
Fiji	14 January 1996
Finland	1 January 1995
Former Yugoslav Republic of Macedonia	4 April 2003
France	1 January 1995
Gabon	1 January 1995
The Gambia	23 October 1996
Georgia	14 June 2000
Germany	1 January 1995
Ghana	1 January 1995
Greece	1 January 1995
Grenada	22 February 1996
Guatemala	21 July 1995
Guinea	25 October 1995
Guinea Bissau	31 May 1995
Guyana	1 January 1995
Haiti	30 January 1996
Honduras	1 January 1995
Hong Kong, China	1 January 1995
Hungary	1 January 1995
Iceland	1 January 1995
India	1 January 1995
Indonesia	1 January 1995
Ireland	1 January 1995
Israel	21 April 1995
Italy	1 January 1995
Jamaica	9 March 1995
Japan	1 January 1995
Jordan	11 April 2000
Kenya	1 January 1995
Korea, Republic of	1 January 1995
Kuwait	1 January 1995
Kyrgyz Republic	20 December 1998
Latvia	10 February 1999
Lesotho	31 May 1995
Liechtenstein	1 September 1995
Lithuania	31 May 2001
Luxembourg	1 January 1995
Macao, China	1 January 1995
Madagascar	17 November 1995

Table (cont.)

Government	Effective Date of Membership
Malawi	31 May 1995
Malaysia	1 January 1995
Maldives	31 May 1995
Mali	31 May 1995
Malta	1 January 1995
Mauritania	31 May 1995
Mauritius	1 January 1995
Mexico	1 January 1995
Moldova	26 July 2001
Mongolia	29 January 1997
Morocco	1 January 1995
Mozambique	26 August 1995
Myanmar	1 January 1995
Namibia	1 January 1995
Nepal	23 April 2004
Netherlands – For the Kingdom in Europe and for the Netherlands Antilles	1 January 1995
New Zealand	1 January 1995
Nicaragua	3 September 1995
Niger	13 December 1996
Nigeria	1 January 1995
Norway	1 January 1995
Oman	9 November 2000
Pakistan	1 January 1995
Panama	6 September 1997
Papua New Guinea	9 June 1996
Paraguay	1 January 1995
Peru	1 January 1995
Philippines	1 January 1995
Poland	1 July 1995
Portugal	1 January 1995
Qatar	13 January 1996
Romania	1 January 1995
Rwanda	22 May 1996
Saint Kitts and Nevis	21 February 1996
Saint Lucia	1 January 1995
Saint Vincent and the Grenadines	1 January 1995
Senegal	1 January 1995
Sierra Leone	23 July 1995
Singapore	1 January 1995
Slovak Republic	1 January 1995
Slovenia	30 July 1995
Solomon Islands	26 July 1996
South Africa	1 January 1995
Spain	1 January 1995
Sri Lanka	1 January 1995
Suriname	1 January 1995
Swaziland	1 January 1995
Sweden	1 January 1995
Switzerland	1 July 1995
Chinese Taipei	1 January 2002
Tanzania	1 January 1995
Thailand	1 January 1995
Togo	31 May 1995
Trinidad and Tobago	1 March 1995
Tunisia	29 March 1995
Turkey	26 March 1995
Uganda	1 January 1995
United Arab Emirates	10 April 1996
United Kingdom	1 January 1995

Table (cont.)

Government	Effective Date of Membership
United States of America	1 January 1995
Uruguay	1 January 1995
Zambia	1 January 1995
Zimbabwe	5 March 1995

XXVI. WTO OBSERVERS

Afghanistan	Algeria
Andorra	Azerbaijan
Bahamas	Belarus
Bhutan	Bosnia and Herzegovina
Cape Verde	Equatorial Guinea
Ethiopia	Holy See (Vatican)
Iraq	Kazakhstan
Lao People's Democratic Republic	Libyan Arab Jamahiriya
Lebanon	Russian Federation
Samoa	Sao Tome and Principe
Saudi Arabia	Serbia and Montenegro ⁵⁸²
Seychelles	Sudan
Tajikistan	Tonga
Ukraine	Uzbekistan
Vanuatu	Viet Nam
Yemen	

XXVII. DOHA TEXTS

A. DOHA DECLARATION

MINISTERIAL DECLARATION

Adopted on 14 November 2001⁵⁸³

1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-devel-

oped among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

3. We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system. We recall the commitments made by Ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.

4. We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.

5. We are aware that the challenges Members face in a rapidly changing international environment cannot be addressed through measures taken in the trade field alone. We shall continue to work with the Bretton Woods institutions for greater coherence in global economic policy-making.

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

⁵⁸² At the time of writing, the General Council had agreed on 15 February 2005 to establish a working party in relation to the accession of Montenegro and a separate working party in relation to the accession of Serbia – WT/GC/M/92

⁵⁸³ WT/MIN(01)/DEC/1.

conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

7. We reaffirm the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services.

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

9. We note with particular satisfaction that this Conference has completed the WTO accession procedures for China and Chinese Taipei. We also welcome the accession as new Members, since our last Session, of Albania, Croatia, Georgia, Jordan, Lithuania, Moldova and Oman, and note the extensive market-access commitments already made by these countries on accession. These accessions will greatly strengthen the multilateral trading system, as will those of the 28 countries now negotiating their accession. We therefore attach great importance to concluding accession proceedings as quickly as possible. In particular, we are committed to accelerating the accession of least-developed countries.

10. Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

11. In view of these considerations, we hereby agree to undertake the broad and balanced Work Programme set out below. This incorporates both an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system.

WORK PROGRAMME

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

12. We attach the utmost importance to the implementation-related issues and concerns raised by Mem-

bers and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

AGRICULTURE

13. We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

14. Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth

Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

SERVICES

15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

16. We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

17. We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate Declaration.

18. With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration

of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant inter-governmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to

regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant inter-governmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

TRANSPARENCY IN GOVERNMENT PROCUREMENT

26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account partici-

pants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

TRADE FACILITATION

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

DISPUTE SETTLEMENT UNDERSTANDING

30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not

later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

TRADE AND ENVIRONMENT

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

- (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;
- (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- (iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phy-

tosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

ELECTRONIC COMMERCE

34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.

SMALL ECONOMIES

35. We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members. The General Council shall review the work programme and make recommendations for action to the Fifth Session of the Ministerial Conference.

TRADE, DEBT AND FINANCE

36. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TRADE AND TRANSFER OF TECHNOLOGY

37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TECHNICAL COOPERATION AND CAPACITY BUILDING

38. We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to Members and Observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.

39. We underscore the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional inter-governmental institutions, within a coherent policy framework and timetable. In the coordinated delivery of technical assistance, we instruct the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).

40. We agree that there is a need for technical assistance to benefit from secure and predictable funding. We therefore instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities outlined above.

41. We have established firm commitments on technical cooperation and capacity building in various paragraphs in this Ministerial Declaration. We reaffirm these specific commitments contained in paragraphs 16, 21,

24, 26, 27, 33, 38–40, 42 and 43, and also reaffirm the understanding in paragraph 2 on the important role of sustainably financed technical assistance and capacity-building programmes. We instruct the Director-General to report to the Fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002 on the implementation and adequacy of these commitments in the identified paragraphs.

LEAST-DEVELOPED COUNTRIES

42. We acknowledge the seriousness of the concerns expressed by the least-developed countries (LDCs) in the Zanzibar Declaration adopted by their Ministers in July 2001. We recognize that the integration of the LDCs into the multilateral trading system requires meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacity building. We agree that the meaningful integration of LDCs into the trading system and the global economy will involve efforts by all WTO Members. We commit ourselves to the objective of duty-free, quota-free market access for products originating from LDCs. In this regard, we welcome the significant market access improvements by WTO Members in advance of the Third UN Conference on LDCs (LDC-III), in Brussels, May 2001. We further commit ourselves to consider additional measures for progressive improvements in market access for LDCs. Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance. We reaffirm the commitments we undertook at LDC-III, and agree that the WTO should take into account, in designing its work programme for LDCs, the trade-related elements of the Brussels Declaration and Programme of Action, consistent with the WTO's mandate, adopted at LDC-III. We instruct the Sub-Committee for Least-Developed Countries to design such a work programme and to report on the agreed work programme to the General Council at its first meeting in 2002.

43. We endorse the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) as a viable model for LDCs' trade development. We urge development partners to significantly increase contributions to the IF Trust Fund and WTO extra-budgetary trust funds in favour of LDCs. We urge the core agencies, in coordination with development partners, to explore the enhancement of the IF with a view to addressing the supply-side constraints of LDCs and the extension of the model to all LDCs, following the review of the IF and the appraisal of the ongoing Pilot Scheme in selected LDCs. We request the Director-General, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth Session of the Ministerial Conference on all issues affecting LDCs.

SPECIAL AND DIFFERENTIAL TREATMENT

44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

ORGANIZATION AND MANAGEMENT OF THE WORK PROGRAMME

45. The negotiations to be pursued under the terms of this Declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

46. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.

47. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

48. Negotiations shall be open to:

- (i) all Members of the WTO; and
- (ii) States and separate customs territories currently in the process of accession and those that inform Members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.

Decisions on the outcomes of the negotiations shall be taken only by WTO Members.

49. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

50. The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

52. Those elements of the Work Programme which do not involve negotiations are also accorded a high priority. They shall be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.

B. DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

244. The text of the Declaration on the TRIPS Agreement and Public Health is annexed to the Chapter on the *TRIPS Agreement*.

C. IMPLEMENTATION-RELATED ISSUES AND CONCERNS

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

*Decision of 14 November 2001*⁵⁸⁴

The Ministerial Conference,

Having regard to Articles IV.1, IV.5 and IX of the Marrakesh Agreement Establishing the World Trade Organization (WTO);

Mindful of the importance that Members attach to the increased participation of developing countries in the multilateral trading system, and of the need to ensure that the system responds fully to the needs and interests of all participants;

Determined to take concrete action to address issues and concerns that have been raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties

⁵⁸⁴ WT/MIN(01)/17.

and resource constraints that have been encountered in the implementation of obligations in various areas;

Recalling the 3 May 2000 Decision of the General Council to meet in special sessions to address outstanding implementation issues, and to assess the existing difficulties, identify ways needed to resolve them, and take decisions for appropriate action not later than the Fourth Session of the Ministerial Conference;

Noting the actions taken by the General Council in pursuance of this mandate at its Special Sessions in October and December 2000 (WT/L/384), as well as the review and further discussion undertaken at the Special Sessions held in April, July and October 2001, including the referral of additional issues to relevant WTO bodies or their chairpersons for further work;

Noting also the reports on the issues referred to the General Council from subsidiary bodies and their chairpersons and from the Director-General, and the discussions as well as the clarifications provided and understandings reached on implementation issues in the intensive informal and formal meetings held under this process since May 2000;

Decides as follows:

1. General Agreement on Tariffs and Trade 1994 (GATT 1994)
 - 1.1 Reaffirms that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994.
 - 1.2 Noting the issues raised in the report of the Chairperson of the Committee on Market Access (WT/GC/50) concerning the meaning to be given to the phrase "substantial interest" in paragraph 2(d) of Article XIII of the GATT 1994, the Market Access Committee is directed to give further consideration to the issue and make recommendations to the General Council as expeditiously as possible but in any event not later than the end of 2002.
2. Agreement on Agriculture
 - 2.1 Urges Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.
 - 2.2 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, and approves the recommendations contained therein regarding (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up.
- 2.3 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the implementation of Article 10.2 of the Agreement on Agriculture, and approves the recommendations and reporting requirements contained therein.
- 2.4 Takes note of the report of the Committee on Agriculture (G/AG/11) regarding the administration of tariff rate quotas and the submission by Members of addenda to their notifications, and endorses the decision by the Committee to keep this matter under review.
3. Agreement on the Application of Sanitary and Phytosanitary Measures
 - 3.1 Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase "longer time-frame for compliance" referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection.
 - 3.2 Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed.
 - 3.3 Takes note of the Decision of the Committee on Sanitary and Phytosanitary Measures

(G/SPS/19) regarding equivalence, and instructs the Committee to develop expeditiously the specific programme to further the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

3.4 Pursuant to the provisions of Article 12.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years.

3.5 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying SPS-related technical assistance needs and how best to address them; and

(ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions in this regard, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.

3.6 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade; and

(ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on the Application of Sanitary and Phytosanitary Measures.

4. Agreement on Textiles and Clothing

Reaffirms the commitment to full and faithful implementation of the Agreement on Textiles and Clothing, and agrees:

4.1 that the provisions of the Agreement relating to the early integration of products and the elimination of quota restrictions should be effectively utilised.

4.2 that Members will exercise particular consideration before initiating investigations in the context of antidumping remedies on textile and clothing exports from developing countries previously subject to quantitative restrictions under the Agreement for a period of two years following full integration of this Agreement into the WTO.

4.3 that without prejudice to their rights and obligations, Members shall notify any changes in their rules of origin concerning products falling under the coverage of the Agreement to the Committee on Rules of Origin which may decide to examine them.

Requests the Council for Trade in Goods to examine the following proposals:

4.4 that when calculating the quota levels for small suppliers for the remaining years of the Agreement, Members will apply the most favourable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; extend the same treatment to least-developed countries; and, where possible, eliminate quota restrictions on imports of such Members;

4.5 that Members will calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for stage 3 had been advanced to 1 January 2000;

and make recommendations to the General Council by 31 July 2002 for appropriate action.

5. Agreement on Technical Barriers to Trade

5.1 Confirms the approach to technical assistance being developed by the Committee on Technical Barriers to Trade, reflecting the results of the triennial review work in this area, and mandates this work to continue.

5.2 Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

5.3 (i) Takes note of the actions taken to date by the Director-General to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations as well as his

- efforts to coordinate with these organizations and financial institutions in identifying TBT-related technical assistance needs and how best to address them; and
- (ii) urges the Director-General to continue his cooperative efforts with these organizations and institutions, including with a view to according priority to the effective participation of least-developed countries and facilitating the provision of technical and financial assistance for this purpose.
- 5.4 (i) Urges Members to provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new TBT measures which may have significant negative effects on their trade; and
- (ii) urges Members to ensure that technical assistance is provided to least-developed countries with a view to responding to the special problems faced by them in implementing the Agreement on Technical Barriers to Trade.
6. Agreement on Trade-Related Investment Measures
- 6.1 Takes note of the actions taken by the Council for Trade in Goods in regard to requests from some developing-country Members for the extension of the five-year transitional period provided for in Article 5.2 of Agreement on Trade-Related Investment Measures.
- 6.2 Urges the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the TRIMs Agreement or Article IX.3 of the WTO Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.
7. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
- 7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.
- 7.2 Recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.
- 7.3 Takes note that Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames.
- 7.4 Takes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guidelines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.
8. Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
- 8.1 Takes note of the actions taken by the Committee on Customs Valuation in regard to the requests from a number of developing-country Members for the extension of the five-year transitional period provided for in Article 20.1 of Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.
- 8.2 Urges the Council for Trade in Goods to give positive consideration to requests that may be made by least-developed country Members under paragraphs 1 and 2 of Annex III of the Customs Valuation Agreement or under Article IX.3 of the WTO Agreement, as well as

to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.

- 8.3 Underlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud. In this regard, it is agreed that, further to the 1994 Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt the truth or accuracy of the declared value, it may seek assistance from the customs administration of an exporting Member on the value of the good concerned. In such cases, the exporting Member shall offer cooperation and assistance, consistent with its domestic laws and procedures, including furnishing information on the export value of the good concerned. Any information provided in this context shall be treated in accordance with Article 10 of the Customs Valuation Agreement. Furthermore, recognizing the legitimate concerns expressed by the customs administrations of several importing Members on the accuracy of the declared value, the Committee on Customs Valuation is directed to identify and assess practical means to address such concerns, including the exchange of information on export values and to report to the General Council by the end of 2002 at the latest.

9. Agreement on Rules of Origin

- 9.1 Takes note of the report of the Committee on Rules of Origin (G/RO/48) regarding progress on the harmonization work programme, and urges the Committee to complete its work by the end of 2001.
- 9.2 Agrees that any interim arrangements on rules of origin implemented by Members in the transitional period before the entry into force of the results of the harmonisation work programme shall be consistent with the Agreement on Rules of Origin, particularly Articles 2 and 5 thereof. Without prejudice to Members' rights and obligations, such arrangements may be examined by the Committee on Rules of Origin.

10. Agreement on Subsidies and Countervailing Measures

- 10.1 Agrees that Annex VII(b) to the Agreement on Subsidies and Countervailing Measures

includes the Members that are listed therein until their GNP per capita reaches US \$1,000 in constant 1990 dollars for three consecutive years. This decision will enter into effect upon the adoption by the Committee on Subsidies and Countervailing Measures of an appropriate methodology for calculating constant 1990 dollars. If, however, the Committee on Subsidies and Countervailing Measures does not reach a consensus agreement on an appropriate methodology by 1 January 2003, the methodology proposed by the Chairman of the Committee set forth in G/SCM/38, Appendix 2 shall be applied. A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US \$1000 based upon the most recent data from the World Bank.

- 10.2 Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below. During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures.
- 10.3 Agrees that the Committee on Subsidies and Countervailing Measures shall continue its review of the provisions of the Agreement on Subsidies and Countervailing Measures regarding countervailing duty investigations and report to the General Council by 31 July 2002.
- 10.4 Agrees that if a Member has been excluded from the list in paragraph (b) of Annex VII to the Agreement on Subsidies and Countervailing Measures, it shall be re-included in it when its GNP per capita falls back below US\$ 1,000.
- 10.5 Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country Members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country Member must phase out its export subsidies in respect of a product in which it

is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6.

- 10.6 Having regard to the particular situation of certain developing-country Members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39. Furthermore, when considering a request for an extension of the transition period under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, and in order to avoid that Members at similar stages of development and having a similar order of magnitude of share in world trade are treated differently in terms of receiving such extensions for the same eligible programmes and the length of such extensions, directs the Committee to extend the transition period for those developing countries, after taking into account the relative competitiveness in relation to other developing-country Members who have requested extension of the transition period following the procedures set forth in document G/SCM/39.

11. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

- 11.1 The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.
- 11.2 Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually.

12. Cross-cutting Issues

12.1 The Committee on Trade and Development is instructed:

- (i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;
- (ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and
- (iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

- 12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause")¹ should be generalised, non-reciprocal and non-discriminatory.

(footnote original) ¹ BISD 26S/203.

13. Outstanding Implementation Issues²

Agrees that outstanding implementation issues be addressed in accordance with paragraph 12 of the Ministerial Declaration (WT/MIN(01)/DEC/1).

(footnote original) ² A list of these issues is compiled in document Job(01)/152/Rev.1.

14. Final Provisions

Requests the Director-General, consistent with paragraphs 38 to 43 of the Ministerial Declaration (WT/MIN(01)/DEC/1), to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries to implement existing WTO obligations as well as on increasing their capacity to participate more effectively in future multilateral trade negotiations. In carrying out this mandate, the WTO Secretariat should cooperate more closely with international and regional intergovernmental organisations so as to increase efficiency and synergies and avoid duplication of programmes.

D. PROCEDURES FOR EXTENSIONS UNDER ARTICLE 27.4 FOR CERTAIN DEVELOPING COUNTRY MEMBERS

PROCEDURES FOR EXTENSIONS UNDER ARTICLE 27.4 FOR CERTAIN DEVELOPING COUNTRY MEMBERS⁵⁸⁵

The Committee on Subsidies and Countervailing Measures ("SCM Committee") shall follow the procedures set forth below in respect of extensions of the transition period under Article 27.4 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") for certain developing country Members. The programmes to which these procedures shall apply are those meeting the criteria set forth in 2.

1. Mechanism for extension

- (a) A Member that maintains programmes meeting the criteria set forth in 2 and that wishes to make use of these procedures, shall initiate Article 27.4 consultations with the Committee in respect of an extension for its eligible subsidy programmes as referred to in 2, on the basis of documentation to be submitted to the Committee not later than 31 December 2001. This documentation shall consist of (i) an identification by the Member of those programmes for which it is seeking an extension under SCM Article 27.4 pursuant to these procedures; and (ii) a statement that the extension is necessary in the light of the Member's economic, financial and development needs.
- (b) Not later than 28 February 2002, the Member seeking an extension shall submit to the SCM Committee an initial notification as referred to in 3(a) providing detailed information about the programmes for which extension is being sought.
- (c) Following receipt of the notifications referred to in 1(b), the SCM Committee shall consider those notifications, with an opportunity for Members to seek clarification of the notified information and/or additional detail with a

view to understanding the nature and operation of the notified programmes, and their scope, coverage and intensity of benefits, as referred to in 3(b). The purpose of this consideration by the SCM Committee shall be to verify that the programmes are of the type eligible under these procedures as referred to in 2, and that the transparency requirement referred to in 3(a) and 3(b) is fulfilled. Not later than 15 December 2002, Members of the SCM Committee shall grant extensions for calendar year 2003 for those programmes notified pursuant to these procedures, provided that the notified programmes meet the eligibility criteria in 2 and that the transparency requirement is fulfilled. The notified information on the basis of which the extensions are granted, including information provided in response to requests from Members as referred to above, shall form the frame of reference for the annual reviews of the extensions as referred to in 1(d) and 1(e).

- (d) As provided for in SCM Article 27.4, the extensions granted by the SCM Committee pursuant to these procedures shall be subject to annual review in the form of consultations between the Committee and the Members receiving the extensions. These annual reviews shall be conducted on the basis of updating notifications from the Members in question, as referred to in 3(a) and 3(b). The purpose of the annual reviews shall be to ensure that the transparency and standstill requirements as set forth in 3 and 4 are being fulfilled.
- (e) Through the end of calendar year 2007, subject to annual reviews during that period to verify that the transparency and standstill requirements set forth in 3 and 4 are being fulfilled, Members of the Committee shall agree to continue the extensions granted pursuant to 1(c).
- (f) During the last year of the period referred to in 1(e), a Member that has received an extension under these procedures shall have the possibility to seek a continuation of the extension pursuant to SCM Article 27.4, for the programmes in question. The Committee shall consider any such requests at that year's annual review, on the basis of the provisions of SCM Article 27.4, i.e., outside the framework of these procedures.
- (g) If a continuation of the extension pursuant to 1(f) is either not requested or not granted, the Member in question shall have the final two

⁵⁸⁵ G/SCM/39.

years referred to in the last sentence of SCM Article 27.4.

2. Eligible programmes

Programmes eligible for extension pursuant to these procedures, and for which Members shall therefore grant extensions for calendar year 2003 as referred to in 1(c), are export subsidy programmes (i) in the form of full or partial exemptions from import duties and internal taxes, (ii) which were in existence not later than 1 September 2001, and (iii) which are provided by developing country Members (iv) whose share of world merchandise export trade was not greater than 0.10 per cent¹, (v) whose total Gross National Income ("GNI") for the year 2000 as published by the World Bank was at or below US \$ 20 billion,² (vi) and who are otherwise eligible to request an extension pursuant to Article 27.4,³ and (vii) in respect of which these procedures are followed.

(footnote original) ¹ According to the calculations performed by the WTO Secretariat as reflected in Appendix 3 to the Report of the Chairman (G/SCM/38).

(footnote original) ² The SCM Committee shall consider other appropriate data sources in respect of Members for whom the World Bank does not publish total GNI data.

(footnote original) ³ The fact that a Member is listed in Annex VII(b) shall not be deemed to make that Member otherwise ineligible to request an extension pursuant to Article 27.4.

3. Transparency

- (a) The initial notification referred to in 1(b), and the updating notifications referred to in 1(d), shall follow the agreed format for subsidy notifications under SCM Article 25 (found in G/SCM/6).
- (b) During the SCM Committee's consideration/review of the notifications referred to in 1(c) and 1(d), notifying Members can be requested by other Members to provide additional detail and clarification, with a view to confirming that the programmes meet the criteria set forth in 2, and to establishing transparency in respect of the scope, coverage and intensity of benefits (the "favourability") of the programmes in question.⁴ Any information provided in response to such requests shall be considered part of the notified information.

(footnote original) ⁴ The scope, coverage and intensity of the programmes in question will be determined on the basis of the legal instruments underlying the programmes.

4. Standstill

- (a) The programmes for which an extension is granted shall not be modified during the period of extension referred to in 1(e) so as to make them more favourable than they were as at 1 September 2001. The continuation of an

expiring programme without modification shall not be deemed to violate standstill.

- (b) The scope, coverage and intensity of benefits (the "favourability") of the programmes as at 1 September 2001 shall be specified in the initial notification referred to in 1(b), and standstill as referred to in 4(a) shall be verified on the basis of the notified information referred to in 1(d) and 3(b).

5. Product graduation on the basis of export competitiveness

Notwithstanding these procedures, Articles 27.5 and 27.6 shall apply in respect of export subsidies for which extensions are granted pursuant to these procedures.

6. Members listed in Annex VII(b)

- (a) A Member listed in Annex VII(b) whose GNP per capita has reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 shall be eligible to make use of these procedures.
- (b) A Member listed in Annex VII(b) whose GNP per capita has not reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 may reserve its right to make use of these procedures, as referred to in 6(c), by submitting the documentation referred to in 1(a) not later than 31 December 2001.
- (c) If the per capita GNP of a Member referred to in 6(b) reaches the level provided for in that Annex during the period referred to in 1(e), that Member shall be able to make use of these procedures as from the date at which its per capita GNP reaches that level and for the remainder of the period referred to in 1(e), as well as for any additional periods as referred to in 1(f) and 1(g), subject to the remaining provisions of these procedures.
- (d) For a Member referred to in 6(b), the effective date for the standstill requirement referred to in 4(a) shall be the year in which that Member's GNP per capita reaches the level provided for in Annex VII(b).

7. Final provisions

- (a) The decision by Ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, are without prejudice to any requests for extensions under Article 27.4 that are not made pursuant to these procedures.
- (b) The decision by Ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, shall not affect any other existing rights and obligations under SCM Article 27.4

or under other provisions of the SCM Agreement.

- (c) The criteria set forth in these procedures are solely and strictly for the purpose of determining whether Members are eligible to invoke these procedures. Members of the Committee agree that these criteria have no precedential value or relevance, direct or indirect, for any other purpose.

E. EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001⁵⁸⁶

The Ministerial Conference,

Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph 3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93);

Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")¹;

(footnote original) ¹ As contained in documents G/C/W/187, G/C/W/204, G/C/W/254 and G/C/W/269).

Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;

Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the WTO and with the

trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement;

Considering that the trade provisions of the Agreement have been applied since 1 March 2000 on the basis of transitional measures adopted by the ACP-EC joint institutions;

Noting the assurances given by the Parties to the Agreement that they will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement;

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;

Noting the assurances from the Parties to the Agreement that any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers and their willingness to accept a multilateral control on the implementation of this commitment.

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,² without being required to extend the same preferential treatment to like products of any other member.

(footnote original) ² Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

⁵⁸⁶ WT/MIN (01)/15

2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.
 3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.
 - 3bis With respect to bananas, the additional provisions in the Annex shall apply.
 4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.
 5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.
 6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.
- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.
 - Within 60 days of such an announcement, any such interested party may request arbitration.
 - The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments.
 - If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If the EC has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime. The Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

ANNEX

The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII.

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.

F. EUROPEAN COMMUNITIES –
TRANSITIONAL REGIME FOR THE EC
AUTONOMOUS TARIFF RATE QUOTAS ON
IMPORTS OF BANANAS

EUROPEAN COMMUNITIES – TRANSITIONAL
REGIME FOR THE EC
AUTONOMOUS TARIFF RATE QUOTAS ON
IMPORTS OF BANANAS

Decision of 14 November 2001⁵⁸⁷

The Ministerial Conference,

Having regard to the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956, the Understanding in Respect of

⁵⁸⁷ WT/MIN(01)/16.

Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, and paragraphs 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter “WTO Agreement”);

Taking note of the request of the European Communities for a waiver from its obligations under paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas;

Taking note of the understandings reached by the EC, Ecuador and the United States that identify the means by which the longstanding dispute over the EC’s banana regime can be resolved, in particular their provision for a temporary global quota allocation for ACP banana supplying countries under specified conditions;

Taking into account the exceptional circumstances surrounding the resolution of the bananas dispute and the interests of many WTO Members in the EC banana regime;

Recognizing the need to afford sufficient protection to the ACP banana supplying countries, including the most vulnerable, during a limited transition period, to enable them to prepare for a tariff-only regime;

Noting assurances given by the EC that it will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the tariff rate quota for bananas originating in ACP States;

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994 with respect to bananas exist;

Decides as follows:

1. With respect to the EC’s imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC’s separate tariff quota of 750,000 tonnes for bananas of ACP origin.
2. The EC will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver; where a Member considers that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.
3. Any Member which considers that the separate tariff rate quota for bananas originating in ACP States covered by this waiver is being applied inconsistently with this waiver or that any benefit accru-

ing to it under the GATT 1994 may be or is being impaired unduly as a result of the implementation of the separate tariff rate quota for bananas originating in ACP States covered by this waiver and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.

4. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the GATT 1994.

XXVIII. THE JULY PACKAGE

Doha Work Programme

Decision Adopted by the General Council on 1 August 2004⁵⁸⁸

1. The General Council reaffirms the Ministerial Declarations and Decisions adopted at Doha and the full commitment of all Members to give effect to them. The Council emphasizes Members’ resolve to complete the Doha Work Programme fully and to conclude successfully the negotiations launched at Doha. Taking into account the Ministerial Statement adopted at Cancún on 14 September 2003, and the statements by the Council Chairman and the Director-General at the Council meeting of 15–16 December 2003, the Council takes note of the report by the Chairman of the Trade Negotiations Committee (TNC) and agrees to take action as follows:

- a. **Agriculture:** the General Council adopts the framework set out in Annex A to this document.
- b. **Cotton:** the General Council reaffirms the importance of the Sectoral Initiative on Cotton and takes note of the parameters set out in Annex A within which the trade-related aspects of this issue will be pursued in the agriculture negotiations. The General Council also attaches importance to the development aspects of the Cotton Initiative and wishes to stress the complementarity between the trade and development aspects. The Council takes note of the recent Workshop on Cotton in Cotonou on 23–24 March 2004 organized by the WTO Secretariat, and other bilateral and multilateral efforts to make progress on the development assistance aspects and instructs the Secretariat to continue to work with the development community and to provide the Council with periodic reports on relevant developments.

Members should work on related issues of development multilaterally with the international financial institutions, continue their bilateral programmes, and all developed countries are urged to

⁵⁸⁸ WT/L/579.

participate. In this regard, the General Council instructs the Director General to consult with the relevant international organizations, including the Bretton Woods Institutions, the Food and Agriculture Organization and the International Trade Centre to direct effectively existing programmes and any additional resources towards development of the economies where cotton has vital importance.

c. Non-agricultural Market Access: the General Council adopts the framework set out in Annex B to this document.

d. Development:

Principles: development concerns form an integral part of the Doha Ministerial Declaration. The General Council rededicates and recommits Members to fulfilling the development dimension of the Doha Development Agenda, which places the needs and interests of developing and least-developed countries at the heart of the Doha Work Programme. The Council reiterates the important role that enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes can play in the economic development of these countries.

Special and Differential Treatment: the General Council reaffirms that provisions for special and differential (S&D) treatment are an integral part of the *WTO Agreements*. The Council recalls Ministers' decision in Doha to review all S&D treatment provisions with a view to strengthening them and making them more precise, effective and operational. The Council recognizes the progress that has been made so far. The Council instructs the Committee on Trade and Development in Special Session to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. The Council further instructs the Committee, within the parameters of the Doha mandate, to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules, as referred to in TN/CTD/7 and report, as appropriate, to the General Council.

The Council also instructs all WTO bodies to which proposals in Category II have been referred to expeditiously complete the consideration of these proposals and report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005. In doing so these bodies will ensure that, as far as possible, their meetings do not overlap so as to enable full and effective participation of developing countries in these discussions.

Technical Assistance: the General Council recognizes the progress that has been made since the Doha Ministerial Conference in expanding Trade-Related Technical Assistance (TRTA) to developing countries and low-income countries in transition. In furthering this effort the Council affirms that such countries, and in particular least-developed countries, should be provided with enhanced TRTA and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages the improved coordination with other agencies, including under the Integrated Framework for TRTA for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP).

Implementation: concerning implementation-related issues, the General Council reaffirms the mandates Ministers gave in paragraph 12 of the Doha Ministerial Declaration and the Doha Decision on Implementation-Related Issues and Concerns, and renews Members' determination to find appropriate solutions to outstanding issues. The Council instructs the Trade Negotiations Committee, negotiating bodies and other WTO bodies concerned to redouble their efforts to find appropriate solutions as a priority. Without prejudice to the positions of Members, the Council requests the Director-General to continue with his consultative process on all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration, including on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations. The Director-General shall report to the TNC and the General Council no later than May 2005. The Council shall review progress and take any appropriate action no later than July 2005.

Other Development Issues: in the ongoing market access negotiations, recognising the fundamental principles of the WTO and relevant provisions of GATT 1994, special attention shall be given to the specific trade and development related needs and concerns of developing countries, including capacity constraints. These particular concerns of developing countries, including relating to food security, rural development, livelihood, preferences, commodities and net food imports, as well as prior unilateral liberalisation, should be taken into consideration, as appropriate, in the course of the Agriculture and NAMA negotiations. The trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading

system, should also be addressed, without creating a sub-category of Members, as part of a work programme, as mandated in paragraph 35 of the Doha Ministerial Declaration.

Least-Developed Countries: the General Council reaffirms the commitments made at Doha concerning least-developed countries and renews its determination to fulfil these commitments. Members will continue to take due account of the concerns of least-developed countries in the negotiations. The Council confirms that nothing in this Decision shall detract in any way from the special provisions agreed by Members in respect of these countries.

e. Services: the General Council takes note of the report to the TNC by the Special Session of the Council for Trade in Services¹ and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the recommendations agreed by the Special Session, set out in Annex C to this document, on the basis of which further progress in the services negotiations will be pursued. Revised offers should be tabled by May 2005.

(footnote original) ¹ This report is contained in document TN/S/16.

f. Other negotiating bodies:

Rules, Trade & Environment and TRIPS: the General Council takes note of the reports to the TNC by the Negotiating Group on Rules and by the Special Sessions of the Committee on Trade and Environment and the TRIPS Council.² The Council reaffirms Members' commitment to progress in all of these areas of the negotiations in line with the Doha mandates.

(footnote original) ² The reports to the TNC referenced in this paragraph are contained in the following documents: Negotiating Group on Rules – TN/RL/9; Special Session of the Committee on Trade and Environment – TN/TE/9; Special Session of the Council for TRIPS – TN/IP/10.

Dispute Settlement: the General Council takes note of the report to the TNC by the Special Session of the Dispute Settlement Body³ and reaffirms Members' commitment to progress in this area of the negotiations in line with the Doha mandate. The Council adopts the TNC's recommendation that work in the Special Session should continue on the basis set out by the Chairman of that body in his report to the TNC.

(footnote original) ³ This report is contained in document TN/DS/10.

g. Trade Facilitation: taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried

out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.

Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20–22, 23–25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

h. Other elements of the Work Programme: the General Council reaffirms the high priority Ministers at Doha gave to those elements of the Work Programme which do not involve negotiations. Noting that a number of these issues are of particular interest to developing-country Members, the Council emphasizes its commitment to fulfil the mandates given by Ministers in all these areas. To this end, the General Council and other relevant bodies shall report in line with their Doha mandates to the Sixth Session of the Ministerial Conference. The moratoria covered by paragraph 11.1 of the Doha Ministerial Decision on Implementation-related Issues and Concerns and paragraph 34 of the Doha Ministerial Declaration are extended up to the Sixth Ministerial Conference.

2. The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the *DSU* and shall not be used for interpreting the existing WTO Agreements.

3. The General Council calls on all Members to redouble their efforts towards the conclusion of a balanced overall outcome of the Doha Development Agenda in fulfilment of the commitments Ministers took at Doha. The Council agrees to continue the negotiations launched at Doha beyond the timeframe set out in paragraph 45 of the Doha Declaration, leading to the Sixth Session of the Ministerial Conference. Recalling its decision of 21 October 2003 to accept the generous offer of the Government of Hong Kong, China to host the Sixth Session, the Council further agrees that this Session will be held in December 2005.

Annex A

Framework for Establishing Modalities in Agriculture

1. The starting point for the current phase of the agriculture negotiations has been the mandate set out in Paragraph 13 of the Doha Ministerial Declaration. This in turn built on the long-term objective of the Agreement

on Agriculture to establish a fair and market-oriented trading system through a programme of fundamental reform. The elements below offer the additional precision required at this stage of the negotiations and thus the basis for the negotiations of full modalities in the next phase. The level of ambition set by the Doha mandate will continue to be the basis for the negotiations on agriculture.

2. The final balance will be found only at the conclusion of these subsequent negotiations and within the Single Undertaking. To achieve this balance, the modalities to be developed will need to incorporate operationally effective and meaningful provisions for special and differential treatment for developing country Members. Agriculture is of critical importance to the economic development of developing country Members and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns. Non-trade concerns, as referred to in Paragraph 13 of the Doha Declaration, will be taken into account.

3. The reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner.

4. The General Council recognizes the importance of cotton for a certain number of countries and its vital importance for developing countries, especially LDCs. It will be addressed ambitiously, expeditiously, and specifically, within the agriculture negotiations. The provisions of this framework provide a basis for this approach, as does the sectoral initiative on cotton. The Special Session of the Committee on Agriculture shall ensure appropriate prioritization of the cotton issue independently from other sectoral initiatives. A subcommittee on cotton will meet periodically and report to the Special Session of the Committee on Agriculture to review progress. Work shall encompass all trade-distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition, as specified in the Doha text and this Framework text.

5. Coherence between trade and development aspects of the cotton issue will be pursued as set out in paragraph 1.b of the text to which this Framework is annexed.

DOMESTIC SUPPORT

6. The Doha Ministerial Declaration calls for "substantial reductions in trade-distorting domestic support". With a view to achieving these substantial reductions, the negotiations in this pillar will ensure the following:

- Special and differential treatment remains an integral component of domestic support. Modalities to be developed will include longer implementation periods and lower reduction coefficients for all types of trade-distorting domestic support and continued access to the provisions under Article 6.2.

- There will be a strong element of harmonisation in the reductions made by developed Members. Specifically, higher levels of permitted trade-distorting domestic support will be subject to deeper cuts.
- Each such Member will make a substantial reduction in the overall level of its trade-distorting support from bound levels.
- As well as this overall commitment, Final Bound Total AMS and permitted *de minimis* levels will be subject to substantial reductions and, in the case of the Blue Box, will be capped as specified in paragraph 15 in order to ensure results that are coherent with the long-term reform objective. Any clarification or development of rules and conditions to govern trade distorting support will take this into account.

Overall Reduction: A Tiered Formula

7. The overall base level of all trade-distorting domestic support, as measured by the Final Bound Total AMS plus permitted *de minimis* level and the level agreed in paragraph 8 below for Blue Box payments, will be reduced according to a tiered formula. Under this formula, Members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result. As the first instalment of the overall cut, in the first year and throughout the implementation period, the sum of all trade-distorting support will not exceed 80 per cent of the sum of Final Bound Total AMS plus permitted *de minimis* plus the Blue Box at the level determined in paragraph 15.

8. The following parameters will guide the further negotiation of this tiered formula:

- This commitment will apply as a minimum overall commitment. It will not be applied as a ceiling on reductions of overall trade-distorting domestic support, should the separate and complementary formulae to be developed for Total AMS, *de minimis* and Blue Box payments imply, when taken together, a deeper cut in overall trade-distorting domestic support for an individual Member.
- The base for measuring the Blue Box component will be the higher of existing Blue Box payments during a recent representative period to be agreed and the cap established in paragraph 15 below.

Final Bound Total AMS: A Tiered Formula

9. To achieve reductions with a harmonizing effect:

- Final Bound Total AMS will be reduced substantially, using a tiered approach.
- Members having higher Total AMS will make greater reductions.
- To prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories,

product-specific AMSs will be capped at their respective average levels according to a methodology to be agreed.

- Substantial reductions in Final Bound Total AMS will result in reductions of some product-specific support.

10. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

De Minimis

11. Reductions in *de minimis* will be negotiated taking into account the principle of special and differential treatment. Developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers will be exempt.

12. Members may make greater than formula reductions in order to achieve the required level of cut in overall trade-distorting domestic support.

Blue Box

13. Members recognize the role of the Blue Box in promoting agricultural reforms. In this light, Article 6.5 will be reviewed so that Members may have recourse to the following measures:

- Direct payments under production-limiting programmes if:
 - such payments are based on fixed and unchanging areas and yields; or
 - such payments are made on 85% or less of a fixed and unchanging base level of production; or
 - livestock payments are made on a fixed and unchanging number of head.

Or

- Direct payments that do not require production if:
 - such payments are based on fixed and unchanging bases and yields; or
 - livestock payments made on a fixed and unchanging number of head; and
 - such payments are made on 85% or less of a fixed and unchanging base level of production.

14. The above criteria, along with additional criteria will be negotiated. Any such criteria will ensure that Blue Box payments are less trade-distorting than AMS measures, it being understood that:

- Any new criteria would need to take account of the balance of WTO rights and obligations.
- Any new criteria to be agreed will not have the perverse effect of undoing ongoing reforms.

15. Blue Box support will not exceed 5% of a Member's average total value of agricultural production during an

historical period. The historical period will be established in the negotiations. This ceiling will apply to any actual or potential Blue Box user from the beginning of the implementation period. In cases where a Member has placed an exceptionally large percentage of its trade-distorting support in the Blue Box, some flexibility will be provided on a basis to be agreed to ensure that such a Member is not called upon to make a wholly disproportionate cut.

Green Box

16. Green Box criteria will be reviewed and clarified with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production. Such a review and clarification will need to ensure that the basic concepts, principles and effectiveness of the Green Box remain and take due account of non-trade concerns. The improved obligations for monitoring and surveillance of all new disciplines foreshadowed in paragraph 48 below will be particularly important with respect to the Green Box.

EXPORT COMPETITION

17. The Doha Ministerial Declaration calls for "reduction of, with a view to phasing out, all forms of export subsidies". As an outcome of the negotiations, Members agree to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.

End Point

18. The following will be eliminated by the end date to be agreed:

- Export subsidies as scheduled.
- Export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days.
- Terms and conditions relating to export credits, export credit guarantees or insurance programmes with repayment periods of 180 days and below which are not in accordance with disciplines to be agreed. These disciplines will cover, *inter alia*, payment of interest, minimum interest rates, minimum premium requirements, and other elements which can constitute subsidies or otherwise distort trade.
- Trade distorting practices with respect to exporting STEs including eliminating export subsidies provided to or by them, government financing, and the underwriting of losses. The issue of the future use of monopoly powers will be subject to further negotiation.
- Provision of food aid that is not in conformity with operationally effective disciplines to be agreed. The objective of such disciplines will be to prevent commercial displacement. The role of international organizations as regards the provision of food aid by

Members, including related humanitarian and developmental issues, will be addressed in the negotiations. The question of providing food aid exclusively in fully grant form will also be addressed in the negotiations.

19. Effective transparency provisions for paragraph 18 will be established. Such provisions, in accordance with standard WTO practice, will be consistent with commercial confidentiality considerations.

Implementation

20. Commitments and disciplines in paragraph 18 will be implemented according to a schedule and modalities to be agreed. Commitments will be implemented by annual instalments. Their phasing will take into account the need for some coherence with internal reform steps of Members.

21. The negotiation of the elements in paragraph 18 and their implementation will ensure equivalent and parallel commitments by Members.

Special and Differential Treatment

22. Developing country Members will benefit from longer implementation periods for the phasing out of all forms of export subsidies.

23. Developing countries will continue to benefit from special and differential treatment under the provisions of Article 9.4 of the Agreement on Agriculture for a reasonable period, to be negotiated, after the phasing out of all forms of export subsidies and implementation of all disciplines identified above are completed.

24. Members will ensure that the disciplines on export credits, export credit guarantees or insurance programs to be agreed will make appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries as provided for in paragraph 4 of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. Improved obligations for monitoring and surveillance of all new disciplines as foreshadowed in paragraph 48 will be critically important in this regard. Provisions to be agreed in this respect must not undermine the commitments undertaken by Members under the obligations in paragraph 18 above.

25. STEs in developing country Members which enjoy special privileges to preserve domestic consumer price stability and to ensure food security will receive special consideration for maintaining monopoly status.

Special Circumstances

26. In exceptional circumstances, which cannot be adequately covered by food aid, commercial export credits or preferential international financing facilities, ad hoc temporary financing arrangements relating to exports to developing countries may be agreed by Members. Such

agreements must not have the effect of undermining commitments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.

MARKET ACCESS

27. The Doha Ministerial Declaration calls for "substantial improvements in market access". Members also agreed that special and differential treatment for developing Members would be an integral part of all elements in the negotiations.

The Single Approach: a Tiered Formula

28. To ensure that a single approach for developed and developing country Members meets all the objectives of the Doha mandate, tariff reductions will be made through a tiered formula that takes into account their different tariff structures.

29. To ensure that such a formula will lead to substantial trade expansion, the following principles will guide its further negotiation:

- Tariff reductions will be made from bound rates. Substantial overall tariff reductions will be achieved as a final result from negotiations.
- Each Member (other than LDCs) will make a contribution. Operationally effective special and differential provisions for developing country Members will be an integral part of all elements.
- Progressivity in tariff reductions will be achieved through deeper cuts in higher tariffs with flexibilities for sensitive products. Substantial improvements in market access will be achieved for all products.

30. The number of bands, the thresholds for defining the bands and the type of tariff reduction in each band remain under negotiation. The role of a tariff cap in a tiered formula with distinct treatment for sensitive products will be further evaluated.

Sensitive Products

Selection

31. Without undermining the overall objective of the tiered approach, Members may designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products.

Treatment

32. The principle of 'substantial improvement' will apply to each product.

33. 'Substantial improvement' will be achieved through combinations of tariff quota commitments and tariff reductions applying to each product. However, balance in this negotiation will be found only if the final negotiated result also reflects the sensitivity of the product concerned.

34. Some MFN-based tariff quota expansion will be required for all such products. A base for such an expansion will be established, taking account of coherent and equitable criteria to be developed in the negotiations. In order not to undermine the objective of the tiered approach, for all such products, MFN based tariff quota expansion will be provided under specific rules to be negotiated taking into account deviations from the tariff formula.

Other Elements

35. Other elements that will give the flexibility required to reach a final balanced result include reduction or elimination of in-quota tariff rates, and operationally effective improvements in tariff quota administration for existing tariff quotas so as to enable Members, and particularly developing country Members, to fully benefit from the market access opportunities under tariff rate quotas.

36. Tariff escalation will be addressed through a formula to be agreed.

37. The issue of tariff simplification remains under negotiation.

38. The question of the special agricultural safeguard (SSG) remains under negotiation.

Special and differential treatment

39. Having regard to their rural development, food security and/or livelihood security needs, special and differential treatment for developing countries will be an integral part of all elements of the negotiation, including the tariff reduction formula, the number and treatment of sensitive products, expansion of tariff rate quotas, and implementation period.

40. Proportionality will be achieved by requiring lesser tariff reduction commitments or tariff quota expansion commitments from developing country Members.

41. Developing country Members will have the flexibility to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs. These products will be eligible for more flexible treatment. The criteria and treatment of these products will be further specified during the negotiation phase and will recognize the fundamental importance of Special Products to developing countries.

42. A Special Safeguard Mechanism (SSM) will be established for use by developing country Members.

43. Full implementation of the long-standing commitment to achieve the fullest liberalisation of trade in tropical agricultural products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops is overdue and will be addressed effectively in the market access negotiations.

44. The importance of long-standing preferences is fully recognised. The issue of preference erosion will be addressed. For the further consideration in this regard, paragraph 16 and other relevant provisions of TN/AG/W/1/Rev.1 will be used as a reference.

LEAST-DEVELOPED COUNTRIES

45. Least-Developed Countries, which will have full access to all special and differential treatment provisions above, are not required to undertake reduction commitments. Developed Members, and developing country Members in a position to do so, should provide duty-free and quota-free market access for products originating from least-developed countries.

46. Work on cotton under all the pillars will reflect the vital importance of this sector to certain LDC Members and we will work to achieve ambitious results expeditiously.

RECENTLY ACCEDED MEMBERS

47. The particular concerns of recently acceded Members will be effectively addressed through specific flexibility provisions.

MONITORING AND SURVEILLANCE

48. Article 18 of the Agreement on Agriculture will be amended with a view to enhancing monitoring so as to effectively ensure full transparency, including through timely and complete notifications with respect to the commitments in market access, domestic support and export competition. The particular concerns of developing countries in this regard will be addressed.

OTHER ISSUES

49. Issues of interest but not agreed: sectoral initiatives, differential export taxes, GIs.

50. Disciplines on export prohibitions and restrictions in Article 12.1 of the Agreement on Agriculture will be strengthened.

Annex B

Framework for Establishing Modalities in Market Access for Non-Agricultural Products

1. This Framework contains the initial elements for future work on modalities by the Negotiating Group on Market Access. Additional negotiations are required to reach agreement on the specifics of some of these elements. These relate to the formula, the issues concerning the treatment of unbound tariffs in indent two of paragraph 5, the flexibilities for developing-country participants, the issue of participation in the sectorial tariff component and the preferences. In order to finalize the modalities, the Negotiating Group is instructed to address these issues expeditiously in a manner consistent with the mandate of paragraph 16 of the Doha Ministerial Declaration and the overall balance therein.

2. We reaffirm that negotiations on market access for non-agricultural products shall aim to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. We also reaffirm the importance of special and differential treatment and less than full reciprocity in reduction commitments as integral parts of the modalities.

3. We acknowledge the substantial work undertaken by the Negotiating Group on Market Access and the progress towards achieving an agreement on negotiating modalities. We take note of the constructive dialogue on the Chair's Draft Elements of Modalities (TN/MA/W/35/Rev.1) and confirm our intention to use this document as a reference for the future work of the Negotiating Group. We instruct the Negotiating Group to continue its work, as mandated by paragraph 16 of the Doha Ministerial Declaration with its corresponding references to the relevant provisions of Article XXVIII bis of GATT 1994 and to the provisions cited in paragraph 50 of the Doha Ministerial Declaration, on the basis set out below.

4. We recognize that a formula approach is key to reducing tariffs, and reducing or eliminating tariff peaks, high tariffs, and tariff escalation. We agree that the Negotiating Group should continue its work on a non-linear formula applied on a line-by-line basis which shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.

5. We further agree on the following elements regarding the formula:

- product coverage shall be comprehensive without *a priori* exclusions;
- tariff reductions or elimination shall commence from the bound rates after full implementation of current concessions; however, for unbound tariff lines, the basis for commencing the tariff reductions shall be [two] times the MFN applied rate in the base year;
- the base year for MFN applied tariff rates shall be 2001 (applicable rates on 14 November);
- credit shall be given for autonomous liberalization by developing countries provided that the tariff lines were bound on an MFN basis in the WTO since the conclusion of the Uruguay Round;
- all non-*ad valorem* duties shall be converted to *ad valorem* equivalents on the basis of a methodology to be determined and bound in *ad valorem* terms;
- negotiations shall commence on the basis of the HS96 or HS2002 nomenclature, with the results

of the negotiations to be finalized in HS2002 nomenclature;

- the reference period for import data shall be 1999–2001.

6. We furthermore agree that, as an exception, participants with a binding coverage of non-agricultural tariff lines of less than [35] percent would be exempt from making tariff reductions through the formula. Instead, we expect them to bind [100] percent of non-agricultural tariff lines at an average level that does not exceed the overall average of bound tariffs for all developing countries after full implementation of current concessions.

7. We recognize that a sectorial tariff component, aiming at elimination or harmonization is another key element to achieving the objectives of paragraph 16 of the Doha Ministerial Declaration with regard to the reduction or elimination of tariffs, in particular on products of export interest to developing countries. We recognize that participation by all participants will be important to that effect. We therefore instruct the Negotiating Group to pursue its discussions on such a component, with a view to defining product coverage, participation, and adequate provisions of flexibility for developing-country participants.

8. We agree that developing-country participants shall have longer implementation periods for tariff reductions. In addition, they shall be given the following flexibility:

- a) applying less than formula cuts to up to [10] percent of the tariff lines provided that the cuts are no less than half the formula cuts and that these tariff lines do not exceed [10] percent of the total value of a Member's imports; or
- b) keeping, as an exception, tariff lines unbound, or not applying formula cuts for up to [5] percent of tariff lines provided they do not exceed [5] percent of the total value of a Member's imports.

We furthermore agree that this flexibility could not be used to exclude entire HS Chapters.

9. We agree that least-developed country participants shall not be required to apply the formula nor participate in the sectorial approach, however, as part of their contribution to this round of negotiations, they are expected to substantially increase their level of binding commitments.

10. Furthermore, in recognition of the need to enhance the integration of least-developed countries into the multilateral trading system and support the diversification of their production and export base, we call upon developed-country participants and other participants who so decide, to grant on an autonomous basis duty-free and quota-free market access for non-agricultural

products originating from least-developed countries by the year [. . .].

11. We recognize that newly acceded Members shall have recourse to special provisions for tariff reductions in order to take into account their extensive market access commitments undertaken as part of their accession and that staged tariff reductions are still being implemented in many cases. We instruct the Negotiating Group to further elaborate on such provisions.

12. We agree that pending agreement on core modalities for tariffs, the possibilities of supplementary modalities such as zero-for-zero sector elimination, sectorial harmonization, and request & offer, should be kept open.

13. In addition, we ask developed-country participants and other participants who so decide to consider the elimination of low duties.

14. We recognize that NTBs are an integral and equally important part of these negotiations and instruct participants to intensify their work on NTBs. In particular, we encourage all participants to make notifications on NTBs by 31 October 2004 and to proceed with identification, examination, categorization, and ultimately negotiations on NTBs. We take note that the modalities for addressing NTBs in these negotiations could include request/offer, horizontal, or vertical approaches; and should fully take into account the principle of special and differential treatment for developing and least-developed country participants.

15. We recognize that appropriate studies and capacity building measures shall be an integral part of the modalities to be agreed. We also recognize the work that has already been undertaken in these areas and ask participants to continue to identify such issues to improve participation in the negotiations.

16. We recognize the challenges that may be faced by non-reciprocal preference beneficiary Members and those Members that are at present highly dependent on tariff revenue as a result of these negotiations on non-agricultural products. We instruct the Negotiating Group to take into consideration, in the course of its work, the particular needs that may arise for the Members concerned.

17. We furthermore encourage the Negotiating Group to work closely with the Committee on Trade and Environment in Special Session with a view to addressing the issue of non-agricultural environmental goods covered in paragraph 31 (iii) of the Doha Ministerial Declaration.

Annex C

Recommendations of the Special Session of the Council for Trade in Services

(a) Members who have not yet submitted their initial offers must do so as soon as possible.

(b) A date for the submission of a round of revised offers should be established as soon as feasible.

(c) With a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.

(d) Members shall aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries, as well as other Members, in Mode 4.

(e) Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles VI:4, X, XIII and XV in accordance with their respective mandates and deadlines.

(f) Targeted technical assistance should be provided with a view to enabling developing countries to participate effectively in the negotiations.

(g) For the purpose of the Sixth Ministerial meeting, the Special Session of the Council for Trade in Services shall review progress in these negotiations and provide a full report to the Trade Negotiations Committee, including possible recommendations.

Annex D

Modalities for Negotiations on Trade Facilitation

1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit.¹ Negotiations shall also aim at enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.

(footnote original) ¹ It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.

2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake

investments in infrastructure projects beyond their means.

3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.

5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such support and assistance during the negotiations.²

(footnote original) ² In connection with this paragraph, Members note that paragraph 38 of the Doha Ministerial Declaration addresses relevant technical assistance and capacity building concerns of Members.

6. Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of

some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is understood that the commitments by developed countries to provide such support are not open-ended.

7. Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

8. In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

10. Paragraphs 45–51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.

General Interpretative Note to Annex 1A

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I. GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

A. TEXT OF GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

General Interpretative Note to Annex 1A

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “*WTO Agreement*”), the provision of the other agreement shall prevail to the extent of the conflict.

B. INTERPRETATION AND APPLICATION OF GENERAL INTERPRETATIVE NOTE TO ANNEX 1A

1. General

(a) Presumption against conflict

1. In *EC – Bananas III*, given the existence of claims raised under *GATT 1994*, the *Licensing Agreement* and the *TRIMs Agreement*, the Panel was required to consider the interpretative interrelationship of these three agreements. In so doing, it first referred to the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. Noting that both the *Licensing Agreement* and the *TRIMs Agreement* are agreements in Annex 1A to *WTO Agreement*, the Panel, in a finding not reviewed by the Appellate Body, concluded that, in the case before it, “no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements . . .”¹

(b) Issue of *lex specialis*/conflict

2. In *Indonesia – Autos*, Indonesia argued that the measures under examination were subsidies and therefore the *SCM Agreement*, being *lex specialis*, was the only “applicable law” (to the exclusion of other WTO provisions). The Panel recalled that a presumption against conflict existed in public international law:

“We recall the Panel’s finding in *Indonesia – Autos*, a dispute where

‘In considering Indonesia’s defence that there is a general conflict between the provisions of the *SCM Agreement* and those of Article III of *GATT*, and consequently that the *SCM Agreement* is the only applicable law, we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the *WTO* context² since all *WTO Agreements*, including *GATT 1994* which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the *WTO* system all agreements) must be given meaning, using the ordinary meaning of words’.”³

3. As regards the order of analysis where two or more provisions from different covered Agreements appear *a priori* to the measure in question, see Section XXXVI.A.1 of the Chapter on the *DSU*.

4. As regards conflicts between provisions of the *GATT 1994* and provisions of other agreements in Annex 1A, see relevant Chapters in the *WTO Analytical Index*.

¹ Panel Report on *EC – Bananas III*, paras. 7.157–7.163.

² (*footnote original*) In this context we note that the *WTO Agreement* contains a specific rule on conflicts which is however limited to conflicts between a specific provision of *GATT 1994* and a provision of another agreement of Annex 1A. We do not consider this interpretative note in this section of the report because we are dealing with Indonesia’s argument that there is a general conflict between Article III and the *SCM Agreement*, while the note is concerned with specific conflicts between a provision of *GATT 1994* and a specific provision of another agreement of Annex 1A.

³ Panel Report on *Indonesia – Autos*, para. 14.28. See also Panel Report on *Turkey – Textiles*, paras. 9.92–9.95.

General Agreement on Tariffs and Trade 1994

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I. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

- A. TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994
1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
- the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
 - the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
 - protocols and certifications relating to tariff concessions;
 - protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
 - decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement¹;
 - other decisions of the CONTRACTING PARTIES to GATT 1947;

(footnote original) ¹ The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994.¹ The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.

- the Understandings set forth below:
 - Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
 - Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
 - Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
 - Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
 - Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
 - Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
- the Marrakesh Protocol to GATT 1994.

2. Explanatory Notes

- The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".
- The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes *Ad* Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.
- The text of GATT 1994 shall be authentic in English, French and Spanish.
 - The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.
 - The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected

¹ By Procés-Verbal of rectification the correct date of document MTN/FA/Corr.6 was noted as 18 March 1994.

Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.

3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to: (a) the continuation or prompt renewal of a non-conforming provision of such legislation; and (b) the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947. This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph.
- (b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.
- (c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.
- (d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.
- (e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

B. INTERPRETATION AND APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. Paragraph 1

(a) Paragraph 1(b)

(i) *Item (iv) – “other decisions of the CONTRACTING PARTIES to GATT 1947”*

1. In *Japan – Alcoholic Beverages II*, the Appellate Body referred to paragraph 1(b)(iv) in examining the legal effect of the panel reports adopted by the CONTRACTING PARTIES to GATT 1947. The Appellate Body stated:

“Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.² In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

[W]e do not agree with the Panel’s conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute ‘other decisions of the CONTRACTING PARTIES to GATT 1947’ for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.³

2. In *EC – Poultry*, the Appellate Body found that the Oilseeds Agreement, concluded between Brazil and the European Communities was not one of the legal instruments enumerated in paragraph 1(b). In the words of the Appellate Body:

² (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

³ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above. Appellate Body Report on *India – Patents (US)*, para. 50. Also, in *US – FSC*, the Appellate Body endorsed the second paragraph. Appellate Body Report on *US – FSC*, para. 108.

"The Oilseeds Agreement [. . .] is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds*.⁴ As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*⁵, the Oilseeds Agreement is not one of those legal instruments."⁶

3. In *Argentina – Footwear (EC)*, the Appellate Body explained with precision that the GATT 1947 is an integral part of GATT 1994. The Appellate Body held:

"We note that the GATT 1994 is the first agreement that appears in Annex 1A to the *WTO Agreement*, and that it consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the *WTO Agreement*; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the *WTO Agreement*; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions."⁷

4. In *Korea – Dairy*, the same conclusion was reiterated with regard to the incorporation of GATT 1947 in the GATT 1994. The Appellate Body stated:

"The GATT 1994 consists of: (a) the provisions of the GATT 1947, as rectified, amended or modified before the entry into force of the *WTO Agreement*; (b) provisions of certain other legal instruments which entered into force under the GATT 1947 and before the date of entry into force of the *WTO Agreement*; (c) a number of Uruguay Round Understandings on the interpretation of certain GATT articles; and (d) the Marrakesh Protocol to GATT 1994."⁸

5. In *US – FSC*, the Appellate Body, in examining whether a certain decision of the GATT 1947 Council to adopt panel reports constituted "other decision" within the meaning of paragraph 1(b)(iv), agreed on the Panel's decision to examine not only the text of the decision but also "the circumstances surrounding the [decision]."⁹

6. In *EC – Tariff Preferences*, the Appellate Body held that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning

of paragraph 1(b)(iv). On that basis the Appellate Body found that the Enabling Clause is "an integral part of the GATT 1994."¹⁰

(b) Relationship with Article XVI:1 of the WTO Agreement

7. With respect to the relationship between Article XVI:1 of the *WTO Agreement* and paragraph 1(b), see Chapter on the *WTO Agreement*, Section XVII.B.1(g)(i).

PART I

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

- (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
- (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were

⁴ (*footnote original*) Adopted 25 January 1990, BISD 37S/86; and DS28/R, 31 March 1992.

⁵ (*footnote original*) Those legal instruments are described in paragraph 1(b) of that incorporating language as including certain protocols and certifications relating to tariff concessions, certain protocols of accession, certain decisions on waivers granted under Article XXV of the GATT 1947, and "other decisions of the CONTRACTING PARTIES to GATT 1947".

⁶ Appellate Body Report on *EC – Poultry*, para 79.

⁷ Appellate Body Report on *Argentina – Footwear (EC)*, para. 80.

⁸ Appellate Body Report on *Korea – Dairy*, para 75.

⁹ Appellate Body Report on *US – FSC*, para. 111.

¹⁰ Appellate Body Report on *EC – Tariff Preferences*, para 90.

* For the convenience of the reader, asterisks mark the portions of the text which should be read in conjunction with notes and supplementary provisions.

connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

- (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
- (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5¹, of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

(footnote original)¹ The authentic text erroneously reads "sub-paragraph 5 (a)".

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

- (a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;
- (b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

B. TEXT OF AD ARTICLE I

Ad Article I *Paragraph 1*

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2

and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.¹

(footnote original)¹ This Protocol entered into force on 14 December 1948.

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

- (1) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favoured-nation rate;
- (2) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent *ad valorem*;
- (3) If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

- (i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and
- (ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

C. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article I:1

- (a) General
 - (i) *Object and purpose*

8. In *Canada – Autos*, in support of its interpretation of Article I:1, the Appellate Body explained the object and purpose of Article I:1 as follows:

“Th[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”¹¹

9. In *EC – Bananas III*, in support of the proposition that Article II of GATS prohibits *de facto* discrimination as well as *de jure* discrimination, the Appellate Body noted that in past practice, GATT Article I applied to *de facto* discrimination. See Chapter on the GATS, Section III.B.3(a).

(ii) *Scope of application*

10. In *Canada – Autos*, the Appellate Body reviewed the Panel’s finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with Article I:1. The Appellate Body found the prohibition of discrimination under Article I:1 to include both *de jure* and *de facto* discrimination:

“In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an ‘advantage’ to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words ‘*de jure*’ nor ‘*de facto*’ appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only ‘in law’, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also ‘in fact’, or *de facto*, discrimination.¹² Like the Panel, we cannot accept Canada’s argument that Article I:1 does not apply to measures which, on their face, are ‘origin-neutral’.”¹³

(iii) *Order of examination*

11. In *Indonesia – Autos*, the Panel explained how to carry out the examination of a measure under Article I:1:

“The Appellate Body, in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all ‘like products’ of all WTO Members. Following this analysis, we shall first examine whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally.”¹⁴

(b) “any advantage, favour, privilege or immunity granted by any Member”

(i) *General*

12. In *Canada – Autos*, the Appellate Body came to the conclusion that Canada’s import duty exemption

accorded to motor vehicles originating in some countries in which affiliates of certain designated manufacturers were present, was inconsistent with Article I:1. The Appellate Body touched on the term “any advantage . . . granted by any Member to any product”:

“We note next that Article I:1 requires that ‘any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.’ (emphasis added) The words of Article I:1 refer not to *some* advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘any advantage’; not to *some* products, but to ‘any product’; and not to like products from *some* other Members, but to like products originating in or destined for ‘*all other*’ Members.”¹⁵

(ii) *Allocation of tariff quotas*

13. In *EC – Bananas III*, the European Communities appealed the Panel’s finding on the ground that the Panel erred in concluding that the European Communities violated Article I:1 by maintaining the so-called activity function rules. Under these rules, importers of bananas from certain countries qualified for allocation of the tariff quota only if they fulfilled requirements which differed from those imposed on importers of bananas from other countries. The Appellate Body stated:

“On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond,

¹¹ Appellate Body Report on *Canada – Autos*, para. 84.

¹² (*footnote original*) We note, though, that the measures examined in those reports differed from the measure in this case. Two of those reports dealt with “like” product issues: Panel Report on *Spain – Unroasted Coffee*; Panel Report on *Japan – SPF Dimension Lumber*. In this case, as we have noted, there is no dispute that the motor vehicles subject to the import duty exemption are “like” products. Furthermore, two other reports dealt with measures which, on their face, discriminated on a strict “origin” basis, so that, at any given time, either *every* product, or *no* product, of a particular origin was accorded an advantage. See Panel Report on *Belgium – Family Allowances*; Panel Report on *EEC – Imports of Beef*. In this case, motor vehicles imported into Canada are not disadvantaged in that same sense.

¹³ Appellate Body Report on *Canada – Autos*, para. 78.

¹⁴ Panel Report on *Indonesia – Autos*, para. 14.138. In *EC – Bananas III*, the Appellate Body stated as follows:

“ . . . Also, a broad definition has been given to the term “advantage” in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members.” See Appellate Body Report on *EC – Bananas III*, para. 206.

¹⁵ Appellate Body Report on *Canada – Autos*, para. 79.

those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term ‘advantage’ in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an ‘advantage’ granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel’s finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994.”¹⁶

(iii) *Reference to GATT practice*

14. With respect to the practice under GATT 1947 concerning the term “any advantage, favour, privilege or immunity granted by any contracting party”, see GATT Analytical Index, page 31.

(c) “like products”

15. In *Indonesia – Autos*, examining the consistency of the Indonesian National Car Programme with Article I:1, the Panel compared the concepts of “like products” under Articles I and III:

“We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I.”¹⁷

16. For the treatment of this subject-matter under GATT 1947, see GATT Analytical Index, pages 35–40.

(d) “any product originating in or destined for an other country”

17. In *EC – Bananas III*, the Appellate Body reviewed the Panel’s finding that the EC import regime for bananas was inconsistent with Article XIII in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. Pointing out that “there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas”, the European Communities appealed that “the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes.”¹⁸ The Appellate Body responded as follows:

“The essence of the non-discrimination obligations is that like products should be treated equally, irrespective

of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.”¹⁹

(e) “shall be accorded immediately and unconditionally”

(i) *General*

18. In *Indonesia – Autos*, the Panel found that the exemption of import duties and sales taxes to those automobiles which met certain origin-neutral requirements was inconsistent with Article I:1, because of the existence of a number of “conditions”:

“Indeed, it appears that the design and structure of the June 1996 car programme is such as to allow situations where another Member’s like product to a National Car imported by PT PTN from Korea will be subject to much higher duties and sales taxes than those imposed on such National Cars. . . . The distinction as to whether one product is subject to 0% duty and the other one is subject to 200% duty or whether one product is subject to 0% sales tax and the other one is subject to a 35% sales tax, depends on whether or not PT TPN had made a ‘deal’ with that exporting company to produce that National Car, and is covered by the authorization of June 1996 with specifications that correspond to those of the Kia car produced only in Korea. In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place.²⁰ The existence of these condi-

¹⁶ Appellate Body Report on *EC – Bananas III*, para. 206.

¹⁷ Panel Report on *Indonesia – Autos*, para. 14.141.

¹⁸ Appellate Body Report on *EC – Bananas III*, para. 189.

¹⁹ Appellate Body Report on *EC – Bananas III*, para. 190.

²⁰ (*footnote original*) For instance in the *FIRA* case, the Panel rejected Canada’s argument that the situation under examination was the consequence of a private contract with an investor: “5.6 The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this were so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters.” See Panel Report on *Canada – FIRA*, para. 5.6.

tions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.²¹

We note also that under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only Pioneer company producing National Cars. And there is also a third condition for these benefits: the meeting of certain local content targets. Indeed under all these car programmes, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.

For the reasons discussed above, we consider that the June 1996 car programme which introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves and the February 1996 car programme which also introduce discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT."²²

19. In *Canada – Autos*, the Canadian measure at issue was an exemption of import duties granted on certain motor vehicles. The exemption was granted only where an exporter of motor vehicles was affiliated with a manufacturer/importer in Canada that had been designated, contingent on compliance with other requirements which were also claimed to be inconsistent with WTO law, as eligible to import motor vehicles duty-free under the Motor Vehicle Tariff Order (MVTO) 1998 or under a so-called Special Remission Order (SRO). In practice, exporters of motor vehicles affiliated with a manufacturer/importer in Canada were located in a small number of countries. The Panel had found the Canadian measure to be inconsistent with Article I:1. On appeal, the Appellate Body first discussed the concepts of *de jure* and *de facto* discrimination under Article I:1 (see paragraph 10 above) and then held that, by granting an advantage to some products from some Members and not to others, the measure in question was inconsistent with Article I:1:

"[F]rom both the text of the measure and the Panel's conclusions about the practical operation of the measure, it is apparent to us that '[w]ith respect to customs duties . . . imposed on or in connection with importation

. . .,' Canada has granted an 'advantage' to some products from some Members that Canada has not 'accorded immediately and unconditionally' to 'like' products 'originating in or destined for the territories of *all other Members*.' (emphasis added) And this, we conclude, is not consistent with Canada's obligations under Article I:1 of the GATT 1994."²³

20. The Appellate Body on *Canada – Autos* added that the context and the "pervasive character" of the MFN principle supported its finding:

"The context of Article I:1 within the GATT 1994 supports this conclusion. Apart from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994.²⁴ The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination."²⁵

21. In the *Canada – Autos* dispute, the Panel further clarified the meaning of the term "unconditionally". With respect to this term, Japan argued that, by making the import duty exemption conditional upon criteria unrelated to the imported product itself, Canada failed to accord the import duty exemption immediately and unconditionally to like products originating in all WTO Members. By "criteria unrelated to the imported products themselves," Japan was referring to the various conditions which confined the eligibility for the exemption to certain motor vehicle manufacturers in Canada. The Panel, in a finding subsequently not reviewed by the Appellate Body, held that the term "unconditionally" could not be "determined independently of an examination of whether it involves discrimination between like products of different countries". The Panel emphasized the "important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members":

"[W]e believe that this interpretation of Japan does not accord with the ordinary meaning of the term 'unconditionally' in Article I:1 in its context and in light of the object and purpose of Article I:1. In our view, whether

²¹ (footnote original) See *Working Party Report on the Accession of Hungary*, BISD 20S/34.

²² Panel Report on *Indonesia – Autos*, paras. 14.145–14.147. Preceding the cited paragraphs, the Panel refers to the GATT Panel Report on *Belgium – Family Allowances*.

²³ Appellate Body Report on *Canada – Autos*, para. 81.

²⁴ (footnote original) These relate to such matters as internal mixing requirements (Article III:7); cinema films (Article IV(b)); transit of goods (Article V:2, 5, 6); marks of origin (Article IX:1); quantitative restrictions (Article XIII:1); measures to assist economic development (Article XVIII:20); and measures for goods in short supply (Article XX(j)).

²⁵ Appellate Body Report on *Canada – Autos*, para. 82.

an advantage within the meaning of Article I:1 is accorded 'unconditionally' cannot be determined independently of an examination of whether it involves discrimination between like products of different countries.

Article I:1 requires that, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to the like product originating in the territories of all other Members. We agree with Japan that the ordinary meaning of 'unconditionally' is 'not subject to conditions'. However, in our view Japan misinterprets the meaning of the word 'unconditionally' in the context in which it appears in Article I:1. The word 'unconditionally' in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.

In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded "unconditionally" to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word "unconditionally" in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.

We thus find that Japan's argument is unsupported by the text of Article I:1."²⁶

22. The Panel on *Canada – Autos* rejected Canada's defence that the Canadian import duty exemption, as described in paragraph 19 above, was a permitted exception under Article XXIV because, on the one hand, Canada was not granting the import duty exemption to

all NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.²⁷ As this finding of the Panel was not appealed, the Appellate Body concluded:

"The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994.²⁸ Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994.

The object and purpose of Article I:1 supports our interpretation. That object and purpose is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."²⁹

23. In *US – Certain EC Products*, the United States increased the bonding requirements on imports from the European Communities in order to secure the payment of additional import duties to be imposed in retaliation for certain EC measures. Examining the consistency of the increased bonding requirements with GATT Article I, the Panel stated, with reference to the finding of the Panel on *Indonesia – Autos* referenced in paragraph 18 above:

"We find that the 3 March additional bonding requirements violated the most-favoured-nation clause of Article I of GATT, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such an additional bonding requirements. The regulatory distinction (whether an additional bonding requirement is needed) was not based on any characteristic of the product but depended exclusively on the origin of the product and targeted exclusively some imports from the European Communities."^{30/31}

24. In *EC – Tariff Preferences*, the Panel interpreted the term "unconditionally" as meaning "not limited by or subjected to any conditions":

²⁶ Panel Report on *Canada – Autos*, paras 10.22–10.25.

²⁷ Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.

²⁸ (*footnote original*) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).

²⁹ Appellate Body Report on *Canada – Autos*, paras. 83–84.

³⁰ (*footnote original*) Panel Report on *Indonesia – Autos*, para. 14.147.

³¹ Panel Report on *US – Certain EC Products*, para. 6.54.

“In the Panel’s view, moreover, the term ‘unconditionally’ in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities’ argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of ‘unconditionally’ under Article I:1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, ‘not limited by or subject to any conditions’.³²

Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded ‘unconditionally’ to the like products originating in all other WTO Members, as required by Article I:1. The Panel therefore finds that the tariff advantages under the Drug Arrangements are not consistent with Article I:1 of GATT 1994.”³³

(ii) *Reference to GATT practice*

25. With respect to the practice concerning the term “shall be accorded immediately and unconditionally” under GATT 1947, see GATT Analytical Index, pages 33–35.

D. EXCEPTIONS TO THE MFN PRINCIPLE

1. **Anti-dumping and countervailing duties**

(a) Article VI of GATT 1994

(i) *Reference to GATT practice*

26. With respect to GATT practice concerning anti-dumping and countervailing duties, see GATT Analytical Index, page 47.

2. **Frontier traffic and customs unions**

(a) Article XXIV of GATT 1994

27. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption which had been found inconsistent with GATT Article I. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.³⁴ Since Canada did not appeal this finding of the Panel, the Appellate Body did not address the issue.

(b) *Reference to GATT practice*

28. With respect to GATT practice concerning frontier traffic and customs unions, see GATT Analytical Index, page 47.

3. **Enabling Clause**

(a) **Text and adoption of the Enabling Clause**

29. On 28 November 1979, the GATT Council adopted the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the “Enabling Clause”).³⁵ The text of the Enabling Clause is set out below:

“Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries³⁶, without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:³⁷

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³⁸

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

³² (*footnote original*) *The New Shorter Oxford English Dictionary*, 4th Edition, p. 3465.

³³ Panel Report on *EC – Tariff Preferences*, paras. 7.59–7.60.

³⁴ Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.

³⁵ BISD 26S/203.

³⁶ (*footnote original*) The words “developing countries” as used in this text are to be understood to refer also to developing territories.

³⁷ (*footnote original*) It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

³⁸ (*footnote original*) As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries” (BISD 18S/24).

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:³⁹

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed

contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement."

(b) Generalized System of Preferences

30. Pursuant to the Enabling Clause, notifications on the Generalized System of Preferences (GSP) schemes of developed country Members in favour of least-developed countries are to be sent to the Committee on Trade and Development. In contrast, under the Waiver on Preferential Tariff Treatment for Least-Developed Countries, which is referred to in paragraph 59 below, notifications on steps taken by developing country Members in favour of least-developed countries are to be sent to the Council on Trade in Goods. In order to allow for a unified consideration of both types of measures in one forum, at its meeting of 16 February 2001, the Committee on Trade and Development agreed *ad referendum* that any market access measures taken specifically in favour of the least-developed countries under the Enabling Clause and notified to the Committee be transmitted to the Sub-Committee on Least-developed Countries, for substantive consideration, and that the Sub-Committee report back to the Committee on its discussions.⁴⁰ A similar procedure was agreed to in the Council for Trade in Goods with respect to the treatment of notifications under the Waiver on Preferential Tariff Treatment for LDCs, see paragraph 59 below.

31. From the establishment of the WTO until 31 December 2004 the following Members have filed noti-

³⁹ (*footnote original*) Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

⁴⁰ WT/COMTD/M/32, section J.

fications with the Committee on Trade and Development on their GSP schemes:

- (a) Canada⁴¹;
- (b) European Communities⁴²;
- (c) Japan⁴³;
- (d) New Zealand⁴⁴;
- (e) Norway⁴⁵;
- (f) Switzerland⁴⁶;
- (g) United States⁴⁷;

(h) Iceland⁴⁸; and

(i) Australia⁴⁹

32. With respect to the GSP schemes notified to the GATT, see GATT Analytical Index, page 50.

(c) Regional trade arrangements among developing country Members

33. To date, the Committee on Trade and Development has received notifications or communications of seven regional trade arrangements among developing country Members.⁵⁰

Agreement	Date of entry into force	Date of notification	WTO document series
Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)	8-Dec-94	29-Jun-95	WT/COMTD/N/3
Trade Agreement among the Melanesian Spearhead Group (MSG) countries	22-Jul-93	7-Oct-99	WT/COMTD/N/9 WT/COMTD/21
Treaty of West African Economic and Monetary Union (WAEMU)	1-Jan-00	3-Feb-00	WT/COMTD/N/11 WT/COMTD/23
Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC)	24-Jun-99	29-Sep-00	WT/COMTD/N/13 WT/COMTD/24
Treaty for the Establishment of the East African Community (EAC)	7-Jul-00	11-Oct-00	WT/COMTD/N/14 WT/COMTD/25
Free Trade Agreement between the Republic of India and the Democratic Socialist Republic of Sri Lanka	15-Dec-01	27-Jun-02	WT/COMTD/N/16
Framework Agreement on comprehensive economic co-operation between the Association of South East Asian Nations (ASEAN) and the People's Republic of China	1-Jul-03	21-12-04	WT/COMTD/N/20 WT/COMTD/51

34. The Committee on Trade and Development has also received notifications with respect to four other regional trade arrangements which were previously notified to the GATT Committee on Trade and Development:

- (a) Southern Common Market Agreement (MERCOSUR)⁵¹, and the Memorandum of Understanding on Closer Relations between Bolivia and MERCOSUR,⁵²

(b) Agreement on SAARC⁵³ Preferential Trading Arrangement (SAPTA)⁵⁴;

(c) Latin American Integration Association (LAIA) – the Membership of Cuba⁵⁵; and

(d) Common Effective Preferential Tariffs (CEPT) scheme for the ASEAN⁵⁶ Free Trade Area (AFTA).⁵⁷

⁴¹ WT/COMTD/N/15 and addenda.

⁴² WT/COMTD/N/4 and addenda.

⁴³ WT/COMTD/N/2 and addenda.

⁴⁴ WT/COMTD/N/5 and addenda.

⁴⁵ WT/COMTD/N/6 and addenda.

⁴⁶ WT/COMTD/N/7.

⁴⁷ WT/COMTD/N/1 and addenda.

⁴⁸ WT/COMTD/N/17 and Corr.1.

⁴⁹ WT/COMTD/N/18.

⁵⁰ With respect to the regional trade arrangements notified under the Enabling Clause within the GATT framework, see GATT Analytical Index, Article I, pp. 56–58. Also, with respect to the role of the GATT Committee on Trade and Development in the operation of the Enabling Clause, see GATT Analytical Index, pp. 1048–1049.

⁵¹ The request for circulation of the updated text of this Agreement

was given in WT/COMTD/1. The parties to this Agreement are: Argentina, Brazil, Paraguay and Uruguay.

⁵² The Memorandum was notified in WT/COMTD/4.

⁵³ “SAARC” is the abbreviation of “South Asian Association for Regional Cooperation”.

⁵⁴ This Agreement was notified in WT/COMTD/10. The parties to the Agreement are: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

⁵⁵ The status of this arrangement was notified in WT/COMTD/7 and WT/COMTD/11. The membership of Cuba was notified in WT/COMTD/N/10.

⁵⁶ “ASEAN” is the abbreviation of “Association of South-East Asian Nations, whose members are: Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand.

⁵⁷ The information on this scheme was given in WT/COMTD/3.

35. On 30 April 2004, the Committee on Trade and Development received notification of China's accession to the Bangkok Agreement.⁵⁸

36. Under paragraph 4(a) of the Enabling Clause, Members are required to notify arrangements taken under the Enabling Clause, and the modification or withdrawal thereof, to the Committee on Trade and Development. In this regard, in fulfilment of its mandate under item 1(b) of its terms of reference⁵⁹, at its meeting on 20 February 1998, the Committee on Regional Trade Agreements (Committee on RTAs) adopted recommendations to the Committee on Trade and Development with respect to how the required reporting on the operation of regional trade agreements, including those under the Enabling Clause, should be carried out.⁶⁰ At its meeting of 2 November 1998, the Committee on Trade and Development adopted the recommended procedures, as general guidelines with respect to information on regional trade agreements submitted to it.⁶¹

37. When an agreement is notified under the Enabling Clause, it is inscribed on the agenda of the Committee on Trade and Development. Subsequent actions of the Committee may include "noting" the agreement, requesting additional information, transferring it to the Committee on RTAs for examination, and reviewing reports made by members on changes to their agreements.

38. At its meeting of 14 September 1995, the Committee on Trade and Development adopted the following terms of reference for the Working Party on MERCOSUR⁶²:

"To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV, and to transmit a report and recommendations to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods. The examination in the Working Party will be based on a complete notification and on written questions and answers."⁶³

39. The review of MERCOSUR was later taken over by the Committee on RTAs.⁶⁴

(d) Special treatment of the least-developed countries

40. As of 31 December 2004 the Committee on Trade and Development has received notifications under the Enabling Clause from the following Members of their special treatment in respect of the least-developed countries in the context of any general or specific measures in favour of developing countries:

- (a) Canada⁶⁵;
- (b) European Communities⁶⁶;
- (c) Japan⁶⁷;
- (d) Republic of Korea⁶⁸;
- (e) Norway⁶⁹;
- (f) New Zealand⁷⁰;
- (g) Switzerland⁷¹;
- (h) United States⁷²;
- (i) Iceland⁷³; and
- (j) Australia⁷⁴

(e) Interpretation

- (i) *The relationship between the Enabling Clause and Article I:1 of the GATT 1994*

The Enabling Clause as an exception to Article I:1 of the GATT 1994

41. In *EC – Tariff Preferences*, the Appellate Body addressed the relationship between Article I:1 of the GATT 1994 and the Enabling Clause and upheld the Panel's characterization of the Enabling Clause as an exception to Article I:1 based on the ordinary meaning

⁵⁸ The notification is contained in WT/COMTD/N/19. The Bangkok Agreement entered into force in 1976 as a preferential trading arrangement between developing countries in the Asia-Pacific region and was notified to GATT/WTO pursuant to the Enabling Clause. The five original participating states of the Agreement are Bangladesh, India, the Lao People's Democratic Republic, the Republic of Korea and Sri Lanka.

⁵⁹ WT/L/127, para. 1(b).

⁶⁰ WT/REG/M/16, Section B. The text of the recommendation can be found in WT/REG/6. See also para. 682 of this Chapter.

⁶¹ WT/COMTD/M/22, section H. The text of the adopted procedures can be found in WT/COMTD/16.

⁶² This is the only regional trade agreement among developing countries that the Committee on RTAs has dealt with.

⁶³ WT/COMTD/M/3, section A. The text of the adopted terms of reference can be found in WT/COMTD/5. With respect to the Working Party on the MERCOSUR, see also GATT Analytical Index, Article I, p. 58. See also WT/L/127, fn. 2.

⁶⁴ The tasks of those working parties which the Council for Trade in Goods had established for examination of regional trade arrangements entered into under Article XXIV of GATT 1947 and 1994 were taken over by the Committee on RTAs after its establishment on 6 February 1996. WT/GC/M/10, subsection 11. Also, WT/L/127, fn. 2. In this regard, see also Section XXV of this Chapter.

⁶⁵ WT/COMTD/N/15.

⁶⁶ WT/COMTD/N/4/Add.2.

⁶⁷ WT/COMTD/N/2/Add.10. See also WT/COMTD/29 and WT/LDC/SWG/IF/12.

⁶⁸ WT/COMTD/N/12.

⁶⁹ WT/COMTD/N/6.

⁷⁰ WT/COMTD/N/5/Add.2. See also WT/GC/36 and WT/COMTD/27.

⁷¹ WT/COMTD/N/7.

⁷² WT/COMTD/N/1/Add.2.

⁷³ WT/COMTD/N/17 and Corr.

⁷⁴ WT/COMTD/N/18.

of paragraph 1 of the Enabling Clause. It also stated that such a characterization does not affect the importance of the policy objectives of the Enabling Clause:

“By using the word ‘notwithstanding’, paragraph 1 of the Enabling Clause permits Members to provide ‘differential and more favourable treatment’ to developing countries ‘in spite of’ the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO ‘immediately and unconditionally’.⁷⁵ Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an ‘exception’ to Article I:1.

...

In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive ‘differential and more favourable treatment’. The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the ‘customary rules of interpretation of public international law’, as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the ‘DSU’).⁷⁶ Members’ rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.”⁷⁷

Order of analysis

42. The Appellate Body stated in *EC – Tariff Preferences* that the Enabling Clause does not exclude the applicability of Article I:1. Rather, it is a more specific rule [on GSP matters] that prevails over Article I:1. According to the Appellate Body, a panel should first examine the consistency of a challenged measure with Article I:1 and then proceed to examine the justifiability of the measure under the Enabling Clause:

“It is well settled that the MFN principle embodied in Article I:1 is a ‘cornerstone of the GATT’ and ‘one of the pillars of the WTO trading system’, which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Mem-

bers are entitled to adopt measures providing ‘differential and more favourable treatment’ under the Enabling Clause. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. In our view, this is so because the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.

In other words, the Enabling Clause ‘does not exclude the applicability’ of Article I:1 in the sense that, as a matter of procedure (or “order of examination”, as the Panel stated), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination – or *application* rather than *applicability* – it is clear that only one provision applies at a time . . .”⁷⁸

(ii) *Footnote 3 to paragraph 2*

“generalized”

43. The Appellate Body addressed the meaning of the term “generalized” as context for the interpretation of the term “non-discriminatory” in *EC – Tariff Preferences* and found that its ordinary meaning is to “apply more generally”. The Appellate Body also took note of the historical context leading to this requirement:

“We continue our interpretive analysis by turning to the immediate context of the term ‘non-discriminatory’. We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being ‘non-discriminatory’, tariff preferences provided under GSP schemes must be ‘generalized’. According to the ordinary meaning of that

⁷⁵ (footnote original) GATT 1994, Art. I:1.

⁷⁶ (footnote original) In this regard, we recall the Appellate Body’s statement in *EC – Hormones* that:

. . . merely characterizing a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

(Appellate Body Report, para. 104)

⁷⁷ Appellate Body Report on *EC – Tariff Preferences*, paras. 90 and 98.

⁷⁸ Appellate Body Report on *EC – Tariff Preferences*, paras. 101–102.

term, tariff preferences provided under GSP schemes must be ‘generalized’ in the sense that they ‘apply more generally; [or] become extended in application’.⁷⁹ However, this ordinary meaning alone may not reflect the entire significance of the word “generalized” in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel’s finding that, by requiring tariff preferences under the GSP to be “generalized”, developed and developing countries together sought to eliminate existing “special” preferences that were granted only to certain designated developing countries.⁸⁰ Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies”.⁸¹

“non-discriminatory”

44. In *EC – Tariff Preferences*, the European Communities appealed the Panel’s findings based on the drafting history of the Generalized System of Preferences that the term “non-discriminatory” in footnote 3 to paragraph 2 of the Enabling Clause requires that identical tariff preferences be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations.⁸² While rejecting the Panel’s findings, the Appellate Body interpreted the ordinary meaning of the term “non-discriminatory” as requiring that preference-giving countries make identical tariff preferences available to all similarly-situated beneficiary developing countries:

“[T]he ordinary meanings of ‘discriminate’ point in conflicting directions with respect to the propriety of according differential treatment. Under India’s reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities’ reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term ‘non-discriminatory’, on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

Nevertheless, at this stage of our analysis, we are able to discern some of the content of the ‘non-discrimination’ obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of ‘discriminate’ converge in one important respect: they both suggest

that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member’s GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. . . .

Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of ‘non-discriminatory’, however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries.”⁸³

45. After taking into account the stated objectives of the Preamble to the *WTO Agreement*, Appellate Body stated in *EC – Tariff Preferences* that the interpretation of the term “non-discriminatory” in the Enabling Clause should allow the possibility of additional preferences to be given to developing countries with particular needs:

“We are of the view that the objective of improving developing countries’ ‘share in the growth in international trade’, and their ‘trade and export earnings’, can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, as well as at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of ‘non-discriminatory’ that does not require the granting of ‘identical tariff preferences’ allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be ‘generalized’ and ‘non-reciprocal’. We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause.”⁸⁴

46. After considering its ordinary meaning, its context and the object and purpose of the *WTO Agreement*, the Appellate Body found in *EC – Tariff Preferences* that the term “non-discriminatory” in footnote 3 to paragraph 2 of the Enabling Clause requires that identical

⁷⁹ (footnote original) *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1082.

⁸⁰ (footnote original) Panel Report, paras. 7.135–7.137. The Panel also observed that statements by developed and developing countries indicated the aim of providing GSP schemes with a broad scope, encompassing the granting of preferences by all developed countries to all developing countries. (*Ibid.*, paras. 7.131–7.132)

⁸¹ Appellate Body Report on *EC – Tariff Preferences*, para.155.

⁸² Panel Report on *EC – Tariff Preferences*, paras. 7.126–7.161.

⁸³ Appellate Body Report on *EC – Tariff Preferences*, paras. 152–154.

⁸⁴ Appellate Body Report on *EC – Tariff Preferences*, para. 169.

preference be made available to all similarly situated GSP beneficiaries that have the “development, financial and trade needs” to which the preference is intended to respond:

“Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the *WTO Agreement* and the Enabling Clause, we conclude that the term ‘non-discriminatory’ in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term ‘non-discriminatory’, to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the ‘development, financial and trade needs’ to which the treatment in question is intended to respond.”⁸⁵

47. The Appellate Body further found in *EC – Tariff Preferences* that due to the closed nature of the beneficiary list and the lack of objective criteria or standards in its GSP Regulation, the European Communities failed to make its special preferences (i.e., the Drug Arrangements) available to all similarly situated beneficiaries:

“We recall our conclusion that the term ‘non-discriminatory’ in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a ‘closed list’ of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel’s request to do so. As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are ‘similarly affected by the drug problem’, because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis

to determine whether those criteria or standards are discriminatory or not.”⁸⁶

48. The Appellate Body also stated in *EC – Tariff Preferences* that in addition to the non-discriminatory requirement in paragraph 2(a), the Enabling Clause also sets out other conditions in paragraph 3(c) and 3(a) that must be complied with by any particular GSP preference scheme. However, the Appellate Body did not examine *per se* the consistency of the Drug Arrangements with the conditions set out in paragraph 3(c) and 3(a) due to the fact that the Panel had not made findings in this regard:

“Although paragraph 3(c) informs the interpretation of the term ‘non-discriminatory’ in footnote 3 to paragraph 2(a), as detailed above, paragraph 3(c) imposes requirements that are separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized ‘development, financial and trade needs’ of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this ‘positive response’ would not, as such, fail to comply with the ‘non-discriminatory’ requirement in footnote 3 of the Enabling Clause, even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members. With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause, we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to ‘respond positively to the development, financial and trade needs of developing countries’ or with the obligation contained in paragraph 3(a) not to ‘raise barriers’ or ‘create undue difficulties’ for the trade of other Members.”⁸⁷

(iii) *Paragraph 2: “developing countries”*

49. Based on its findings on the term “non-discriminatory” in footnote 3 of paragraph 2 and on its discussion of paragraph 3(c), the Appellate Body found in *EC – Tariff Preferences* that the phrase “developing countries” in paragraph 2 of the Enabling Clause does not mean “all developing countries”:

⁸⁵ Appellate Body Report on *EC – Tariff Preferences*, para. 173.

⁸⁶ Appellate Body Report on *EC – Tariff Preferences*, paras. 187–188.

⁸⁷ Appellate Body Report on *EC – Tariff Preferences*, para. 179.

Actually, in this case, India had not challenged the inconsistency of the Drug Arrangements with either paragraph 3(c) or paragraph 3(a) during the proceedings. See, Appellate Body Report on *EC – Tariff Preferences*, para. 178.

“We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term ‘developing countries’ in paragraph 2(a) should not be read to mean ‘all’ developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.”⁸⁸

(iv) *Relationship between paragraph 2(a) and 2(d)*

50. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 2(d) is not an exception to paragraph 2(a) of the Enabling Clause. Rather, it found that by virtue of paragraph 2(d), preference-giving countries need not establish that the differentiation between developing and the least-developed countries is “non-discriminatory”:

“We do not agree with the Panel that paragraph 2(d) is an ‘exception’ to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-developed countries form an identifiable sub-category of developing countries with ‘special economic difficulties and . . . particular development, financial and trade needs’.⁸⁹ When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have already found, footnote 3 imposes a requirement that such preferences be ‘non-discriminatory’. In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not ‘discriminate’ against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is ‘non-discriminatory’. This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term ‘non-discriminatory’ does not require the granting of ‘identical tariff preferences’ to all GSP beneficiaries.”⁹⁰

(v) *Paragraph 3(a)*

51. The Appellate Body found in *EC – Tariff Preferences* although there was a requirement of non-discrimination, this did not mean that identical tariff preferences should be granted to “all” developing countries. The Appellate Body concluded that the Enabling Clause contains sufficient other conditions on the granting of preferences, including those under paragraph 3(a), to guard against such a conclusion:

“It does not necessarily follow, however, that ‘non-discriminatory’ should be interpreted to require that preference-granting countries provide ‘identical’ tariff preferences under GSP schemes to ‘all’ developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily ‘result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries’.⁹¹ To us, this conclusion is unwarranted. We observe that the term ‘generalized’ requires that the GSP schemes of preference-granting countries remain generally applicable.⁹² Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below⁹³, provisions such as paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.”⁹⁴

52. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 3(a) requires that any positive response of a preference-giving country to the varying needs of developing countries not impose unjustifiable burdens on other Members:

⁸⁸ Appellate Body Report on *EC – Tariff Preferences*, para. 175.

⁸⁹ (*footnote original*) Enabling Clause, para. 6 (attached as Annex 2 to this Report). Similarly, paragraph 8 of the Enabling Clause refers to the “special economic situation and [the] development, financial and trade needs” of least-developed countries.

⁹⁰ Appellate Body Report on *EC – Tariff Preferences*, para. 172.

⁹¹ (*footnote original*) Panel Report, para. 7.102.

⁹² (*footnote original*) The European Communities argues in this respect that the GATT Contracting Parties and the WTO Members have granted a number of waivers, as mentioned in the Panel Report, for tariff preferences that are “confined *ab initio* and permanently to a limited number of developing countries located in a certain geographical region”. (European Communities’ appellant’s submission, paras. 184–185 (referring to Panel Report, para. 7.160)) See also, Panel Report, footnote 31 to para. 4.32 (referring to Waiver Decision on the Caribbean Basin Economic Recovery Act, GATT Document L/5779, 15 February 1985, BISD 31S/20, renewed 15 November 1995, WT/L/104; Waiver Decision on CARIBCAN, GATT Document L/6102, 28 November 1986, BISD 33S/97, renewed 14 October 1996, WT/L/185; Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385, renewed 14 October 1996, WT/L/184; Waiver Decision on The Fourth ACP-EEC Convention of Lomé, GATT Document L/7604, 9 December 1994, BISD 41S/26, renewed 14 October 1996, WT/L/186; and Waiver Decision on European Communities – The ACP-EC Partnership Agreement, WT/MIN (01)/15, 14 November 2001.

⁹³ (*footnote original*) *Infra*, paras. 157–168.

⁹⁴ Appellate Body Report on *EC – Tariff Preferences*, para. 156.

"Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any 'differential and more favourable treatment . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.' This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another.⁹⁵ Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries⁹⁶, and paragraph 3(c) even contemplates such differentiation under certain circumstances⁹⁷, paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members."⁹⁸

(vi) *Paragraph 3(c) "to respond positively to the development, financial and trade needs of developing countries"*

53. The Appellate Body stated in *EC – Tariff Preferences* that in the light of one of the stated objectives of the Preamble to the *WTO Agreement*, the text of paragraph 3(c) authorizes preference-giving countries to treat different developing countries differently:

"[T]he Preamble to the *WTO Agreement*, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'. The word 'commensurate' in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the *WTO Agreement* further recognizes that Members' 'respective needs and concerns at different levels of economic development' may vary according to the different stages of development of different Members.

In sum, we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently."⁹⁹

54. The Appellate Body on *EC – Tariff Preferences* also stated that paragraph 3(c) requires that a response to a particular "development, financial and trade needs" based on objective standard. These standards could be those particular needs as broadly recognized and explicitly set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations. It also stated that in order to make the "response" "posi-

tive", sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the relevant need:

"At the outset, we note that the use of the word 'shall' in paragraph 3(c) suggests that paragraph 3(c) sets out obligations for developed-country Members in providing preferential treatment under a GSP scheme to 'respond positively' to the 'needs of developing countries'. . . .

. . .

However, paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to 'development, financial and trade needs'. In our view, a 'need' cannot be characterized as one of the specified 'needs of developing countries' in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a 'development, financial [or] trade need' must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.

Secondly, paragraph 3(c) mandates that the response provided to the needs of developing countries be 'positive'. 'Positive' is defined as 'consisting in or characterized by constructive action or attitudes'. This suggests that the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will 'respond positively' to the 'needs of developing countries' suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant 'development, financial [or] trade need'. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the 'positive' manner suggested, in 'respon[se]' to a widely-recognized 'development, financial [or] trade need', can such action satisfy the requirements of paragraph 3(c)."¹⁰⁰

⁹⁵ (footnote original) We note in this respect that the language contained in paragraph 3(a) of the Enabling Clause is reflected in waivers referred to in *supra*, footnote 323.

⁹⁶ (footnote original) *Supra*, paras. 153–154.

⁹⁷ (footnote original) *Supra*, paras. 162–165.

⁹⁸ Appellate Body Report on *EC – Tariff Preferences*, para. 167.

⁹⁹ Appellate Body Report on *EC – Tariff Preferences*, paras. 161–162.

¹⁰⁰ Appellate Body Report on *EC – Tariff Preferences*, paras. 158, 163 and 164.

(vii) Burden of proof under the Enabling Clause

55. The Appellate Body stated in *EC – Tariff Preferences* that as an exception provision, the ultimate burden of proof under the Enabling Clause falls on the respondent party:

“As a general rule, the burden of proof for an ‘exception’ falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party ‘assert[ing] the affirmative of a particular . . . defence’.¹⁰¹ From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.

We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.”¹⁰²

56. However, the Appellate Body also found in *EC – Tariff Preferences* that the complainant bears the burden of raising the Enabling Clause in its panel request, although the ultimate burden of justifying the challenged measure under the Enabling Clause is with the respondent:

“In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, ‘notwithstanding’ the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an ‘advantage’ to a developing country’s products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the ‘legal basis of the complaint sufficient to present the problem clearly’. In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that

the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.

...

The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above, remains on the responding party invoking the Enabling Clause as a defence.”¹⁰³

(f) Reference to GATT practice

57. With respect to GATT practice concerning the Enabling Clause, see GATT Analytical Index, Article I, pages 53–59.

4. Waiver on Preferential Tariff Treatment for Least-Developed Countries

58. At its meeting of 15 June 1999, the General Council adopted a decision concerning the Preferential Tariff Treatment for Least-Developed Countries. This decision waives the provisions of GATT Article I:¹⁰⁴ in order to provide a means for developing-country Members to offer preferential tariff treatment to products of least-developed countries. The decision sets forth:

“1. Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the GATT 1994 shall be waived until 30 June 2009, to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member.

2. Developing country Members wishing to take actions pursuant to the provisions of this Waiver shall notify to the Council on Trade in Goods the list of all products of least-developed countries for which preferential tariff treatment is to be provided on a generalized, non-reciprocal and non-discriminatory basis and the preference margins to be accorded. Subsequent modifications to the preferences shall similarly be notified.

¹⁰¹ (*footnote original*) Appellate Body Report, p. 14, DSR 1997:1, at 335. (See also, Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report, *India – Quantitative Restrictions*, para. 136)

¹⁰² Appellate Body Report on *EC – Tariff Preferences*, paras. 104–105.

¹⁰³ Appellate Body Report on *EC – Tariff Preferences*, paras. 110 and 115.

¹⁰⁴ WT/GC/M/40/Add.3, section 4(d)(i). The text of the adopted decision can be found in WT/L/304. The decision refers to the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries. WT/L/304, para. 2. In this regard, see further Chapter on *WTO Agreement*, Section V.B(7)(iv).

3. Any preferential tariff treatment implemented pursuant to this Waiver shall be designed to facilitate and promote the trade of least-developed countries and not to raise barriers or create undue difficulties for the trade of any other Member. Such preferential tariff treatment shall not constitute an impediment to the reduction or elimination of tariffs on a most-favoured-nation basis.

4. In accordance with the provisions of paragraph 4 of Article IX of the WTO Agreement, the General Council shall review annually whether the exceptional circumstances justifying the Waiver still exist and whether the terms and conditions attached to the Waiver have been met.

5. The government of any Member providing preferential tariff treatment pursuant to this Waiver shall, upon request, promptly enter into consultations with any interested Member with respect to any difficulty or any matter that may arise as a result of the implementation of programmes authorized by this Waiver. Where a Member considers that any benefit accruing to it under GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultation shall examine the possibility of action for a satisfactory adjustment of the matter. This Waiver does not affect Members' rights as set forth in the Understanding in Respect of Waivers of Obligations under GATT 1994.

6. This waiver does not affect in any way and is without prejudice to rights of Members in their actions pursuant to the provisions of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries."¹⁰⁵

59. Under the Decision on Waiver on Preferential Tariff Treatment for LDCs, which is referred to in paragraph 58 above, notifications on steps taken by developing country Members are to be sent to the Council on Trade in Goods. In contrast, pursuant to the Enabling Clause, which is referred to in paragraph 30 above, notifications on the GSP schemes of developed country Members in favour of LDCs are to be sent to the Committee on Trade and Development. In order to allow for a unified consideration of both types of measures in one forum, at its meeting of 14 March 2001, the Council for Trade in Goods agreed *ad referendum* that any market access measures taken specifically in favour of the least-developed countries under the Waiver on Preferential Tariff Treatment for LDCs and notified to the Council be transmitted to the Sub-Committee on Least-developed Countries, for substantive consideration, and that the Sub-Committee report back to the Council on its discussions.¹⁰⁶ A similar procedure was agreed in the Committee on Trade and Development with respect to the treatment of notifications under the Enabling Clause, see paragraph 30 above.

60. To date, only Morocco has notified its preferential tariff treatment for the least-developed countries to the

Council for Trade in Goods.¹⁰⁷ In this regard, the following developing country Members notified their own tariff reduction or duty-free treatment for the least-developed countries to the Committee on Trade and Development, prior to the adoption of the Waiver on Preferential Tariff Treatment for LDCs: (i) Turkey¹⁰⁸; (ii) Egypt¹⁰⁹; and (iii) Mauritius.¹¹⁰

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article III

61. In *US – Gasoline*, with respect to the relationship between Articles I and III, the Panel considered:

"[The Panel's] findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1."¹¹¹

(a) Reference to GATT practice

62. With respect to GATT practice regarding the relationship between Article I and Article III, see GATT Analytical Index, page 44.

2. Article VI

63. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of the *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Articles I and II of the *GATT 1994*, which were derived from claims of inconsistency with Article VI of the *GATT 1994*, could not succeed.¹¹² The Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.¹¹³

3. Article XI

64. In *US – Shrimp*, with respect to the relationship between Articles I and XI, the Panel stated:

"Given our conclusion in paragraph 7.17 above that Section 609 violates Article XI:1, we consider that it is not necessary for us to review the other claims of the complainants with respect to Articles I:1 and XIII:1. This is consistent with GATT¹¹⁴ and WTO¹¹⁵ panel practice and

¹⁰⁵ WT/L/304.

¹⁰⁶ G/C/M/47, Section VII.

¹⁰⁷ G/C/6 and WT/LDC/SWG/IF/18. See further Chapter on *WTO Agreement*, Section V.B.7(a) with respect to preferential tariff treatment for the least-developed countries in general.

¹⁰⁸ WT/COMTD/W/39.

¹⁰⁹ WT/COMTD/W/47.

¹¹⁰ WT/COMTD/W/53.

¹¹¹ Panel Report on *US – Gasoline*, para. 6.19. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.

¹¹² Panel Report on *Brazil – Desiccated Coconut*, para. 281.

¹¹³ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

¹¹⁴ (footnote original) See, e.g., Panel Report on *Canada – FIRA*, para. 5.16.

¹¹⁵ (footnote original) See, e.g., Panel Report on *Brazil – Desiccated Coconut*, para. 293.

has been confirmed by the Appellate Body in its report in the *Wool Shirts* case, where the Appellate Body mentioned that ‘A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute’.¹¹⁶

Therefore we do not find it necessary to review the allegations of the complainants with respect to Articles I:1 and XIII:1. On the basis of our finding of violation of Article XI:1, we move to address the defence of the United States under Article XX.¹¹⁷

4. Article XIII

65. In *EC – Bananas III*, the European Communities argued that a violation of Article XIII in respect of its tariff regime for bananas was covered by the Lomé waiver, whereby the provisions of Article I:1 of the *GATT 1994* were waived in respect of the allocation of country-specific tariff quotas for bananas to certain countries. The Panel agreed with this argument, however on appeal, the Appellate Body reversed this conclusion, finding that the Lomé waiver waives only the provisions of Article I:1.¹¹⁸ See Chapter on the *WTO Agreement*, Section X.3(a)(i).

5. Article XXIV

66. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, found to be inconsistent with Article I of the *GATT 1994*. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.¹¹⁹ Canada did not appeal this finding of the Panel. In this regard, the Appellate Body noted:

“The drafters also wrote various exceptions to the MFN principle into the *GATT 1947* which remain in the *GATT 1994*.¹²⁰ Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel’s findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the *GATT 1994*, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the *GATT 1994*.”¹²¹

6. Article XXVIII

67. In *EC – Poultry*, the Appellate Body addressed a complaint against the allocation of tariff quotas for certain poultry products by the European Communities, and rejected Brazil’s appeal that Articles I and XIII of the *GATT 1994* were not applicable to the allocation of tariff quota resulting from negotiations under Article

XXVIII of the *GATT 1994*. The Appellate Body first confirmed its finding in *EC – Bananas III* according to which Members may, in their concessions and commitments set out in their schedules annexed to the *GATT 1994*, yield rights but may not diminish their obligations.¹²² The Appellate Body then held that: “[t]herefore, the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the *GATT 1994*.”¹²³

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. SCM Agreement

68. In *Indonesia – Autos*, the Panel rejected Indonesia’s argument that the *SCM Agreement* was exclusively applicable to measures involving subsidies and referred to its finding on the relationship between the *SCM Agreement* and Article III of the *GATT 1994*.¹²⁴ With respect to the exemption of customs duties and domestic taxes, the Panel indicated:

“The customs duty benefits of the various Indonesian car programmes are explicitly covered by the wording of Article I. As to the tax benefits of these programmes, we note that Article I:1 refers explicitly to ‘all matters referred to in paragraphs 2 and 4 of Article III’. We have already decided that the tax discrimination aspects of the National Car programme were matters covered by Article III:2 of *GATT*. Therefore, the customs duty and tax advantages of the February and June 1996 car programmes are of the type covered by Article I of *GATT*.”¹²⁵

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II *Schedules of Concessions*

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less

¹¹⁶ (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.

¹¹⁷ Panel Report on *US – Shrimp*, paras. 7.22–7.23.

¹¹⁸ Appellate Body Report on *EC – Bananas III*, paras. 183–187.

¹¹⁹ Panel Report on *Canada – Autos*, paras. 10.55–10.56, which is referenced in para. 696 of this Chapter.

¹²⁰ (*footnote original*) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).

¹²¹ Appellate Body Report on *Canada – Autos*, para. 83.

¹²² Appellate Body Report on *EC – Poultry*, para. 98, citing Appellate Body Report on *EC – Bananas III*, para. 154, which is referenced in para. 85 of this Chapter.

¹²³ Appellate Body Report on *EC – Poultry*, para. 99.

¹²⁴ See para. 303 of this Chapter.

¹²⁵ Panel Report on *Indonesia – Autos*, para. 14.139.

favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*
- (c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

B. TEXT OF AD ARTICLE II

Ad Article II
Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.¹

(footnote original) ¹ This Protocol entered into force on 14 December 1948.

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

C. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Article II:1(a)

(a) Bonding requirements

69. In *US – Certain EC Products*, the Appellate Body reversed the Panel's finding that the United States had acted inconsistently with Article II:1(a) and (b) of GATT 1994, first sentence, by increasing the bonding requirements on certain products imported from the European Communities in order to secure the collection of import duties whose imposition, however, had not yet been determined at the time that the increased bonding requirement was imposed. Referring to the increased bonding requirements as the "3 March Measure", the Panel stated, *inter alia*: "We have found that the bonding requirements should be assessed together with the rights/obligations they purport to protect, being in this case, the right to collect tariffs at bound levels. The 3 March Measure imposed additional bonding requirements to guarantee collection of 100 per cent tariff duty."¹²⁶ In contrast, the Appellate Body emphasized the distinction between the imposition of duties and the increased bonding requirements:

"The task of the Panel . . . was . . . to examine the GATT-1994-consistency of the increased bonding requirements; the Panel's task was not to examine the GATT 1994-consistency of the imposition of 100 per cent duties.

Nevertheless, the Panel examined the GATT 1994-consistency of the increased bonding requirements *in*

the light of the GATT 1994-consistency of the imposition of 100 per cent duties, and concluded, on the basis of this examination, that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994. As the Panel had previously concluded that the imposition of 100 per cent duties and the increased bonding requirements were legally distinct measures, and that the imposition of 100 per cent duties was not in the Panel's terms of reference, the Panel could not, based on this reasoning, have come to the conclusion that the increased bonding requirements are inconsistent with Articles II:1(a) and II:1(b), first sentence, of the GATT 1994."¹²⁷

(b) Qualification in schedules

70. In *Korea – Various Measures on Beef*, the Panel ruled, in a finding not reviewed by the Appellate Body, that pursuant to Article II of the *GATT 1994* any other "terms, conditions or qualifications" that are added to import concessions, must be included in the schedules. The Panel went on to find that "[g]iven that Korea made no such qualification, and that imports of grass-fed beef by the LPMO are thus restricted, the Panel finds that imports of grass-fed beef are accorded less favourable treatment than that is provided for in Korea's Schedule, contrary to Article II:1(a)."¹²⁸

(c) Implementation in WTO Schedules of HS changes

71. On 18 July 2001, the General Council approved new procedures to introduce HS2002 changes to schedules of concessions.¹²⁹

(d) Database for tariffs

(i) *Integrated Data Base (IDB) Project*

72. At its meeting on 24 June 1997, the Committee on Market Access agreed to the restructuring of the existing Integrated Data Base (IDB) from a mainframe environment to a Personal Computer (PC)-based system, which would utilize new technology to improve the operation of the IDB.¹³⁰ At its meeting of 16 July 1997,

¹²⁶ Panel Report on *US – Certain EC Products*, para. 6.58. On this issue, the following minority view was expressed:

" . . . Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure . . . confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a 'restriction', contrary to Article XI of GATT, rather than a duty or charge under Article II," para. 6.61.

¹²⁷ Appellate Body Report on *US – Certain EC Products*, paras. 103–104.

¹²⁸ Panel Report on *Korea – Various Measures on Beef*, para. 779. WT/L/407.

¹³⁰ G/MA/M/10, para. 4. The agreement is outlined in G/MA/IDB/1/Rev. 1.

the General Council adopted the Decision on the Supply of Information to the Integrated Data Base for Personal Computers, which was approved and forwarded to the General Council by the Committee on Market Access at its meeting of 24 June 1997.¹³¹ At its meeting of 2 December 1997, the Committee on Market Access further adopted two decisions concerning: (1) the deadlines for IDB submissions, pursuant to the decision adopted by the General Council on 16 July 1997 on the Supply of Information for the Integrated Data Base for Personal Computers, and (2) access to the IDB.¹³² At its meeting on 31 May 1999, the Committee on Market Access further adopted the document entitled "Dissemination of the Integrated Data Base".¹³³ At its meeting of 18 December 2000, the Committee on Market Access adopted, on an *ad referendum* basis, the document entitled "Review of the Operation of the Integrated Data Base (IDB) and Related Technical Assistance Activities" and gave the Indian delegation until 22 January 2001 to provide comments.¹³⁴

73. On 12 June 2002, the Committee on Market Access adopted the dissemination policy of the IDB.¹³⁵ Since then several organizations have been granted access to this database.¹³⁶

(ii) *Consolidated Tariff Schedule Data Base*

74. At its meeting on 22 November 1995, the Committee on Market Access agreed to the establishment of consolidated loose-leaf schedules on the basis of a proposal by the Chairman contained in document G/MA/TAR/W/4/Rev.2.¹³⁷ At its meeting on 29 November 1996, the Council for Trade in Goods adopted the Decision on the "Establishment of Consolidated Loose-Leaf Schedules".¹³⁸ Earlier, at its meeting on 18 October 1996, the Committee on Market Access had approved the Decision and had agreed to forward it to the Council for Trade in Goods for approval.

75. At its meeting on 26 March 1998, the Committee on Market Access approved the project proposal on the Consolidated Tariff Schedules (CTS) Database.¹³⁹

76. At its meeting on 28 July 2000, the Committee on Market Access adopted the format for inclusion of agricultural commitments into the CTS database on the understanding that the database has no legal basis and that the data contained therein would be available to all delegations at the same time.¹⁴⁰

77. On 12 June 2002, the Committee on Market Access adopted the dissemination policy of the CTS database.¹⁴¹ Several organizations have been granted access to this database.¹⁴²

(iii) *Review of the Understanding on the Interpretation of Article XXVIII of GATT 1994*

78. With respect to the review by the Committee of the Understanding on the Interpretation of Article XXVIII of GATT 1994, see paragraph 733 below.

(e) Information technology products

(i) *The Ministerial Declaration on Trade in Information Technology Products*

79. In December 1996, the Singapore Ministerial Conference adopted the Ministerial Declaration on Trade in Information Technology Products.¹⁴³ The Declaration, initially agreed by 29 Members (including the 15 EC member States) and States or separate customs territories in the process of WTO accession, called on its participants to:

"[B]ind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

'(a) all products classified (or classifiable) with Harmonized System (1996) ('HS') headings listed in Attachment A to the Annex to this Declaration; and

(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;'

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances."¹⁴⁴

80. As of 31 December 2004, there were 38 participants (covering 63 Members and States or separate customs territories in the process of acceding to the WTO) representing approximately 97 per cent of world trade in information technology products.¹⁴⁵

¹³¹ G/MA/M/10, para. 4. The text of the agreement can be found in WT/L/225.

¹³² G/MA/M/12, para. 3. The text of the adopted decisions can be found in G/MA/IDB/1/Rev.1/Add.1.

¹³³ G/MA/M/18, para. 2.7. The text of the adopted document can be found in G/MA/IDB/3.

¹³⁴ G/MA/M/27, para. 1.

¹³⁵ G/MA/115.

¹³⁶ See G/MA/115/Add.1 and Add.2.

¹³⁷ G/MA/M/4, para. 1.2.

¹³⁸ See G/C/W/98/Rev.1, para. 9.1. The text of the adopted Decision can be found in G/L/138.

¹³⁹ G/MA/M/13, para. 5.

¹⁴⁰ G/MA/M/25, para. 1.

¹⁴¹ G/M/115.

¹⁴² See G/MA/115/Add.1 and Add.2.

¹⁴³ WT/MIN(96)/16.

¹⁴⁴ WT/MIN(96)/16, para. 2.

¹⁴⁵ See G/IT/1/Rev.33.

(ii) *The Committee of Participants on the Expansion of Trade in Information Technology Products*

81. On 26 March 1997, the Participants established the Committee of Participants on the Expansion of Trade in Information Technology Products in order to monitor the provisions of paragraphs 3, 5, 6 and 7 of the Annex to the Declaration.¹⁴⁶

82. At its meeting of 30 October 1997, the Committee of Participants adopted rules of procedure which are similar to those of other WTO bodies.¹⁴⁷

83. At its meeting of 26 October 2000, the Committee of Participants agreed, on an *ad referendum* basis, to a Non-Tariff Measures Work Programme, subject to further consultations with capitals by 10 November 2000. Since no comments were received by this date, the Work Programme was deemed approved and issued as a formal document.¹⁴⁸

2. Article II:1(b)

(a) First sentence

(i) *“subject to the terms, conditions or qualifications set forth”*

84. In *EC – Bananas III*, addressing the question as to whether the allocation of tariff quotas as inscribed in a Schedule was inconsistent with GATT Article XIII, the Appellate Body addressed the legal status of tariff concessions. The Appellate Body held that “a Member may yield rights and grant benefits, but it cannot diminish its obligations”:

“With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States – Restrictions on Importation of Sugar* (“*United States – Sugar Headnote*”) found that:

‘... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.’¹⁴⁹

This principle is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term ‘concessions’ suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

‘The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of*

Members under Agreements in Annex 1A of the WTO Agreement. (emphasis added)’¹⁵⁰

85. In *EC – Poultry*, the Appellate Body rejected Brazil’s argument that the MFN principle in Articles I and XIII of the *GATT 1994* does not necessarily apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the *GATT 1994*. In so doing, the Appellate Body confirmed its finding in *EC – Bananas III*, cited in paragraph 84 above, and again referred to paragraph 3 of the *Marrakesh Protocol*. The Appellate Body stated:

“In *United States – Restrictions on Imports of Sugar*¹⁵¹ the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts *diminishing* obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC – Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994.¹⁵² The ordinary meaning of the term ‘concessions’ suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

‘The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement.* (emphasis added)’¹⁵³

86. In *Canada – Dairy*, Canada’s Schedule established a quota of 64,500 tons, under which imports were subject to a certain duty, while out-of-quota imports were subject to a higher duty. Under the heading “Other terms and conditions”, the Canadian Schedule stated: “This quantity [64,500] represents the estimated annual

¹⁴⁶ G/L/160, para. 3. The Committee’s rules of procedure provide for observer status in the Committee to WTO Members which are not parties, and governments that are observers to the Council for Trade in Goods. Furthermore, requests for observer status by international intergovernmental organizations would be considered on a case-by-case basis.

¹⁴⁷ G/IT/M/2, para. 1.5. The text of the Rules of Procedure can be found in G/IT/3.

¹⁴⁸ G/IT/19.

¹⁴⁹ (footnote original) Panel Report on *US – Sugar*, para. 5.2.

¹⁵⁰ Appellate Body Report on *EC – Bananas III*, para. 154.

¹⁵¹ (footnote original) Adopted 22 June 1989, BISD 36S/331, para. 5.2.

¹⁵² Adopted 25 September 1997, WT/DS27/AB/R, para. 154.

¹⁵³ Appellate Body Report on *EC – Poultry*, para. 98.

cross-border purchases imported by Canadian consumers.” The United States argued that Canada violated Article II:1(b) in restricting access to tariff quotas for fluid milk to cross-border imports by Canadians of (i) consumer packaged milk for personal use, (ii) valued at less than Can\$20. The United States argued that with respect to those two conditions, Canada was granting imports of fluid milk treatment less favourable than that provided for in its Schedule. The Panel found the language contained in Canada’s Schedule under the heading “Other terms and conditions” to be a *description* of the way the size of the quota was determined, rather than a statement of the *conditions* as to the kind of imports qualified to enter Canada under this quota. The Panel found that “. . . the ordinary meaning of the word “represent” in this context does not, in our view, call to mind the setting out of specific restrictions or conditions”.¹⁵⁴ The Panel added that “[e]ven if the phrase could be said to include restrictions on access to the tariff-rate quota, we do not see how the two conditions *at issue in this dispute* could be read into this phrase”.¹⁵⁵ As a result, the Panel did not find any restriction to tariff quotas in Canada’s relevant Schedule, and thus, agreed with the United States’ argument.¹⁵⁶ The Appellate Body disagreed with the Panel’s reading of the Schedule and presented the following interpretation of the term “subject to terms, conditions or qualifications” contained in Article II:1(b):

“Under Article II:1(b) of the GATT 1994, the market access concessions granted by a Member are ‘*subject to*’ the ‘terms, conditions or qualifications set forth in [its] Schedule’. (emphasis added) In our view, the ordinary meaning of the phrase ‘subject to’ is that such concessions are without prejudice to and are *subordinated to*, and are, therefore, *qualified by*, any ‘terms, conditions or qualifications’ inscribed in a Member’s Schedule. We believe that the relationship between the 64,500 tonnes tariff-rate quota and the ‘Other Terms and Conditions’ set forth in Canada’s Schedule is of this nature. The phrase ‘terms and conditions’ is a composite one which, in its ordinary meaning, denotes the imposition of qualifying restrictions or conditions. A strong presumption arises that the language which is inscribed in a Member’s Schedule under the heading, ‘Other Terms and Conditions’, has some *qualifying* or *limiting* effect on the substantive content or scope of the concession or commitment.¹⁵⁷

In interpreting the language in Canada’s Schedule, the Panel focused on the verb ‘represents’ and opined that, because of the use of this verb, the notation was no more than a ‘*description*’ of the ‘way the size of the quota was determined’.¹⁵⁸ The net consequence of the Panel’s interpretation is a failure to give the notation in Canada’s Schedule any legal effect as a ‘term and condition’. If the language is *merely* a ‘description’ or a ‘nar-

ration’ of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule. The Panel, in other words, acted upon the assumption that Canada projected no identifiably necessary or useful qualifying or limiting purpose in inscribing the notation in its Schedule. The Panel thus disregarded the principle of effectiveness in its interpretive effort.

We note that the Panel also adopted an overly literal and narrow view of the words ‘cross-border purchases imported by Canadian consumers’ in the notation at issue. Moreover, the Panel erred in failing to give meaning to *all* of the words in that notation. On the basis of its ordinary meaning, the Panel stated that the language in the notation could *not* refer only to ‘*consumer packaged*’ milk ‘*for personal use*’.¹⁵⁹ (emphasis in original) We do not agree that the ordinary meaning of that phrase in the notation is so unequivocal. We do not see anything in the text of the notation which necessarily *precludes* such an interpretation. The notation refers to ‘cross-border purchases imported by Canadian consumers’. It seems, to us, that this language may well be taken to refer to imports of fluid milk made by Canadian consumers for personal use in the course of cross-border shopping.”¹⁶⁰

87. After making the findings referenced in paragraph 86 above, the Appellate Body in *Canada – Dairy* found that while the language contained in Canada’s Schedule could be said to refer to the requirement of “consumer packaged milk for personal use”, it could not refer to the Can\$ 50 value limitation. As a result, the Appellate Body found the latter requirement not to be contained in Canada’s Schedule and its existence to be inconsistent with Article II:1(b).¹⁶¹

88. In *US – Certain EC Products*, one of the issues was the consistency of increased bonding requirements imposed on imports with GATT Article II:1(b), first sentence. See paragraph 69 above.

(ii) *Interpretation of tariff concessions in a Schedule*

Applicable interpretative rules

89. In *EC – Computer Equipment*, the Appellate Body dealt with the complaint that the reclassification of

¹⁵⁴ Panel Report on *Canada – Dairy*, para.7.151.

¹⁵⁵ Panel Report on *Canada – Dairy*, para. 7.152.

¹⁵⁶ Panel Report on *Canada – Dairy*, paras. 7.151–7.155.

¹⁵⁷ (*footnote original*) The United States contends, on the basis of the panel report in *United States – Restrictions on Imports of Sugar* (*supra*, footnote 52), that “terms and conditions” may encompass “additional concessions”. We take no position as to whether “terms and conditions” may encompass “additional concessions”; but we do, however, note that, even assuming that the United States is correct on this point, an “additional concession” may well embody a qualification to a concession by expanding its scope or adding to it.

¹⁵⁸ (*footnote original*) Panel Report, para. 7.151.

¹⁵⁹ (*footnote original*) *Ibid.*, para. 7.152.

¹⁶⁰ Appellate Body Report on *Canada – Dairy*, paras. 134–136.

¹⁶¹ Appellate Body Report on *Canada – Dairy*, para. 143.

certain computer equipment was in violation of the relevant tariff concession of the European Communities, and therefore inconsistent with Article II. The Appellate Body set forth the interpretative rules on tariff concessions and, contrary to the Panel which had based its interpretation of the European Communities' tariff commitments on the "legitimate expectations" of the exporting Member¹⁶², it emphasized the *common intentions* of the parties:

"The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common intentions* of the parties. These *common intentions* cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."¹⁶³

Relevance of "legitimate expectations"

90. In *EC – Computer Equipment*, the European Communities appealed against the Panel's finding that "the meaning of the term 'ADP machines' in this context [of Article II:1(b)] may be determined in light of the legitimate expectations of an exporting Member."¹⁶⁴ In addition, the Panel found that the United States "was not required to clarify the scope of the European Communities' tariff concessions".¹⁶⁵ In rejecting the Panel's finding, the Appellate Body stated as follows:

"Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.¹⁶⁶ Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.

For the reasons stated above, we conclude that the Panel erred in finding that 'the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment'.¹⁶⁷ We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties."¹⁶⁸

91. However, despite its rejection, referenced in paragraph 90 above, of the Panel's interpretative approach to the European Communities' tariff commitments, the Appellate Body in *EC – Computer Equipment* stated that "[w]e do not agree that the Panel has created and applied a new rule on the burden of proof. The rules on the burden of proof are those which we clarified in *United States – Shirts and Blouses*.¹⁶⁹"¹⁷⁰ The Appellate Body opined that the Panel's findings on the "requirement of clarification" were linked to the Panel's reliance on "legitimate expectations" as a means of interpretation of the European Communities' tariff concessions and "serve[d] to complete and buttress the Panel's conclusion that 'the United States was entitled to legitimate expectations that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities'".¹⁷¹

Relevance of Harmonized System/WCO practices

92. On the relevance of the Harmonized System in interpreting tariff concessions, the Appellate Body in *EC – Computer Equipment* stated as follows:

"We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. Neither the European Communities nor the United States argued before the Panel that the *Harmonized System* and its *Explanatory Notes* were

¹⁶² Panel Report on *EC – Computer Equipment*, para. 8.60.

¹⁶³ Appellate Body Report on *EC – Computer Equipment*, para. 84. The Appellate Body confirmed this finding in *Canada – Dairy*. Appellate Body Report on *Canada – Dairy*, para. 131.

¹⁶⁴ Panel Report on *EC – Computer Equipment*, para. 8.31.

¹⁶⁵ Panel Report on *EC – Computer Equipment*, para. 8.60.

¹⁶⁶ (footnote original) MTN.TNC/W/131, 21 January 1994. See also *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*, para. 3.

¹⁶⁷ Panel Report on *EC – Computer Equipment*, para. 8.60.

¹⁶⁸ Appellate Body Report on *EC – Computer Equipment*, paras. 109–110. This finding was referred to by the Panel on *Korea – Procurement*, in relation to the interpretation of Annexes to the *Agreement on Government Procurement*, which specify the coverage of the Agreement for each Party. See Chapter on *Agreement on Government Procurement*, Section XXVI.

¹⁶⁹ (footnote original) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14. See also, Appellate Body Report on *EC – Hormones*, paras. 97–109.

¹⁷⁰ Appellate Body Report on *EC – Computer Equipment*, para. 103.

¹⁷¹ Appellate Body Report on *EC – Computer Equipment*, para. 104.

relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*.¹⁷²

93. The Appellate Body also discussed the relevance of decisions of the World Customs Organization (“WCO”) for the interpretation of the tariff concessions at issue:

“A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute ‘was about duty treatment and not about product classification’. We note that the United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute on whether the tariff treatment accorded to LAN equipment was less favourable than that provided for in Schedule LXXX. However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel.”¹⁷³

Relevance of prior practice in tariff classification

94. In *EC – Computer Equipment*, in its interpretation of the tariff concessions at issue, the Appellate Body found that the terms of the relevant Schedule were ambiguous. In continuing its analysis, the Appellate Body discussed the relevance of tariff classification practice of Members to the interpretation of tariff concessions as follows:

“In the light of our observations on ‘the circumstances of [the] conclusion’ of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of ‘the circumstances of [the] conclusion’ of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.”¹⁷⁴

95. However, the Appellate Body added the following caveat regarding the relevance of prior practice on tariff classification:

“The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance.”¹⁷⁵

96. Also, the Appellate Body in *EC – Computer Equipment* denied the relevance of inconsistent practice for the interpretation of tariff concessions. In addition, the Appellate Body pointed to the fact that the Panel on *EC – Computer Equipment* had focused on only two member States of the European Communities:

“Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession. . . .

. . . [T]he Panel identified Ireland and the United Kingdom as the ‘largest’ and ‘major’ market for LAN equipment exported from the United States. On the basis of this assumption, the Panel gave special importance to the classification practice by customs authorities in these two Member States. However, the European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State.”¹⁷⁶

(iii) “ordinary customs duties”

97. As regards the concept of ordinary customs duty, the Appellate Body in *Chile – Price Band System*, reversed the Panel’s interpretation of this concept with respect to Article 4 of the *Agreement on Agriculture* and Article II.1(b) first sentence of *GATT 1994*. See Section V.B.3 of the Chapter on the *Agreement on Agriculture*.

(iv) “in excess of”

Specific import duties under tariff concessions made on an ad valorem basis

98. In *Argentina – Textiles and Apparel*, the measure at issue was a minimum specific import duty (the so-called “DIEM”) imposed by Argentina on footwear, textiles and apparel. Argentina’s Schedule included a

¹⁷² Appellate Body Report on *EC – Computer Equipment*, para. 89.

¹⁷³ Appellate Body Report on *EC – Computer Equipment*, para. 90.

¹⁷⁴ Appellate Body Report on *EC – Computer Equipment*, para. 92. This reasoning was reiterated and followed in *Canada – Dairy*, where the Appellate Body addressed a complaint that Canadian administration of tariff-rate quota on fluid milk was inconsistent with GATT Article II:1(b). Appellate Body Report on *Canada – Dairy*, para. 132.

¹⁷⁵ Appellate Body Report on *EC – Computer Equipment*, para. 93.

¹⁷⁶ Appellate Body Report on *EC – Computer Equipment*, paras. 95–96.

bound rate of duty of 35 per cent *ad valorem* with respect to the above-mentioned goods. In practice, textiles and apparel were subject to the higher of either (i) a 35 per cent *ad valorem* duty or (ii) the minimum specific duty. The Panel found the Argentine specific duty to be a violation of Article II for two reasons: First, the Panel found that Argentina had acted inconsistently with Article II simply by virtue of applying a different *type* of import duty than set out in its Schedule, independently of whether the *ad valorem* equivalent of the specific duty in fact exceeded the bound *ad valorem* rate.¹⁷⁷ In making this finding, the Panel relied on past GATT practice which it found to be “clear”.¹⁷⁸ Second, the Panel found a violation of Article II in the fact that the minimum specific import duty in certain cases exceeded the bound 35 per cent *ad valorem* duty.¹⁷⁹ The Appellate Body modified the findings of the Panel. In so doing, the Appellate Body disagreed with the Panel about the clarity of past GATT practice and focused, in its analysis, on the terms of Article II. The Appellate Body first addressed the Panel’s finding that merely by applying a *type* of duty different from the *type* provided for in a Member’s Schedule, that Member acted inconsistently with Article II:

“A tariff binding in a Member’s Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member’s Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member’s Schedule is inconsistent, in itself, with that provision.”¹⁸⁰

99. After finding that the text of Article II:1(b) did not address the question whether a violation of Article II could result merely from the application a *type* of duty different from the *type* of duty provided for in a Member’s Schedule, the Appellate Body in *Argentina – Textiles and Apparel* addressed the question whether Argentina had applied customs duties *in excess of* those provided for in its Schedule:

“[T]he application of a *type* of duty different from the *type* provided for in a Member’s Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member’s Schedule. In this case, we find that Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff

category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent *ad valorem* in Argentina’s Schedule.”¹⁸¹

100. In reaching this conclusion, the Appellate Body in *Argentina – Textiles and Apparel* pointed out the possibility of a price sufficiently low to render the *ad valorem* equivalent of the DIEM greater than 35 per cent:

“[W]e may generalize that under the Argentine system, whether the amount of the DIEM is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a ‘break-even’ price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent.

We note that it is possible, under certain circumstances, for a Member to design a legislative ‘ceiling’ or ‘cap’ on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member’s Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member’s Schedule. However, no such “ceiling” exists in this case. The measures at issue here, as we have already noted, specifically and expressly require Argentine customs officials to collect the *greater* of the *ad valorem* or the specific duties applicable, with no upper limit on the level of the *ad valorem* equivalent of the specific duty that may be imposed. Before the Panel, Argentina argued that its domestic challenge procedure (*recurso de impugnación*), in combination with the precedence and direct effect of international treaty obligations in the Argentine national legal system, operated as an effective legislative ‘ceiling’ to ensure that a duty in excess of the bound rate of 35 per cent *ad valorem* could never actually be imposed. The Panel did not accept this argument, and Argentina has not appealed from that finding of the Panel. In this case, therefore, there is no effective legislative ‘ceiling’ in the Argentine system which ensures that duties in excess of the bound rate of 35 per cent *ad valorem* will not be applied.”¹⁸²

¹⁷⁷ Panel Report on *Argentina – Textiles and Apparel*, paras. 6.31–6.32.

¹⁷⁸ Panel Report on *Argentina – Textiles and Apparel*, para. 6.31.

¹⁷⁹ Panel Report on *Argentina – Textiles and Apparel*, para. 6.65.

¹⁸⁰ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 46.

¹⁸¹ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 55.

¹⁸² Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 53–54.

(b) Article II:1(b) Second sentence

101. The Appellate Body on *Chile – Price Band System* reversed the Panel's finding that the duties resulting from Chile's price band system constituted a violation of the *second* sentence of Article II:1(b), because no claim had been made under that provision, and therefore the Panel had acted inconsistently with Article 11 of the DSU.¹⁸³ See Section XI.B(2)(a)(ii) of the Chapter on the DSU.

102. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the Agreement on Agriculture, referred to Article II:1(b) second sentence of the GATT 1994. See Section V.B.2 of the Chapter on the *Agreement on Agriculture*.

3. Relationship between paragraphs 1(a) and 1(b)

103. In *Argentina – Textiles and Apparel*, in addressing the consistency with GATT Article II of certain minimum specific duties imposed on textiles and apparel, the Appellate Body described the relationship between paragraphs (a) and (b) of Article II:1 as follows:

"The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule. Article II:1(b), first sentence, states, in part: 'The products described in Part I of the Schedule . . . shall, on their importation into the territory to which the Schedule relates, . . . be exempt from ordinary customs duties in excess of those set forth and provided therein.' Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule. Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision."¹⁸⁴

4. Article II:5

104. In *EC – Computer Equipment*, the Appellate Body rejected the Panel's finding that Article II:5 confirmed the relevance of "legitimate expectations" of the exporting Member for interpreting tariff concessions of the importing Member:

"[W]e reject the Panel's view that Article II:5 of the GATT 1994 confirms that 'legitimate expectations are a vital element in the interpretation' of Article II:1 of the GATT 1994 and of Members' Schedules. It is clear from the wording of Article II:5 that it does not support the Panel's view. This paragraph recognizes the possibility that the

treatment *contemplated* in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment *accorded* to that product and provides for a compensatory mechanism to rebalance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the 'contemplated treatment' referred to in that provision is the treatment contemplated by *both* Members."¹⁸⁵

5. Article II:7

105. In *EC – Computer Equipment*, the Appellate Body considered that "[a] Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994". The Appellate Body thus concluded that "the concessions provided for in that Schedule are part of the terms of the treaty".¹⁸⁶ In this regard, see paragraph 89 above.

D. RELATIONSHIP WITH OTHER ARTICLES

1. General

106. In *EC – Bananas III*, the Appellate Body, discussing whether tariff concessions for agricultural products can deviate from Article XIII of *GATT 1994*, emphasized that in their Schedules, Members may yield their rights, but may not diminish their obligations under *GATT 1994*. See paragraph 84 above.

2. Article III

107. In *EC – Bananas III*, the Appellate Body rejected the argument that Article III:4 of the *GATT 1994* did not cover the EC licensing system for the allocation of tariff quotas for imports of bananas because it was a border measure. See paragraphs 125 and 285 below.

108. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of treating grass-fed beef and grain-fed beef differently was inconsistent with GATT Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Articles III:4 and XVII of GATT."¹⁸⁷

¹⁸³ Appellate Body Report on *Chile – Price Band System*, para. 285.

¹⁸⁴ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.

¹⁸⁵ Appellate Body Report on *EC – Computer Equipment*, para. 81.

¹⁸⁶ Appellate Body Report on *EC – Computer Equipment*, para. 84.

¹⁸⁷ Panel Report on *Korea – Various Measures on Beef*, para. 780. With respect to judicial economy in general, see Chapter on DSU, Section XXXVI.F.

3. Article XI

109. The majority of the Panel on *US – Certain EC Products* decided that the United States' bonding requirements on imports from the European Communities fell within the scope of Article II of *GATT 1994*; in a separate opinion, one panelist, whose identity remained confidential pursuant to Article 14.3 of the *DSU*, expressed the view that the increased bonding requirement was subject to, and inconsistent with, Article XI. The Appellate Body reversed the finding of the Panel. See paragraph 69 above, and footnote 126.

4. Article XIII

110. Following the finding referenced in paragraph 106 above, the Appellate Body in *EC – Bananas III* addressed whether the *Agreement on Agriculture* permits market access concessions on agricultural products to be inconsistent with Article XIII of *GATT 1994*. In so doing, the Appellate Body addressed the relationship between the *Agreement on Agriculture* and *GATT 1994* and found that Article XIII of *GATT 1994* was applicable to such concessions:

"The question remains whether the provisions of the *Agreement on Agriculture* allow market access concessions on agricultural products to deviate from Article XIII of the *GATT 1994*. The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective *GATT* rules and disciplines'. The relationship between the provisions of the *GATT 1994* and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:

'The provisions of *GATT 1994* and of other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement* shall apply subject to the provisions of this *Agreement*.'

Therefore, the provisions of the *GATT 1994*, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter."¹⁸⁸

111. In *EC – Bananas III*, the Panel also found that the European Communities' import regime for bananas was inconsistent with Article XIII of *GATT 1994* in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. In doing so, with respect to the relationship between Articles II and XIII, the Panel stated as follows:

"The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other *GATT* provisions after an analysis of the wording of Article II, its object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof. . . ."¹⁸⁹

...
We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the *GATT CONTRACTING PARTIES* in the middle of the Round (June 1989)."¹⁹⁰

5. Article XVII

112. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of treating grass-fed beef and grain-fed beef differently was inconsistent with *GATT* Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Article XVII of *GATT*"¹⁹¹.

E. EXCEPTIONS AND DEROGATIONS FROM ARTICLE II

1. Waivers

113. A number of waivers of a "collective" or individual nature have been granted to enable Members to implement the HS changes domestically and undertake Article XXVIII negotiations, subsequently, if required. With respect to these waivers, see the Chapter on the *WTO Agreement*.

¹⁸⁸ Appellate Body Report on *EC – Bananas III*, para. 155.

¹⁸⁹ Following this paragraph, the Panel cited Panel Report on *US – Sugar*, paras. 5.1–5.7.

¹⁹⁰ Panel Report on *EC – Bananas III*, paras. 7.113–7.114. In support of its finding, the Panel cited Appellate Body Report on *Japan – Alcoholic Beverages II*, p.15, as stating that "[a]dopted panel reports are an important part of the *GATT acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".

¹⁹¹ Panel Report on *Korea – Various Measures on Beef*, para. 780. With respect to judicial economy in general, see Chapter on *DSU*, Section XXXVI.F.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

114. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the *Agreement on Agriculture*, referred to Article II:1(b) of *GATT 1994*. See Section V.B.3 of the Chapter on the *Agreement on Agriculture*. The Appellate Body also indicated that if it were to find that Chile's price band system was inconsistent with Article 4.2 of the *Agreement on Agriculture*, it would not need to make a separate finding on whether Chile's price band system also results in a violation of Article II:1(b) of the *GATT 1994* to resolve this dispute.¹⁹²

2. Licensing Agreement

115. In *Canada – Dairy*, the Panel decided not to examine a claim that Canada violated Article 3 of the *Licensing Agreement* in that it restricted access to tariff-rate quotas for imports of fluid milk to Canadians of consumer packaged milk for personal use, valued less than Can\$20, after having found the Canadian measure inconsistent with *GATT* Article II:1(b) (see paragraph 86 above).¹⁹³ See Chapter on the *Licensing Agreement*, paragraph 33.

PART II

IV. ARTICLE III

A. TEXT OF ARTICLE III

*Article III**

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

¹⁹² Appellate Body Report on *Chile – Price Band System*, para. 190.

¹⁹³ Panel Report on *Canada – Dairy*, para. 7.157.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

B. TEXT OF AD ARTICLE III

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be

inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

C. INTERPRETATION AND APPLICATION OF ARTICLE III

1. General

(a) Purpose of Article III

(i) *Avoidance of protectionism in the application of internal measures*

116. In examining the consistency of the Japanese taxation on liquor products with Article III, the Appellate Body in *Japan – Alcoholic Beverages II* explained the purpose of Article III in the following terms:

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production"'.¹⁹⁴ Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.¹⁹⁵ [T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given'.¹⁹⁶"¹⁹⁷

117. The Appellate Body repeatedly cited its finding referenced in paragraph 116 above.¹⁹⁸ Further, in *Korea – Alcoholic Beverages*, the Appellate Body added:

¹⁹⁴ (footnote original) Panel Report on *US – Section 337*, para. 5.10.

¹⁹⁵ (footnote original) Panel Reports on *US – Superfund*, para. 5.1.9; and *Japan – Alcoholic Beverages II*, para. 5.5(b).

¹⁹⁶ (footnote original) Panel Report on *Italy – Agricultural Machinery*, para. 11.

¹⁹⁷ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.

¹⁹⁸ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119; Appellate Body Report on *Chile – Alcoholic Beverages*, para. 67; and Appellate Body Report on *EC – Asbestos*, para. 97. See also Panel Report on *Indonesia – Autos*, para. 14.108.

"In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable'." ¹⁹⁹

118. Also, in *Canada – Periodicals*, the Appellate Body added:

"The fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products." ²⁰⁰ ²⁰¹

119. In *Argentina – Hides and Leather*, the Panel referred to the findings of the Appellate Body referenced in paragraphs 116–118 above, and stated that "Article III:2, first sentence, is not concerned with taxes or changes as such or the policy purposes Members pursue with them, but with their economic *impact* on the competitive opportunities of imported and like domestic products." ²⁰² See also paragraph 176 below.

(ii) *Protection of tariff commitments under Article III/Relevance of tariff concessions*

120. In *Japan – Alcoholic Beverages II*, the Panel held that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II." ²⁰³ Although the Appellate Body agreed about the significance of Article III with respect to tariff concessions, it emphasized that the purpose of Article III was broader:

"The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that 'one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II' should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III." ²⁰⁴

(iii) *Comparison with competition law*

121. In *Korea – Alcoholic Beverages*, the Panel, in a statement subsequently not addressed by the Appellate Body, considered that it is not necessary to use the same criteria for defining markets under Article III:2 as under competition law. The Panel stated:

"While the specifics of the interaction between trade and competition law are still being developed, we concur that the market definitions need not be the same. Trade law generally, and Article III in particular, focuses on the promotion of economic opportunities for importers through the elimination of discriminatory governmental measures which impair fair international trade. Thus, trade law addresses the issue of the potentiality to compete. Antitrust law generally focuses on firms' practices or structural modifications which may prevent or restrain or eliminate competition. It is not illogical that markets be defined more broadly when implementing laws primarily designed to protect competitive opportunities than when implementing laws designed to protect the actual mechanisms of competition. In our view, it can thus be appropriate to utilize a broader concept of markets with respect to Article III:2, second sentence, than is used in antitrust law. We also take note of the developments under European Community law in this regard. For instance, under Article 95 of the Treaty of Rome, which is based on the language of Article III, distilled alcoholic beverages have been considered similar or competitive in a series of rulings by the European Court of Justice ('ECJ'). ²⁰⁵ On the other hand, in examining a merger under the European Merger Regulation, ²⁰⁶ the Commission of the European Communities found that whisky constituted a separate market. ²⁰⁷ Similarly, in an Article 95 case, bananas were considered in competition with other fruits. ²⁰⁸ However, under EC competition law, bananas constituted a distinct product market. ²⁰⁹ We are mindful that the Treaty of Rome is different in scope and purpose from the General Agreement, the similarity of Article 95 and Article III, notwithstanding. Nonetheless, we observe that there is relevance in examining how the ECJ has defined markets in similar situations to assist in understanding the relationship between the

¹⁹⁹ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.

²⁰⁰ (footnote original) Panel Reports on *US – Tobacco*, para. 99; *US – Malt Beverages*, para. 5.6; *Canada – Provincial Liquor Boards (EEC)*, para. 5.6; *US – Section 337*, para. 5.13; *US – Superfund*, para. 5.1.9; *Brazil – Internal Taxes*, para. 15.

²⁰¹ Appellate Body Report on *Canada – Periodicals*, p. 18.

²⁰² Panel Report on *Argentina – Hides and Leather*, para. 11.182. (emphasis added)

²⁰³ Panel Report on *Japan – Alcoholic Beverages II*, para. 6.13.

²⁰⁴ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 16–17.

²⁰⁵ (footnote original) See *Commission v. France*, Case 168/78, 1980 ECR 347; *Commission v. Kingdom of Denmark*, Case 171/78, 1980 ECR 447; *Commission v. Italian Republic*, Case 319/81, 1983 ECR 601; *Commission v. Hellenic Republic*, Case 230/89, 1991 ECR 1909.

²⁰⁶ (footnote original) Council Regulation No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

²⁰⁷ (footnote original) Case No. IV/M 938 – *Guinness/Grand Metropolitan*.

²⁰⁸ (footnote original) *Commission v. Italy*, Case 184/85, 1987 ECR 2013.

²⁰⁹ (footnote original) *United Brands v. Commission*, Case 27/76, 1978 ECR 207.

analysis of non-discrimination provisions and competition law.^{210/211}

(iv) *Reference to GATT practice*

122. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 125–127.

(b) *Scope of application – measures imposed at the time or point of importation*

123. In *Argentina – Hides and Leather*, the Panel addressed the question whether Argentine fiscal provisions concerning pre-payment of a value added tax, applied to imported goods at the time of their importation, were nevertheless to be considered “internal measures” within the meaning of Article III:2. The Panel addressed in particular Note *Ad Article III*, which sets forth that a measure applied to a product at the time of importation is nevertheless an internal measure within the meaning of Article III if this measure is also imposed on the like domestic product:

“RG 3431 [the value-added tax measure applicable to imported goods] applies to definitive import transactions, but only if the products imported are subsequently re-sold in the internal Argentinean market. In other words, RG 3431 provides for the pre-payment of the IVA chargeable to an *internal* transaction. It should also be pointed out that the fact that RG 3431 is collected at the time and point of importation does not preclude it from qualifying as an internal tax measure.”²¹²

124. While the parties to the *Argentina – Hides and Leather* dispute agreed that RG 3543, another Argentine tax measure imposing a collection regime of income taxes with respect to import transactions, was an internal measure within the meaning of Article III, they disagreed with respect to the question whether the same tax regime existed for domestic goods, i.e. whether RG 2784, the income tax measure applicable with respect to domestic transactions, was the “internal analogue” of RG 3431. While RG 3543 established a *collection* regime and defined the *purchaser* as the taxable person, RG 2784 established a *withholding* regime and defined the *seller* as the taxable person. The Panel did not consider these differences significant enough for the Argentine regime to fall outside the scope the Note *Ad Article III*:

“[I]t is clear that the fact that RG 3543 creates a collection regime and not a withholding regime does not establish, in itself, that RG 2784 is not equivalent to RG 3543. The use of a different method of taxation may be justified by objective reasons. In this regard, it seems logical to us to collect pre-payments of an income tax from the sellers of a product, as indeed RG 2784 envisages. As we understand it, RG 3543 does not do so, *inter alia*, because foreign sellers are not normally subject to income taxation in Argentina. In those circumstances,

Argentina apparently saw fit to adjust for the adverse competitive effect of RG 2784 on domestic products by collecting pre-payments from importers in accordance with RG 3543.

For these reasons, we find that RG 3543 establishes a mechanism for the collection of the IG at the border which is equivalent in nature to the IG withholding mechanism established by RG 2784. In accordance with the Note *Ad Article III*, we therefore conclude that RG 3543 is an internal measure within the meaning of Article III:2.”²¹³

125. In *EC – Bananas III*, the Appellate Body found the EC import licensing system for bananas inconsistent with Article III:4. The European Communities claimed that Article III:4 was not applicable to the import licensing system because it was a border measure. The Appellate Body replied as follows:

“At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European Communities are within the scope of this provision. The EC licensing procedures and requirements include the operator category rules, under which 30 per cent of the import licences for third-country and non-traditional ACP bananas are allocated to operators that market EC or traditional ACP bananas, and the activity function rules, under which Category A and B licences are distributed among operators on the basis of their economic activities as importers, customs clearers or ripeners. These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect ‘the internal sale, offering for sale, purchase, . . .’ within the meaning of Article III:4, and therefore fall within the scope of this provision. Therefore, we agree with the conclusion of the Panel on this point.”²¹⁴

(i) *State trading enterprises*

126. In *Korea – Various Measures on Beef*, the Panel recognized that where a state trading enterprise has a

²¹⁰ (*footnote original*) In finding the relationship of the provisions to each other relevant, we do not intend to imply that we have adopted the market definitions defined in these or other ECJ cases for purposes of this decision.

²¹¹ Panel Report on *Korea – Alcoholic Beverages*, para. 10.81.

²¹² Panel Report on *Argentina – Hides and Leather*, para. 11.145.

²¹³ Panel Report on *Argentina – Hides and Leather*, paras. 11.150 and 11.154.

²¹⁴ Appellate Body Report on *EC – Bananas III*, para. 211.

monopoly over both importation and distribution of goods, a blurring may occur of the traditional distinction between measures affecting imported products and measures affecting importation:

“Based on the panel findings in the Canada – Marketing Agencies (1988) case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the importation of products (i.e. border measures) and restrictions affecting imported products (i.e. internal measures) loses much of its significance.”²¹⁵

(ii) *Reference to GATT practice*

127. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 136–139.

(c) *Relevance of policy purpose of internal measures / “aims-and-effects” test*

128. With respect to the relevance of policy purposes of subject internal measures, in *Japan – Alcoholic Beverages II*, the Appellate Body stated as follows:

“Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement.”²¹⁶

129. In this respect, in *Argentina – Hides and Leather*, the Panel stated that “[i]t must be stated . . . that the applicability of Article III:2 is not conditional upon the policy purpose of a tax measure.”²¹⁷²¹⁸ See also paragraph 119 above.

130. In *Japan – Alcoholic Beverages II*, the Panel, in a finding subsequently upheld by the Appellate Body, explicitly rejected the so-called “aims-and-effects” test. The Panel summarized the parties’ arguments for the “aims-and-effects” test as follows:

“Japan . . . essentially argued that the Panel should examine the contested legislation in the light of its aim and effect in order to determine whether or not it is consistent with Article III:2. According to this view, in case the aim and effect of the contested legislation do not operate so as to afford protection to domestic production, no inconsistency with Article III:2 can be established. . . . [T]he United States . . . essentially argued that, in determining whether two products that were taxed differently under a Member’s origin-neutral tax measure were nonetheless ‘like products’ for the purposes of Article III:2, the Panel should examine not only the similarity in physical characteristics and end-uses, consumer tastes and preferences, and tariff classifications for each product, but also whether the tax distinction in question was ‘applied . . . so as to afford protection to domestic pro-

duction’: that is, whether the aim and effect of that distinction, considered as a whole, was to afford protection to domestic production. According to this view, if the tax distinction in question is not being applied so as to afford protection to domestic production, the products between which the distinction is drawn are not to be deemed ‘like products’ for the purpose of Article III:2.”²¹⁹

131. In upholding the rejection by the Panel of the “aims-and-effects” test under Article III:2, first sentence, the Appellate Body, in *Japan – Alcoholic Beverages II*, found that the policy purpose of a tax measure (the “aim” of a measure) was not relevant for the purpose of Article III:2, first sentence:

“Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures ‘so as to afford protection’. This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. . . . If the imported and domestic products are ‘like products’, and if the taxes applied to the imported products are ‘in excess of’ those applied to the domestic like products, then the measure is inconsistent with Article III:2, first sentence.”²²⁰

132. Also, in *EC – Bananas III*, the Appellate Body rejected the “aims-and-effects” test under both Article II and Article XVII of the GATS.²²¹ See Chapter on the GATS, Section XXI.B.3.

133. With respect to this topic, see also paragraph 219 below.

(i) *Reference to GATT practice*

134. With respect to GATT practice on this subject-matter, see GATT Analytical Index, page 127.

(d) *Relevance of trade effects*

135. In *Japan – Alcoholic Beverages II*, the Appellate Body addressed the relevance of the trade effects of measures falling under the scope of Article III:

²¹⁵ Panel Report on *Korea – Various Measures on Beef*, para. 766.

²¹⁶ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.

²¹⁷ (footnote original) See the Panel Reports on *US – Superfund*, para. 5.2.4, *EEC – Parts and Components*, para. 5.6.

²¹⁸ Panel Report on *Argentina – Hides and Leather*, para. 11.144.

²¹⁹ Panel Report on *Japan – Alcoholic Beverages II*, para. 6.15.

²²⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 18–19.

²²¹ Appellate Body Report on *EC – Bananas III*, paras. 216 and 241.

"[I]t is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."²²²"²²³

136. The Appellate Body reiterated this approach in *Canada – Periodicals*:

"It is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III."²²⁴"²²⁵

(i) *Reference to GATT practice*

137. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 128–130.

(e) *State trading monopolies*

138. In *Korea – Various Measures on Beef*, the Panel addressed the relationship between Article XVII, the provision on state trading enterprises, and Article III. Finding support for its conclusions in GATT practice, the Panel held:

"Article XVII.1(a) establishes the general obligation on state trading enterprises to undertake their activities in accordance with the GATT principles of non-discrimination. The Panel considers that this general principle of non-discrimination includes at least the provisions of Articles I and III of GATT.

...

... A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII."²²⁶

(i) *Reference to GATT practice*

139. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 131–133.

2. Article III:1

(a) *Relationship between paragraph 1 and paragraphs 2, 4 and 5*

140. In *US – Gasoline*, in a finding subsequently not addressed by the Appellate Body, the Panel examined whether a US gasoline regulation treated imported gasoline in a manner inconsistent with Article III:1. In response to the US argument that Article III:1 "could not form the basis of a violation"²²⁷, the Panel answered as follows:

"The Panel examined first whether, after making a finding of inconsistency with Article III:4, it should make a

finding under Article III:1. The Panel noted that the panel in the *Malt Beverages* case had examined a claim made under paragraphs 1, 2 and 4 of Article III. That panel had concluded that 'because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider [the complainant's] Article III:1 allegations to the extent that the Panel were to find [the respondent's] measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.'²²⁸ The present Panel agreed with this reasoning, and therefore did not find it necessary to examine the consistency of the Gasoline Rule with Article III:1."²²⁹

141. In *Japan – Alcoholic Beverages II*, the Appellate Body examined the Panel's finding of inconsistency of the Japanese Liquor Tax Law with both sentences of Article III:2. With respect to the legal status of Article III:1, the Appellate Body invoked the principle of effective treaty interpretation and found that Article III:1 constitutes part of the context for Article III:2:

"The terms of Article III must be given their ordinary meaning – in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which 'contains general principles', and Article III:2, which 'provides for specific obligations regarding internal taxes and internal charges'. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness,

²²² (*footnote original*) Panel Report on *US – Superfund*, para. 5.1.9.

²²³ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16. This statement was endorsed in *Korea – Alcoholic Beverages*.

Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119. See also Panel Report on *Indonesia – Autos*, para. 14.108.

²²⁴ (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.

²²⁵ Appellate Body Report on *Canada – Periodicals*, p. 18.

²²⁶ Panel Report on *Korea – Various Measures on Beef*, paras. 753 and 757.

²²⁷ Panel Report on *US – Gasoline*, para. 6.17.

²²⁸ (*footnote original*) *US – Malt Beverages*, para. 5.2.

²²⁹ Panel Report on *US – Gasoline*, para. 6.17.

and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.”²³⁰

142. In *EC – Asbestos*, the Appellate Body, in interpreting Article III:4 by comparing its terms with the terms used in Article III:2, referred to Article III:1. See paragraph 234 below.

143. The precise significance of Article III:1 for the interpretation of Article III:2, first sentence, was also addressed by the Panels on *Argentina – Hides and Leather*. See paragraph 154 below.²³¹

(i) *Reference to GATT practice*

144. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 139–140.

3. Article III:2

(a) General

(i) *General distinction between first and second sentences*

145. In *Japan – Alcoholic Beverages II*, the Appellate Body described the distinction between the first and second sentences of Article III:2 as follows:

“[T]he second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not ‘like products’ as contemplated by the first sentence”²³²

146. In *Canada – Periodicals*, the Appellate Body, in reviewing the Panel’s finding that the Canadian excise tax on magazines was inconsistent with Article III:2, first sentence, also addressed the distinction between the first and second sentence of Article III:2 :

“[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence. If the answer to one question is negative, there is a need to examine further whether the measure is consistent with Article III:2, second sentence.”²³³

147. In *Canada – Periodicals*, the Appellate Body also reiterated its statement from *Japan – Alcoholic Beverages II* that Article III:2, second sentence, contemplates a “broader category of products” than Article III:2, first sentence:

“Any measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2,

first sentence, or by implication, second sentence, given the broader application of the latter.”²³⁴

148. Further, in *Canada – Periodicals*, the Appellate Body rejected Canada’s argument that the imported and domestic periodicals in question were only imperfectly substitutable with each other and, therefore, did not fall under the term “directly competitive or substitutable product”:

“A case of perfect substitutability would fall within Article III:2, first sentence, while we are examining the broader prohibition of the second sentence.”²³⁵

149. In *Korea – Alcoholic Beverages*, the Appellate Body examined the Panel’s finding that Korean tax laws concerning liquor products were inconsistent with Article III:2. In rejecting Korea’s appeal that “potential competition” was not enough to find that subject products were “directly competitive or substitutable products”, the Appellate Body stated as follows:

“The first sentence of Article III:2 also forms part of the context of the term. ‘Like’ products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all ‘directly competitive or substitutable’ products are ‘like’.²³⁶ The notion of like products must be construed narrowly²³⁷ but the category of directly competitive or substitutable products is broader.²³⁸ While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.”²³⁹ ²⁴⁰

(ii) *Relationship with paragraph 1*

150. With respect to the relationship with paragraph 1, see paragraphs 140–143 above.

(iii) *Legal status of Ad Article III*

151. In *Japan – Alcoholic Beverages II*, the Appellate Body defined the legal status of Interpretative Note Ad Article III:2 and its relevance for the interpretation of Article III:2, as follows:

²³⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 17–18.

²³¹ With respect to this issue, see also Panel Report on *Japan – Film*, para. 10.371.

²³² Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 19.

²³³ Appellate Body Report on *Canada – Periodicals*, pp. 22–23.

²³⁴ Appellate Body Report on *Canada – Periodicals*, p. 19.

²³⁵ Appellate Body Report on *Canada – Periodicals*, p. 28.

²³⁶ (footnote original) Panel Report on *Japan – Alcoholic Beverages II*, para. 6.22, approved by the Appellate Body at p. 23 of its Report.

²³⁷ (footnote original) Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 20, and *Canada – Periodicals*, p. 21.

²³⁸ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

²³⁹ (footnote original) Appellate Body Report on *Canada – Periodicals*, p. 28.

²⁴⁰ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.

“Article III:2, second sentence, and the accompanying *Ad Article* have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time. The *Ad Article* does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the *Ad Article* must be read together in order to give them their proper meaning.”²⁴¹

(b) Paragraph 2, first sentence

(i) *General*

Test under Article III:2, first sentence

152. In *Japan – Alcoholic Beverages II*, the Appellate Body clarified the two elements contained in the first sentence of Article III:2 – “like products” and “in excess of”. The Appellate Body established that these requirements constitute, in and of themselves, an application of the general principle contained in Article III:1 and that, consequently, the presence of a protective application need not be established separately from the specific criteria of Article III:2, first sentence:

“Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures so as to afford protection’. This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are ‘like’ and, second, whether the taxes applied to the imported products are ‘in excess of’ those applied to the like domestic products. If the imported and domestic products are ‘like products’, and if the taxes applied to the imported products are ‘in excess of’ those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947. Moreover, it is consistent with the object and pur-

pose of Article III:2, which the panel in the predecessor to this case dealing with an earlier version of the Liquor Tax Law, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* . . ., rightly stated as ‘promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products’.”²⁴²

153. In *Canada – Periodicals*, the Appellate Body reiterated this two-tiered test:

“[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence.”²⁴³

154. In *Argentina – Hides and Leather*, Argentina, citing the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in paragraph 131 above, argued that the existence of a protective application must be determined together with the other specific requirements contained in Article III:2. The Panel rejected this argument:

“We are unable to agree with Argentina’s interpretation of the Appellate Body’s statement. As we understand it, the presence of a protective application need be established neither separately nor together with the specific requirements contained in Article III:2, first sentence. The quoted passage from the Appellate Body report in *Japan – Alcoholic Beverages II* makes clear that Article III:2, first sentence, is, in effect, an application of the general principle stated in Article III:1. Accordingly, whenever imported products from one Member’s territory are subject to taxes in excess of those applied to like domestic products in the territory of another Member, this is deemed to ‘afford protection to domestic production’ within the meaning of Article III:1. It follows that, in applying Article III:2, first sentence, recourse to the general principle of Article III:1 is neither necessary nor appropriate.”²⁴⁴ The only requirements that need to be

²⁴¹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 24. Two panels cited this finding and stated that “*Ad Article III* has equal stature under international law as the GATT language to which it refers, pursuant to Article XXXIV.” Panel Report on *Korea – Alcoholic Beverages*, footnote. 346; and Panel Report on *Chile – Alcoholic Beverages*, footnote. 349.

²⁴² Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 18–19.

²⁴³ Appellate Body Report on *Canada – Periodicals*, pp. 22–23.

²⁴⁴ (*footnote original*) We find further support for our view in the following statement made by the Appellate Body in its report on *EC – Bananas III*, *supra*, at para. 216:

“Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a

demonstrated by the complaining party are those contained in Article III:2, first sentence, itself.²⁴⁵²⁴⁶

Burden of proof

155. In *Japan – Alcoholic Beverages II*, in a finding subsequently not addressed by the Appellate Body, the Panel stated that “complainants have the burden of proof to show first that products are like and second, that foreign products are taxed in excess of domestic ones.”²⁴⁷

156. With respect to the issue of the burden of proof in general, see Section XXXVI.D of the Chapter on the DSU.

(ii) “like domestic products”

Relationship between “like products” and “directly competitive products” under Article III:2

157. In *Japan – Alcoholic Beverages II*, the Appellate Body analysed the scope of the first sentence of Article III:2 in relation to the second sentence of this Article. It held that the term “like products” in Article III:2, first sentence, should be construed narrowly. Subsequently, it considered the basic GATT approach for interpreting “like products” generally in the various provisions of the GATT 1947:

“Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not ‘like products’ as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of ‘like products’ in Article III:2, first sentence, should be construed narrowly.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are ‘like’ on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting ‘like or similar products’ generally in the various provisions of the GATT 1947:

‘... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality’.²⁴⁸

This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*.²⁴⁹ This approach should be helpful in identifying on a case-by-case basis the range of ‘like products’ that fall within the narrow limits of Article III:2, first sentence in the GATT 1994. Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of ‘like products’ in Article III:2, first sentence is meant to be as opposed to the range of ‘like’ products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*. In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are ‘like’. This will always involve an unavoidable element of individual, discretionary judgement. We do not agree with the Panel’s observation in paragraph 6.22 of the Panel Report that distinguishing between ‘like products’ and ‘directly competitive or substitutable products’ under Article III:2 is ‘an arbitrary decision’. Rather, we think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.”²⁵⁰

158. The consequence of the determination whether two products are or are not like was stated by the Appellate Body in *Japan – Alcoholic Beverages II*:

“If imported and domestic products are not ‘like products’ for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their

violation of Article III:4 does *not* require a separate consideration of whether a measure “afford[s] protection to domestic production”.

While this statement relates to Article III:4 of the GATT, which is not at issue in the present case, it nevertheless provides useful clarification for purposes of analysing Argentina’s argument in respect of Article III:2, first sentence. It clearly emerges from this statement that not only is there no requirement separately to establish the presence of a protective application, but that there is not even a requirement separately to consider whether there is a protective application.

²⁴⁵ (footnote original) We note Argentina’s contention that the GATT 1947 panel reports on *Japan – Alcoholic Beverages I*; *US – Section 337*, and *US – Malt Beverages*, lend support to its view that the presence of a protective application must be established for purposes of a claim under Article III:2, first sentence. See paras. 8.228 *et seq.* of this report. Since all of the aforementioned reports pre-date the Appellate Body reports on *Japan – Alcoholic Beverages II* and *EC – Bananas III* and since those Appellate Body reports directly address the issue before us, we see no need to further consider the GATT 1947 reports in this regard.

²⁴⁶ Panel Report on *Argentina – Hides and Leather*, para. 11.137.

²⁴⁷ Panel Report on *Japan – Alcoholic Beverages II*, para. 6.14.

²⁴⁸ (footnote original) Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

²⁴⁹ (footnote original) Panel Reports on *Australia – Ammonium Sulphate*; *EEC – Animal Proteins*; *Spain – Unroasted Coffee*; *Japan – Alcoholic Beverages I*; *US – Superfund*. Also see Panel Report on *US – Gasoline*.

²⁵⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 19–21.

nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of 'directly competitive or substitutable products' that fall within the domain of Article III:2, second sentence."²⁵¹

159. With respect to the nature of like products as a subset of the category of "directly competitive or substitutable products", see also paragraph 149 above.

Relationship with "like products" in Article III:4

160. In *EC – Asbestos*, the Appellate Body discussed the relationship between the term "like products" in Article III:4, and that in the first sentence of Article III:2. See paragraphs 237 and 239 below.

161. In *Japan – Alcoholic Beverages II*, the Panel discussed whether the term "like products" can be interpreted differently between GATT provisions, with a focus on the relationship between Article III:2, first sentence and Article III:4:

"The Panel noted that the term 'like product' appears in various GATT provisions. The Panel further noted that it did not necessarily follow that the term had to be interpreted in a uniform way. In this respect, the Panel noted the discrepancy between Article III:2, on the one hand, and Article III:4 on the other: while the former referred to Article III:1 and to like, as well as to directly competitive or substitutable products (see also Article XIX of GATT), the latter referred only to like products. If the coverage of Article III:2 is identical to that of Article III:4, a different interpretation of the term 'like product' would be called for in the two paragraphs. Otherwise, if the term 'like product' were to be interpreted in an identical way in both instances, the scope of the two paragraphs would be different. This is precisely why, in the Panel's view, its conclusions reached in this dispute are relevant only for the interpretation of the term 'like product' as it appears in Article III:2."²⁵²

Relationship with "like products" in other GATT provisions

162. In *Japan – Alcoholic Beverages II*, the Appellate Body explained the possible differences in the scope of "like products" depending on provisions. To illustrate that the term "like products" will vary between different provisions of the WTO Agreement, the Appellate Body evoked the image of an accordion:

"No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The

width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of 'likeness' is meant to be narrowly squeezed."²⁵³

Hypothetical "like products"

163. In *Canada – Periodicals*, the Panel found that the Canadian excise tax on magazines was inconsistent with Article III:2. Upon appeal, Canada argued that the Panel erred in basing its comparison upon a hypothetical example of periodicals. The Appellate Body endorsed the Panel's recourse to a hypothetical example of imported products:

"As Article III:2, first sentence, normally requires a comparison between imported products and like domestic products, and as there were no imports of split-run editions of periodicals because of the import prohibition in Tariff Code 9958, which the Panel found (and Canada did not contest on appeal) to be inconsistent with the provisions of Article XI of the GATT 1994, hypothetical imports of split-run periodicals have to be considered. As the Panel recognized, the proper test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

- (i) the product's end-uses in a given market;
- (ii) consumers' tastes and habits; and
- (iii) the product's properties, nature and quality.²⁵⁴"²⁵⁵

164. In *Indonesia – Autos*, the Panel examined the consistency with Article III of measures contained in the Indonesian National Car Programme, including the luxury tax exemption given to certain domestically produced cars. On the issue of hypothetical "like products", the Panel referred to the finding of the Appellate Body in *Canada – Periodicals*, referenced in paragraph 163 above, and emphasized the significance of the fact that the Indonesian car programme distinguished between the products at issue on the grounds of nationality of the producer or the origin of the parts and components of the product:

"In *Periodicals*, the Appellate Body recognized the possibility of using hypothetical imports to determine whether a measure violates Article III:2, although in that case the Appellate Body rejected the hypothetical exam-

²⁵¹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

²⁵² Panel Report on *Japan – Alcoholic Beverages II*, para. 6.20.

²⁵³ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 21.

²⁵⁴ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20.

²⁵⁵ Appellate Body Report on *Canada – Periodicals*, pp. 20–21.

ple used by the Panel.²⁵⁶ But this case is different. Under the Indonesian car programmes the distinction between the products for tax purposes is based on such factors as the nationality of the producer or the origin of the parts and components contained in the product. Appropriate hypotheticals are therefore easily constructed. An imported motor vehicle alike in all aspects relevant to a likeness determination would be taxed at higher rate simply because of its origin or lack of sufficient local content. Such vehicles certainly can exist (and, as demonstrated above, do in fact exist). In our view, such an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products. This is directly in accord with the broad purposes of Article III:2, as outlined by the Appellate Body²⁵⁷

165. In *Argentina – Hides and Leather*, referring to the finding of the Panel on *Indonesia – Autos* referenced in paragraph 164 above. The Panel reiterated this standard of varying “quantum and nature of the evidence” required for a finding under Article III:2, first sentence, depending on the “structure and design” of the measure at issue:

“In the case before us, the European Communities has neither compared specific products nor addressed the criteria relevant to determining likeness. The European Communities considers that it is not incumbent upon it to do so. We agree. In circumstances such as those confronting us in this case no comparison of specific products is required. Logically, no examination of the various criteria relevant to determining likeness is then called for either.

We consider that in the specific context of a claim under Article III:2, first sentence, the quantum and nature of the evidence required for a complaining party to discharge its burden of establishing a violation is dependent, above all, on the structure and design of the measure in issue.²⁵⁸ The structure and design of RG 3431 and RG 3543 and their domestic counterparts RG 3337 and RG 2784 are such that the level of tax pre-payment is not determined by the physical characteristics or end-uses of the products subject to these resolutions, but instead is determined by factors which are not relevant to the definition of likeness, such as whether a particular product is definitively imported into Argentina or sold domestically as well as the characteristics of the seller or purchaser of the product.²⁵⁹ It is therefore inevitable, in our view, that like products will be subject to RG 3431 and its domestic counterpart, RG 3337. The same holds true for RG 3543 and its domestic counterpart, RG 2784.²⁶⁰ The European Communities has demonstrated this to our satisfaction, and, in our view, this is all it needs to establish in the present case as far as the ‘like product’ requirement contained in Article III:2, first sentence, is concerned.

This view is consistent with that adopted by the panel in *Indonesia – Autos*. That panel was of the view that:

‘. . . an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products.’²⁶¹ ²⁶²

Relevant factors for the determination of “likeness”

General

166. In *Japan – Alcoholic Beverages II*, the Appellate Body was called upon to examine the Panel’s finding of inconsistency of the Japanese Liquor Tax Law with Article III:2. The Appellate Body analysed what factors to take into consideration in deciding whether two products in question were “like products”:

“We agree with the practice under the GATT 1947 of determining whether imported and domestic products are ‘like’ on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting ‘like or similar products’ generally in the various provisions of the GATT 1947:

. . . the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is ‘similar’: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality.²⁶³

²⁵⁶ (footnote original) Appellate Body Report on *Canada – Periodicals*, pp. 20–21.

²⁵⁷ Panel Report on *Indonesia – Autos*, para. 14.113.

²⁵⁸ (footnote original) As the Appellate Body has stated in *US – Wool Shirts and Blouses*, p. 14:

“In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.”

²⁵⁹ (footnote original) In our view, the mere fact that a product is of non-Argentinean origin or that it is being definitively imported into Argentina does not, *per se*, distinguish it – in terms of its physical characteristics and end-uses – from a product of Argentinean origin or a product which is being sold inside Argentina. Nor does likeness turn on whether the sellers or purchasers of the products under comparison qualify as registered or non-registered taxable persons or as *agentes de percepción* under Argentinean tax law.

²⁶⁰ (footnote original) This view is unaffected by the fact that, according to the Appellate Body, the term “like products”, as it appears in Article III:2, first sentence, is to be construed narrowly and on a case-by-case basis. See the Appellate Body Report on *Japan – Alcoholic Beverages*, pp. 19–20.

²⁶¹ (footnote original) Panel Report on *Indonesia – Autos*, para. 14.113. See also the Panel Reports on *Korea – Various Measures on Beef*, para. 627 (with respect to Article III:4 of the GATT 1994) and *US – Certain EC Products*, para. 6.54 (with respect to Article I:1 of the GATT 1994).

²⁶² Panel Report on *Argentina – Hides and Leather*, paras. 11.168–11.170.

²⁶³ The Appellate Body cited Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*. This approach should be helpful in identifying on a case-by-case basis the range of 'like products' that fall within the narrow limits of Article III:2, first sentence in the GATT 1994."²⁶⁴

167. In *Canada – Periodicals*, the Appellate Body reiterated the aforementioned finding in *Japan – Alcoholic Beverages II*:

"[T]he proper test is that a determination of 'like products' for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

- (i) the product's end-uses in a given market;
- (ii) consumers' tastes and habits; and
- (iii) the product's properties, nature and quality."²⁶⁵

168. With respect to the criteria of likeness, see also the Panel Report on *Argentina – Hides and Leather*, where the Panel referred to the Appellate Body's finding in *Canada – Periodicals* referenced in paragraph 167 above.²⁶⁶

Relevance of tariff classifications and bindings

169. In *Japan – Alcoholic Beverages II*, the Appellate Body addressed the relevance of tariff classification for establishing the "likeness" of products:

"A uniform tariff classification of products can be relevant in determining what are 'like products'. If sufficiently detailed, tariff classification can be a helpful sign of product similarity. Tariff classification has been used as a criterion for determining 'like products' in several previous adopted panel reports.²⁶⁷ For example, in the 1987 *Japan – Alcohol* Panel Report, the panel examined certain wines and alcoholic beverages on a 'product-by-product basis' by applying the criteria listed in the Working Party Report on *Border Tax Adjustments*,

... as well as others recognized in previous GATT practice (see BISD 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan."²⁶⁸²⁶⁹

170. In *Japan – Alcoholic Beverages II*, in addition to tariff classification, the Appellate Body also examined the relevance of tariff bindings for the determination of "like products". In contrast to tariff classification, the Appellate Body expressed reservations about the reliability of tariff bindings as a criterion in establishing "likeness":

"Uniform classification in tariff nomenclatures based on the Harmonized System (the 'HS') was recognized in GATT 1947 practice as providing a useful basis for confirming 'likeness' in products. However, there is a major

difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product 'likeness'. Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the *WTO Agreement*. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products. This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of 'like products'. Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product 'likeness' under Article III:2."²⁷⁰

171. With respect to the purpose of Article III as it relates to tariff bindings, see paragraph 120 above.

Reference to GATT practice

172. With respect to the interpretation of the "like products" under Article III:2, see also GATT Analytical Index, pages 155–159.

(iii) "internal tax or other internal charge of any kind"

173. In *Argentina – Hides and Leather*, the Panel examined whether the measures at issue, establishing a mechanism for the collection of certain taxes, were covered by Article III:2. The Panel found that the measures provide for the imposition of charges and create a liability and, as such, fall under the scope of Article III:2:

"We consider that RG 3431 and RG 3543 are properly viewed not as taxes in their own right, but as mecha-

²⁶⁴ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20. In *Indonesia – Autos*, the Panel followed this finding of the Appellate Body. Panel Report on *Indonesia – Autos*, para. 14.109.

²⁶⁵ Appellate Body Report on *Canada – Periodicals*, pp. 21–22.

²⁶⁶ Panel Report on *Argentina – Hides and Leather*, para. 11.167.

²⁶⁷ (footnote original) Panel Reports on *EEC – Animal Proteins, Japan – Alcoholic Beverages I*; and *US – Gasoline*.

²⁶⁸ (footnote original) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.6.

²⁶⁹ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 21–22.

²⁷⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, p.22.

nisms for the collection of the IVA [value-added tax] and IG [income tax]. What is special, however, about RG 3431 and RG 3543 as mechanisms for the collection of the IVA and IG is that they provide for the imposition of charges. We recall that Article III:2 covers ‘charges of any kind’ (emphasis added). The term ‘charge’ denotes, *inter alia*, a ‘pecuniary burden’ and a ‘liability to pay money laid on a person . . .’. There can be no doubt, in our view, that both RG 3431 and RG 3543 impose a pecuniary burden and create a liability to pay money. Moreover, the charges provided for in RG 3431 and RG 3543 represent advance payments of the IVA and IG. RG 3431 and RG 3543 in effect impose on importers part of their definitive IVA and IG liability. It is clear to us, therefore, that the charges in question qualify as tax measures. As such, they fall to be assessed under Article III:2.

With regard to Argentina’s argument that RG 3431 and RG 3543 are measures designed to achieve efficient tax administration and collection and as such do not fall under Article III:2, it should be noted that Argentina has provided no support for this argument, except to say that it is up to Members to decide how best to achieve efficient tax administration. We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit. However, if, as here, such ‘tax administration’ measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that ‘tax administration’ measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2. It must be stated, moreover, that the applicability of Article III:2 is not conditional upon the policy purpose of a tax measure.²⁷¹ On that basis, we cannot agree with Argentina that charges intended to promote efficient tax administration or collection *a priori* fall outside the scope of Article III:2.”²⁷²

Reference to GATT practice

174. With respect to practice on this subject-matter under GATT, see GATT Analytical Index, pages 141–150.

(iv) “*in excess of those applied*”

General

175. In *Japan – Alcoholic Beverages II*, the Appellate Body established a strict standard for the term “in excess of” under Article III:2, first sentence:

“The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are ‘in excess of’ those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of ‘excess’ is

too much. ‘The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a “trade effects test” nor is it qualified by a *de minimis* standard.’”²⁷³

Methodology of comparison – “individual import transactions” basis

176. In *Argentina – Hides and Leather*, the Panel explained the method of comparison, for the purposes of Article III:1, first sentence, of the tax burdens imposed on imports and on domestic like products. In the case before it, the Panel emphasized that Article III:2, first sentence, requires a comparison of *actual* tax burdens rather than merely of *nominal* tax burdens:

“[I]t is necessary to recall the purpose of Article III:2, first sentence, which is to ensure ‘equality of competitive conditions between imported and like domestic products’²⁷⁴. Accordingly, Article III:2, first sentence, is not concerned with taxes or charges as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic products. It follows, in our view, that what must be compared are the tax burdens imposed on the taxed products.

We consider that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens. Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products. In this regard, the GATT 1947 panel in *Japan – Alcoholic Beverages I* has stated that:

... in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods (e.g. different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (e.g. basis of assessment).²⁷⁵

It may thus be stated, in more general terms, that a determination of whether an infringement of Article

²⁷¹ (footnote original) See the Panel Reports on *US – Superfund*, para. 5.2.4, *EEC – Parts and Components*, para. 5.6.

²⁷² Panel Report on *Argentina – Hides and Leather*, paras. 11.143–11.144.

²⁷³ Appellate Body Report on *Japan – Alcoholic Beverages II*, p.23. This finding was followed by the Panel on *Argentina – Hides and Leather*. Panel Report on *Argentina – Hides and Leather*, para. 11.243.

²⁷⁴ (footnote original) Appellate Body Report on *Canada – Periodicals*, p. 18.

²⁷⁵ (footnote original) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.8.

III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.”²⁷⁶

177. In *Argentina – Hides and Leather*, the measure at issue was, *inter alia*, an income tax provision under which customs authorities collected a certain amount of tax when foreign goods were definitively imported into Argentina. The normal applicable tax rate was 3 per cent. The corresponding provision for internal sales provided for a withholding rate of 2 or 4 per cent, depending on whether the payment, on which the tax was being withheld, was made to a registered or non-registered taxpayer. Argentina argued that the measure applicable to imported goods was consistent with Article III:2, first sentence because, “the 3 percent rate applicable to imports is lower than the 4 percent rate applicable to like domestic products”. The Panel explained:

“Article III:2, first sentence, is applicable to each individual import transaction. It does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances.”²⁷⁷ ²⁷⁸

178. In *Canada – Periodicals*, the Appellate Body also addressed the issue of “balancing more favourable treatment in some instances against less favourable treatment in other instances “under Article III:2, second sentence. See paragraph 217 below.

179. With respect to the methodology of comparison used to examine the requirement of “no less favourable treatment” under Article III:4, see paragraphs 270–275 below.²⁷⁹

Relevance of duration of tax differentials

180. In *Argentina – Hides and Leather*, the measure at issue provided for the pre-payment of taxes on import sales, while exempting certain types of internal sales from such pre-payment; thus, although a tax liability would arise for every sale, certain internal sales were not subject to the tax *pre-payment* requirement. The Panel held that the loss of interest on the part of the taxpayer due to the pre-payment requirement constituted a tax differential (even if the same nominal tax rates were imposed). The Panel then rejected Argentina’s justification that the tax burden differential was limited to a 30-day period and therefore was *de minimis*:

“The terms of Article III:2, first sentence, prohibit tax burden differentials irrespective of whether they are of limited duration. Moreover, since we have found above that even the smallest tax burden differential is in viola-

tion of Article III:2, first sentence, it would be inconsistent for us to allow tax burden differentials on the basis that their impact is limited to a 30-day period.”²⁸⁰

Relevance of differences among sellers of goods

181. In *Argentina – Hides and Leather*, the Panel addressed Argentina’s tax collection mechanism which required the pre-payment of taxes only with respect to internal sales made by certain taxable persons, so-called *agentes de percepción*, whilst in respect of import transactions, a pre-payment obligation would arise without regard to who made them. See also paragraph 180 above. Finding this mechanism inconsistent with Article III:2, first sentence, the Panel stated:

“As a further consideration, we add that, in the context of an inquiry under Article III:2, first sentence, the mere fact that a domestic product is sold by a non-*agente de percepción* does not, in our view, render a product which is otherwise like an imported product ‘unlike’ that product.”²⁸¹

...

“The identity and circumstances of the persons involved in sales transactions cannot, in our view, serve as a justification for tax burden differentials.”²⁸² ²⁸³

Relevance of distinction based upon nationality of producers or parts and components

182. In *Indonesia – Autos*, the Panel found that tax differences are necessarily inconsistent with Article III:2, first sentence, if they are based only upon the nationality of producers or the origin of the parts and components contained in the products:

²⁷⁶ Panel Report on *Argentina – Hides and Leather*, paras. 11.182–11.184.

²⁷⁷ (*footnote original*) See Panel Report on *US – Tobacco*, para. 98. For reports with respect to Article III:4 of the GATT 1994, see the Panel Reports on *US – Section 337*, para. 5.14; *US – Gasoline*, para. 6.14.

²⁷⁸ Panel Report on *Argentina – Hides and Leather*, para. 11.260.

²⁷⁹ Further, with respect to the methodology of comparison in identifying “directly competitive and substitutable products” under the second sentence of Article III:2, see paras. 194–210 of this Chapter.

²⁸⁰ Panel Report on *Argentina – Hides and Leather*, para. 11.245.

²⁸¹ (*footnote original*) See also the Panel Reports on *US – Gasoline*, *supra*, para. 6.11; *United States – Alcoholic Beverages*, para. 5.19. These panels held that differential regulatory or tax treatment of imported and like domestic products cannot be maintained, consistently with Article III, on the basis that the characteristics and circumstances of the producers of those products are different. The same logic must apply, in our view, to cases where tax distinctions between like imported and domestic products are based on the characteristics and circumstances of the sellers or purchasers of those products.

²⁸² (*footnote original*) See the Panel Reports on *US – Gasoline*, para. 6.11; *United States – Alcoholic Beverages*, para. 5.19. See also footnote 499 of this report. The disciplines of Article III:2, first sentence, are of course subject to whatever exceptions a Member may justifiably invoke.

²⁸³ Panel Report on *Argentina – Hides and Leather*, paras. 11.210 and 11.220.

“[B]ecause of the structure of the tax regime under examination, any imported like products would necessarily be taxed in excess of domestic like products. In considering the broader arguments put forward by the complainants that the tax measures in dispute violate Article III:2 because they discriminate not on the basis of factors affecting the properties, nature, qualities or end use of the products, but on origin-related criteria, we recall that the Appellate Body decisions in *Alcoholic Beverages (1996)* and *Periodicals* suggest that the term ‘like products’ as used in Article III:2 should be interpreted narrowly.²⁸⁴ We note, however, that in this case the ‘like products’ issue is not the same as the ‘like products’ issue in the *Alcoholic Beverages (1996)* case. There, the internal tax imposed on domestic shochu was the same as that imposed on imported shochu; the higher tax imposed on imported vodka was also imposed on domestic vodka. Identical products (not considering brand differences) were taxed identically. The issue was whether the differences between the two products shochu and vodka, as defined for tax purposes, were so minor that shochu and vodka should be considered to be like products and therefore subject to the requirement of Article III:2, first sentence, that one should not be taxed in excess of the other. Here, the situation is quite different. The distinction between the products, which results in different levels of taxation, is not based on the products *per se*, but rather on such factors as the nationality of the producer or the origin of the parts and components contained in the product. As such, an imported product identical in all respects to a domestic product, except for its origin or the origin of its parts and components or other factors not related to the product itself, would be subject to a different level of taxation.”²⁸⁵

Reference to GATT practice

183. With respect to the interpretation of “in excess of those applied” under Article III:2, see also GATT Analytical Index, pages 150–155.

Relevance of regulatory objectives

184. In *Japan – Alcoholic Beverages II*, the Appellate Body made a general statement on the relevance of regulatory objectives of a measure at issue, finding that Members may pursue, through their tax measures, any given policy objective, provided they do so in compliance with Article III:2. See paragraph 128 above.

185. In *Argentina – Hides and Leather*, the Panel rejected Argentina’s argument that the measures in question were designed to achieve efficient tax administration and collection and as such did not fall under Article III:2. The Panel stated:

“We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit. However, if, as here, such ‘tax administration’ measures take

the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that ‘tax administration’ measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2.”²⁸⁶

186. With respect to the relevance of regulatory objectives in relation to the “aims-and-effect” test, see paragraphs 128–132 above.

(v) *Applied, “directly or indirectly”, to like domestic products*

187. In *Canada – Periodicals*, the Appellate Body reviewed the Panel’s finding that the Canadian excise tax on magazines was inconsistent with Article III:2. The Panel had found that the relevant tax provision was a measure affecting the trade in goods, as it applied to so-called split-run editions of periodicals which were distinguished from foreign non-split-run editions by virtue of their advertising content directed at the Canadian market. Canada argued that its measure regulated trade in services (advertising) “in their own right”, therefore did not “indirectly” affect imported products and, as a result, was subject to GATS and *not* to GATT 1994. The Appellate Body rejected Canada’s argument:

“An examination of Part V.1 of the Excise Tax Act demonstrates that it is an excise tax which is applied on a good, a split-run edition of a periodical, on a ‘per issue’ basis. By its very structure and design, it is a tax on a periodical. It is the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser.

Based on the above analysis of the measure, which is essentially an excise tax imposed on split-run editions of periodicals, we cannot agree with Canada’s argument that this internal tax does not ‘indirectly’ affect imported products.”²⁸⁷

188. In *Argentina – Hides and Leather*, Argentina argued that, since an income tax is not a tax on products, its measure establishing the collection regime for such a tax (“RG 3543”) could not be subject to the provisions of Article III:2. Citing the finding of the Appellate Body in *Canada – Periodicals* as support²⁸⁸, the Panel rejected this argument:

²⁸⁴ The footnote to this sentence refers to Appellate Body Report on *Alcoholic Beverages*, pp. 19–20; Appellate Body Report on *Canada – Periodicals*, p. 22.

²⁸⁵ Panel Report on *Indonesia – Autos*, para. 14.112.

²⁸⁶ Panel Report on *Argentina – Hides and Leather*, para. 11.144.

²⁸⁷ Appellate Body Report on *Canada – Periodicals*, p. 18.

²⁸⁸ Panel Report on *Argentina – Hides and Leather*, para. 11.160, which refers to the Appellate Body Report on *Canada – Periodicals*, p. 20.

"We . . . agree that income taxes, because they are taxes not normally directly levied on products, are generally considered not to be subject to Article III:2.²⁸⁹ It is not obvious to us, however, how the fact that the IG is an income tax outside the scope of Article III:2 logically leads to the conclusion that RG 3543 does not fall within the ambit of Article III:2, even though RG 3543 is a tax measure applied to products. Not only do we see nothing in the provisions of Article III:2 which would preclude the applicability of these provisions to RG 3543 merely because of the latter's linkage to the IG. Were we to accept Argentina's argument, it would also not be difficult for Members to introduce measures designed to circumvent the disciplines of Article III:2."²⁹⁰

Reference to GATT practice

189. With respect to the practice on this subject-matter, see GATT Analytical Index, page 141.

(c) Paragraph 2, second sentence

(i) *General*

Legal status of *Ad Article III:2*

190. In *Japan – Alcoholic Beverages II*, the Appellate Body discussed the legal status of *Note Ad Article III:2* in the interpretation of Article III:2 and held that the Note must always be read together with Article III. See paragraph 151 above.

Test under Article III:2, second sentence

191. In *Japan – Alcoholic Beverages II*, the Appellate Body explained the test to be used under Article III:2, second sentence, and distinguished this test from the test applicable under the first sentence. This distinction, in the view of the Appellate Body, is a result of the explicit reference to Article III:1 in the second sentence of Article III:2:

"Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

- (1) the imported products and the domestic products are '*directly competitive or substitutable products*' which are in competition with each other;
- (2) the directly competitive or substitutable imported and domestic products are '*not similarly taxed*'; and

- (3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is '*applied . . . so as to afford protection to domestic production*'.

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence."²⁹¹

Burden of proof

192. In *Japan – Alcoholic Beverages II*, the Panel, in a finding not expressly addressed by the Appellate Body, allocated the burden of proof under Article III:2, second sentence, to the complaining party:

"[T]he complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production."²⁹²

193. In *Korea – Alcoholic Beverages*, the Panel followed the approach to the allocation of burden of proof according to the standard set out by the Panel on *Japan – Alcoholic Beverages II*, referred to in paragraph 192 above. The Appellate Body rejected Korea's appeal against this allocation of the burden of proof:

"[T]he Panel properly understood and applied the rules on allocation of the burden of proof. First, the Panel insisted that it could make findings under Article III:2, second sentence, only with respect to products for which a *prima facie* case had been made out on the basis of evidence presented. Second, it declined to establish a presumption concerning all alcoholic beverages within HS 2208. Such a presumption would be inconsistent with the rules on the burden of proof because it would prematurely shift the burden of proof to the defending party. The Panel, therefore, did not consider alleged violations of Article III:2, second sentence, concerning products for which evidence was not presented. Thus, the Panel examined tequila because evidence was presented for it, but did not examine mescal and certain other alcoholic beverages included in HS 2208 for which no evidence was presented. Third, contrary to Korea's assertions, the Panel did consider the evidence presented by Korea in rebuttal, but concluded that there was '*sufficient un rebutted evidence*'

²⁸⁹ (*footnote original*) See the Working Party Report on Border Tax Adjustments, adopted on 2 December 1970, BISD 18S/97, at para. 14.

²⁹⁰ Panel Report on *Argentina – Hides and Leather*, para. 11.159.

²⁹¹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p.24. This part has been later cited and endorsed by the Appellate Body, in Appellate Body Report on *Canada – Periodicals*, pp. 24–25, and in Appellate Body Report on *Chile – Alcoholic Beverages*, para. 47.

²⁹² Panel Report on *Japan – Alcoholic Beverages II*, para. 6.28.

for it to make findings of inconsistency.”²⁹³ (emphasis added)

(ii) “directly competitive or substitutable products”

Relevance of market competition/cross-price elasticity

General

194. In interpreting the term “directly competitive or substitutable” products, the Appellate Body in *Japan – Alcoholic Beverages II* found that it was “not inappropriate” to consider the competitive conditions in the relevant market, as manifested in the cross-price elasticity in particular:

“The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as ‘directly competitive or substitutable’.

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is ‘the decisive criterion’ for determining whether products are ‘directly competitive or substitutable’.”²⁹⁴

195. The Appellate Body developed this finding – contained in *Japan – Alcoholic Beverages II* – in the *Korea – Alcoholic Beverages dispute*:

“We observe that studies of cross-price elasticity, which in our Report in *Japan – Alcoholic Beverages* were regarded as one means of examining a market,²⁹⁵ involve an assessment of latent demand. Such studies attempt to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the relative tax burdens on domestic and imported products.”²⁹⁶

196. In its approach to cross-price elasticity between domestic and imported products, the Panel on *Korea – Alcoholic Beverages* emphasized the “quality” or “nature” of competition, rather than the “quantitative overlap of competition”. Upon appeal, Korea argued that through its reliance on the “nature of competition” the Panel had created a “vague and subjective element” not found in Article III:2, second sentence. The Appellate Body, however, shared the Panel’s scepticism towards reliance upon the “quantitative overlap of competition”:

“In taking issue with the use of the term ‘nature of competition’, Korea, in effect, objects to the Panel’s sceptical attitude to quantification of the competitive relationship between imported and domestic products. For the reasons set above, we share the Panel’s reluctance to rely unduly on quantitative analyses of the competitive rela-

tionship.²⁹⁷ In our view, an approach that focused solely on the quantitative overlap of competition would, in essence, make cross-price elasticity *the* decisive criterion in determining whether products are ‘directly competitive or substitutable’.”²⁹⁸

Relevance of the market situation in other countries

197. In *Korea – Alcoholic Beverages*, the Appellate Body addressed whether the market situation in *other* Members should be taken into consideration in evaluating whether subject products are directly competitive or substitutable products. The Appellate Body held that although not every other market would be relevant, evidence from other markets may nevertheless be pertinent to the analysis of the market at issue:

“It is, of course, true that the ‘directly competitive or substitutable’ relationship must be present in the market at issue²⁹⁹, in this case, the Korean market. It is also true that consumer responsiveness to products may vary from country to country.³⁰⁰ This does not, however, preclude consideration of consumer behaviour in a country other than the one at issue. It seems to us that evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition. Clearly, not every other market will be relevant to the market at issue. But if another market displays characteristics similar to the market at issue, then evidence of consumer demand in that other market may have some relevance to the market at issue. This, however, can only be determined on a case-by-case basis, taking account of all relevant facts.”³⁰¹

“directly competitive or substitutable”

198. In *Korea – Alcoholic Beverages*, the Appellate Body considered the “object and purpose” of Article III in its interpretation of the term “directly competitive or substitutable”:

“[T]he object and purpose of Article III is the maintenance of equality of competitive conditions for imported and domestic products. It is, therefore, not only legitimate, but even necessary, to take account of this

²⁹³ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 156. With respect to the burden of proof in general, see Chapter on the DSU, Section XXXVI.D.

²⁹⁴ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

²⁹⁵ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.

²⁹⁶ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 121.

²⁹⁷ (footnote original) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.

²⁹⁸ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 134.

²⁹⁹ (footnote original) Appellate Body Reports on *Japan – Alcoholic Beverages II*, fn. 20 and *Canada – Periodicals*, fn. 91.

³⁰⁰ (footnote original) Panel Report on *Japan – Alcoholic Beverages II*, fn. 16, with reference to Working Party Report on *Border Tax Adjustments*, L/3464, BISD 18S/97, para. 18, approved by the Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.

³⁰¹ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 137.

purpose in interpreting the term 'directly competitive or substitutable product'.³⁰²

Latent, extant and potential demand

199. In *Korea – Alcoholic Beverages*, the Appellate Body considered that competition in the market place is a dynamic, evolving process and thus the concept of "directly competitive or substitutable" implies that "the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences". Following this line of argumentation, the Appellate Body concluded that the term "directly competitive or substitutable" may include the analysis of *latent* as well as *extant* demand:

"The term 'directly competitive or substitutable' describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word 'competitive' which means 'characterized by competition', and from the word 'substitutable' which means 'able to be substituted'. The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another.

Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable³⁰³ or if they offer, as the Panel noted, 'alternative ways of satisfying a particular need or taste'. Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand.³⁰⁴ The words 'competitive or substitutable' are qualified in the *Ad Article* by the term 'directly'. In the context of Article III:2, second sentence, the word 'directly' suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word 'directly' does not, however, prevent a panel from considering both latent and extant demand.³⁰⁵

200. In support of its proposition that the term "directly competitive or substitutable" required a dynamic interpretation of both latent and extant demand, the Appellate Body in *Korea – Alcoholic Beverages* rejected an attempt by one of the parties to read a prohibition of considering "potential competition" into the text of Note *Ad Article III*:

"Our reading of the ordinary meaning of the term 'directly competitive or substitutable' is supported by its context as well as its object and purpose. As part of the context, we note that the *Ad Article* provides that the second sentence of Article III:2 is applicable 'only in cases where competition was involved'. (emphasis added) According to Korea, the use of the past indicative 'was' prevents a panel taking account of 'potential' competition. However, in our view, the use of the word 'was' does not have any necessary significance in defining the temporal scope of the analysis to be carried out. The *Ad Article* describes the circumstances in which a hypothetical tax 'would be considered to be inconsistent with the provisions of the second sentence'. (emphasis added) The first part of the clause is cast in the conditional mood ('would') and the use of the past indicative simply follows from the use of the word 'would'. It does not place any limitations on the temporal dimension of the word 'competition'.³⁰⁶

201. The Appellate Body subsequently referred to the context of Article III:2 to support its dynamic approach to the notion of "directly competitive or substitutable":

"The context of Article III:2, second sentence, also includes Article III:1 of the GATT 1994. As we stated in our Report in *Japan – Alcoholic Beverages*, Article III:1 informs Article III:2 through specific reference.³⁰⁷ Article III:1 sets forth the principle 'that internal taxes . . . should not be applied to imported or domestic products so as to afford protection to domestic production.' It is in the light of this principle, which embodies the object and purpose of the whole of Article III, that the term 'directly competitive and substitutable' must be read. As we said in *Japan – Alcoholic Beverages*:

'The broad and fundamental purpose of Article III is to *avoid protectionism* in the application of internal tax and regulatory measures. . . . Toward this end, Article III obliges Members of the WTO to *provide equality of competitive conditions* for imported products in relation to domestic products. . . . Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III *protects expectations* not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products.' (emphasis added).³⁰⁸

³⁰² Appellate Body Report on *Korea – Alcoholic Beverages*, para. 127.

³⁰³ (footnote original) Appellate Body Report on *Canada – Periodicals*.

³⁰⁴ Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 114–115.

³⁰⁵ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 116.

³⁰⁶ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 117.

³⁰⁷ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, footnote 20.

³⁰⁸ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 119.

202. The Panel on *Japan – Alcoholic Beverages II* held that “a tax system that discriminates against imports has the consequence of creating and even freezing preferences for domestic goods. In the Panel’s view, this meant that consumer surveys in a country with such a tax system would likely understate the degree of potential competitiveness between substitutable products.”³⁰⁹ The Appellate Body on *Korea – Alcoholic Beverages* confirmed this approach and emphasized the importance of an analysis of “latent” or “potential” demand by pointing out that current consumer behaviour itself could be influenced by protectionist taxation. It concluded that if only “current instances of substitution” could be taken into account, Article III:2 would, in effect, be confirming the very protective taxation it aims to prohibit:

“In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term ‘directly competitive or substitutable’. The object and purpose of Article III confirms that the scope of the term ‘directly competitive or substitutable’ cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit. Past panels have, in fact, acknowledged that consumer behaviour might be influenced, in particular, by protectionist internal taxation. Citing the panel in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* . . .³¹⁰, the panel in *Japan – Alcoholic Beverages* observed that ‘a tax system that discriminates against imports has the consequence of creating and even freezing preferences for domestic goods’.³¹¹ The panel in *Japan – Alcoholic Beverages* also stated that ‘consumer surveys in a country with . . . a [protective] tax system would likely understate the degree of *potential* competitiveness between substitutable products’.³¹² (emphasis added) Accordingly, in some cases, it may be highly relevant to examine latent demand.”³¹³

203. The Appellate Body on *Korea – Alcoholic Beverages* concluded its analysis of why “latent” demand had to be considered in the interpretation of “directly competitive or substitutable products” by emphasizing the need for such an analysis particularly in the product sector in the case before it:

“We note, however, that actual consumer demand may be influenced by measures other than internal taxation. Thus, demand may be influenced by, *inter alia*, earlier protectionist taxation, previous import prohibitions or quantitative restrictions. Latent demand can be a particular problem in the case of ‘experience goods’, such as food and beverages, which consumers tend to purchase

because they are familiar with them and with which consumers experiment only reluctantly.

[T]he term ‘directly competitive or substitutable’ does not prevent a panel from taking account of evidence of latent consumer demand as one of a range of factors to be considered when assessing the competitive relationship between imported and domestic products under Article III:2, second sentence, of the GATT 1994.”³¹⁴

204. In *Canada – Periodicals*, the Appellate Body reiterated the need for the consideration of latent demand in assessing whether products are “directly competitive or substitutable”. In this dispute, the Appellate Body rejected Canada’s argument that the market shares of foreign and domestic magazines on the Canadian periodicals market had remained constant over an extended period of time and that this fact pointed to a lack of competition or substitutability between domestic and foreign periodicals:

“We are not impressed either by Canada’s argument that the market share of imported and domestic magazines has remained remarkably constant over the last 30-plus years, and that one would have expected some variation if competitive forces had been in play to the degree necessary to meet the standard of ‘directly competitive’ goods. This argument would have weight only if Canada had not protected the domestic market of Canadian periodicals through, among other measures, the import prohibition of Tariff Code 9958 and the excise tax of Part V.1 of the Excise Tax Act.”³¹⁵

205. In *Korea – Alcoholic Beverages*, the Panel elaborated on the meaning of the term “*directly competitive or substitutable products*”:

“[W]e must first decide how the term ‘directly competitive or substitutable’ should be interpreted. . . .

The Appellate Body on *Japan – Taxes on Alcoholic Beverages II* stated that ‘like product’ should be narrowly construed for purposes of Article III:2. It then noted that directly competitive or substitutable is a broader category, saying: ‘How much broader that category of ‘directly competitive or substitutable products’ may be in a given case is a matter for the panel to determine based on all the relevant facts in that case.’³¹⁶ Article 32 of the

³⁰⁹ Panel Report on *Japan – Alcoholic Beverages II*, para. 6.28.

³¹⁰ (footnote original) Panel Report on *Japan – Alcoholic Beverages I*. The panel in *Japan – Alcoholic Beverages II* cited para. 5.9 of this panel report.

³¹¹ (footnote original) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, para. 6.28. This excerpt was expressly approved by the Appellate Body in its Report in this case (p. 25).

³¹² (footnote original) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, para. 6.28.

³¹³ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120.

³¹⁴ Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 122–124.

³¹⁵ Appellate Body Report on *Canada – Periodicals*, p. 28.

³¹⁶ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

Vienna Convention provides that it is appropriate to refer to the negotiating history of a treaty provision in order to confirm the meaning of the terms as interpreted pursuant to the application of Article 31. A review of the negotiating history of Article III:2, second sentence and the *Ad Article III* language confirms that the product categories should not be so narrowly construed as to defeat the purpose of the anti-discrimination language informing the interpretation of Article III. The Geneva session of the Preparatory Committee provided an explanation of the language of the second sentence by noting that apples and oranges could be directly competitive or substitutable. Other examples provided were domestic linseed oil and imported tung oil and domestic synthetic rubber and imported natural rubber. There was discussion of whether such products as tramways and busses or coal and fuel oil could be considered as categories of directly competitive or substitutable products. There was some disagreement with respect to these products.

This negotiating history illustrates the key question in this regard. It is whether the products are *directly* competitive or substitutable. Tramways and busses, when they are not directly competitive, may still be indirectly competitive as transportation systems. Similarly even if most power generation systems are set up to utilize either coal or fuel oil, but not both, these two products could still compete indirectly as fuels. Thus, the focus should not be exclusively on the quantitative extent of the competitive overlap, but on the methodological basis on which a panel should assess the competitive relationship.

At some level all products or services are at least indirectly competitive. Because consumers have limited amounts of disposable income, they may have to arbitrate between various needs such as giving up going on a vacation to buy a car or abstaining from eating in restaurants to buy new shoes or a television set. However, an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste.³¹⁷

Factors relevant to “directly competitive or substitutable”

206. In *Japan – Alcoholic Beverages II*, the Appellate Body agreed with the Panel’s illustrative enumeration of the factors to be considered in deciding whether two subject products are “directly competitive or substitutable”; for example, the nature of the compared products, and the competitive conditions in the relevant market, in addition to their physical characteristics, common end-use, and tariff classifications.³¹⁸

207. In *Korea – Alcoholic Beverages*, the Panel evaluated whether the subject products were “directly competitive

or substitutable products” by discussing the various characteristics of the products. The Appellate Body implicitly endorsed this approach in the context of upholding the Panel’s approach of grouping certain products into categories:³¹⁹

“We next will consider the various characteristics of the products to assess whether there is a competitive or substitutable relationship between the imported and domestic products and draw conclusions as to whether the nature of any such relationship is direct. We will review the physical characteristics, end-uses including evidence of advertising activities, channels of distribution, price relationships including cross-price elasticities, and any other characteristics.”³²⁰

208. With respect to the “grouping” methodology, see also paragraph 209 below:

Methodology of comparison – grouping of products

209. In *Korea – Alcoholic Beverages*, the Appellate Body agreed with the Panel’s comparison method of domestic and imported products, where under both types of *soju* (Korean traditional liquor), i.e. distilled and diluted *soju*, were compared with imported liquor products on a group basis, rather than on an item-by-item basis. The Appellate Body rejected Korea’s appeal of this methodology :

“We consider that Korea’s argument raises two distinct questions. The first question is whether the Panel erred in its ‘analytical approach’. The second is whether, on the facts of this case, the Panel was entitled to group the products in the manner that it did. Since the second question involves a review of the way in which the Panel assessed the evidence, we address it in our analysis of procedural issues.

The Panel describes ‘grouping’ as an ‘analytical tool’. It appears to us, however, that whatever else the Panel may have seen in this ‘analytical tool’, it used this ‘tool’ as a practical device to minimize repetition when examining the competitive relationship between a large number of differing products. Some grouping is almost always necessary in cases arising under Article III:2, second sentence, since generic categories commonly include products with *some* variation in composition, quality, function and price, and thus commonly give rise to sub-categories. From a slightly different perspective, we note that ‘grouping’ of products involves at least a preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis. But, the use of such ‘analytical tools’ does not

³¹⁷ Panel Report on *Korea – Alcoholic Beverages*, paras. 10.37–10.40.

³¹⁸ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 25.

³¹⁹ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 144.

³²⁰ Panel Report on *Korea – Alcoholic Beverages*, para. 10.61.

relieve a panel of its duty to make an objective assessment of whether the components of a group of imported products are directly competitive or substitutable with the domestic products. We share Korea's concern that, in certain circumstances, such 'grouping' of products *might* result in individual product characteristics being ignored, and that, in turn, *might* affect the outcome of a case. However, as we will see below, the Panel avoided that pitfall in this case.

Whether, and to what extent, products can be grouped is a matter to be decided on a case-by-case basis. In this case, the Panel decided to group the imported products at issue on the basis that:

... on balance, all of the imported products specifically identified by the complainants have sufficient common characteristics, end-uses and channels of distribution and prices. . . .³²¹

As the Panel explained in the footnote attached to this passage, the Panel's subsequent analysis of the physical characteristics, end-uses, channels of distribution and prices of the imported products confirmed the correctness of its decision to group the products for analytical purposes. Furthermore, where appropriate, the Panel did take account of individual product characteristics. It, therefore, seems to us that the Panel's grouping of imported products, complemented where appropriate by individual product examination, produced the same outcome that individual examination of each imported product would have produced.³²² We, therefore, conclude that the Panel did not err in considering the imported beverages together."³²³

210. In *Argentina – Hides and Leather*, the Panel discussed the methodology of comparison to be applied with respect to the term "in excess of those applied" under the first sentence of Article III:2. See paragraphs 176–177 above. See also the Appellate Body's finding in *Canada – Periodicals* on the methodology of comparison for "dissimilar taxation". See paragraph 217 below. Also, with respect to the methodology of comparison applicable to the term "no less favourable treatment" under Article III:4, see paragraphs 270–275 below.

Like products as a subset of directly competitive or substitutable products

211. In *Korea – Alcoholic Beverages*, the Appellate Body defined "like products" as a subset of "directly competitive or substitutable" products:

"The first sentence of Article III:2 also forms part of the context of the term. 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'.³²⁴ The notion of like products must be construed narrowly³²⁵ but the cate-

gory of directly competitive or substitutable products is broader.³²⁶ While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.³²⁷"³²⁸

Reference to GATT practice

212. With respect to the interpretation of "directly competitive or substitutable products" under GATT, see also GATT Analytical Index, pages 159–161.

Relationship with "like products"

213. In *Japan – Alcoholic Beverages II* and *Korea – Alcoholic Beverages*, the Appellate Body compared the term "like products" with the term "directly competitive or substitutable products". See paragraphs 157–159 above.

(iii) "not similarly taxed"

General

"de minimis" standard

214. In *Japan – Alcoholic Beverages II*, the Appellate Body interpreted the term "not similarly taxed" as requiring excessive taxation more than "*de minimis*":

"To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase 'not similarly taxed' in the *Ad Article* to the second sentence must not be construed so as to mean the same thing as the phrase 'in excess of' in the first sentence. On its face, the phrase 'in excess of' in the first sentence means *any* amount of tax on imported products 'in excess of' the tax on domestic 'like products'. The phrase 'not similarly taxed' in the *Ad Article* to the second sentence must therefore mean something else. It requires a different standard, just as 'directly competitive or substitutable products' requires a different standard as compared to 'like products' for these same interpretive purposes."³²⁹

215. The Appellate Body found support for the above approach in *Japan – Alcoholic Beverages II* also in the

³²¹ (footnote original) Panel Report on *Korea – Alcoholic Beverages*, para. 10.60.

³²² (footnote original) We note that the panels in *Japan – Alcohol Beverages I* and in *Japan – Alcoholic Beverages II*, followed the same approach. This approach was implicitly approved in our Report on *Japan – Alcoholic Beverages II*.

³²³ Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 141–144.

³²⁴ (footnote original) Panel Report on *Japan – Alcoholic Beverages II*, footnote 16, approved by the Appellate Body at p. 23 of its Report.

³²⁵ (footnote original) Appellate Body Reports on *Japan – Alcoholic Beverages II*, footnote 20, and *Canada – Periodicals*, footnote 91.

³²⁶ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, footnote 20.

³²⁷ (footnote original) Appellate Body Report on *Canada – Periodicals*, footnote 91.

³²⁸ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.

³²⁹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 26.

distinction between “like products” in the first sentence and “directly competitive or substitutable products” in Note *Ad* Article III:

“Reinforcing this conclusion is the need to give due meaning to the distinction between ‘like products’ in the first sentence and ‘directly competitive or substitutable products’ in the *Ad* Article to the second sentence. If ‘in excess of’ in the first sentence and ‘not similarly taxed’ in the *Ad* Article to the second sentence were construed to mean one and the same thing, then ‘like products’ in the first sentence and ‘directly competitive or substitutable products’ in the *Ad* Article to the second sentence would also mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.

To interpret ‘in excess of’ and ‘not similarly taxed’ identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be ‘in excess of’ the tax on domestic ‘like products’ but may not be so much as to compel a conclusion that ‘directly competitive or substitutable’ imported and domestic products are ‘not similarly taxed’ for the purposes of the *Ad* Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic ‘directly competitive or substitutable products’ but may nevertheless not be enough to justify a conclusion that such products are ‘not similarly taxed’ for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed ‘not similarly taxed’ in any given case. And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be ‘not similarly taxed’, the tax burden on imported products must be heavier than on ‘directly competitive or substitutable’ domestic products, and that burden must be more than *de minimis* in any given case.”³³⁰

Distinction from “so as to afford protection”

216. With respect to the distinction between “not similarly taxed” and “so as to afford protection” by the Appellate Body in *Japan – Alcoholic Beverages II*, see paragraphs 219–227 below.

Methodology of comparison – treatment of dissimilar taxation of some imported products

217. In *Canada – Periodicals*, referring to its Report on *Japan – Alcoholic Beverages II*³³¹, the Appellate Body stated:

“[D]issimilar taxation of even some imported products as compared to directly competitive or substitutable

domestic products is inconsistent with the provisions of the second sentence of Article III:2. In *United States – Section 337*, the panel found:

... that the ‘no less favourable’ treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products.³³²”³³³

218. The issue of balancing more favourable treatment of some imported products against less favourable treatment of other imported products was also addressed by the Panel on *Argentina – Hides and Leather* with respect to Article III:2, first sentence (see paragraphs 176–177 above and by the Panel on *US – Gasoline* (see paragraph 275 below).³³⁴

(iv) “so as to afford protection to domestic production”

General

Relationship with *Ad* Article – distinction from “not similarly taxed”

219. In *Japan – Alcoholic Beverages II*, the Appellate Body drew a distinction between the term “not similarly taxed” and the term “so as to afford protection to domestic production” as follows:

“[T]he Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied ‘so as to afford protection’. Again, these are separate issues that must be addressed individually. If ‘directly competitive or substitutable products’ are *not* ‘not similarly taxed’, then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied ‘so as to afford protection’. But if such products are ‘not similarly taxed’, a further inquiry must necessarily be made.”³³⁵

³³⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 26–27. This “*de minimis*” standard was endorsed by the Appellate Body in *Canada – Periodicals* (Appellate Body Report on *Canada – Periodicals*, p. 29); in *Chile – Alcoholic Beverages* (Appellate Body Report on *Chile – Alcoholic Beverages*, para. 49.). Also, the Panel on *Indonesia Autos* followed it. Panel Report on *Indonesia – Auto*, para. 14.115.

³³¹ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 27.

³³² (footnote original) GATT Panel Report on *US – Section 337*, BISD 36S/345, para. 5.14.

³³³ Appellate Body Report on *Canada – Periodicals*, p. 29.

³³⁴ Further, with respect to the methodology of comparison in identifying “directly competitive and substitutable products” under the second sentence of Article III:2, see paras. 194–210 of this Chapter. Also with respect to this issue under Article III:4, see paras. 242–247 of this Chapter.

³³⁵ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 27.

Relevant factors

General

220. In *Japan – Alcoholic Beverages II*, the Appellate Body indicated as follows:

“As in [GATT Panel Report on *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83], we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.”³³⁶

Relevance of tax differentials

221. In *Japan – Alcoholic Beverages II*, the Appellate Body held that the very magnitude of the tax differentials may be evidence of the protective application of a national fiscal measure:

“The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

...

... The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied ‘so as to afford protection’. In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied ‘so as to afford protection’. In any case, the three issues that must be addressed in determining whether there is such a violation must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful, objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine ‘the existence of protective taxation’.³³⁷ ³³⁸

222. The Appellate Body on *Japan – Alcoholic Beverages II* supported its interpretation of the various elements of Article III:2, second sentence, by emphasizing

the consistency of its analysis with the customary rules of interpretation of public international law:

“Our interpretation of Article III is faithful to the ‘customary rules of interpretation of public international law’. WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system’.”³³⁹

Relevance of tariffs on subject products

223. The Panel’s approach in *Japan – Alcoholic Beverages II* reveals the possible roles of tariffs in a finding that a national measure has been applied “so as to afford protection to domestic production”. The Appellate Body agreed with the following finding of the Panel:³⁴⁰

“The Panel took note, in this context, of the statement by Japan that the 1987 Panel Report erred when it concluded that shochu is essentially a Japanese product. The Panel accepted the evidence submitted by Japan according to which a shochu-like product is produced in various countries outside Japan, including the Republic of Korea, the People’s Republic of China and Singapore. The Panel noted, however, that Japanese import duties on shochu are set at 17.9 per cent. At any rate what is at stake, in the Panel’s view, is the market share of the domestic shochu market in Japan that was occupied by Japanese-made shochu. The high import duties on foreign-produced shochu resulted in a significant share of the Japanese shochu market held by Japanese shochu producers. Consequently, in the Panel’s view, the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced shochu to penetrate the Japanese market and, on the other, it does not guarantee equality of competitive conditions between shochu and the rest of ‘white’ and ‘brown’ spirits. Thus, through a combination of high import duties and differentiated internal taxes, Japan manages to ‘isolate’ domestically produced shochu from foreign competition, be it foreign produced shochu or any other of the mentioned white and brown spirits.”³⁴¹

³³⁶ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 29.

³³⁷ (footnote original) Panel Report on *Japan – Alcoholic Beverages I*, para. 5.11. See also Appellate Body Report on *Canada – Periodicals*, p. 30.

³³⁸ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 33.

³³⁹ Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 29–31.

³⁴⁰ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 31.

³⁴¹ Panel Report on *Japan – Alcoholic Beverages II*, para. 6.35.

Relevance of the intent of legislators/regulators

224. In *Japan – Alcoholic Beverages II*, the Appellate Body considered that the subjective intent of legislators and regulators in the drafting and the enactment of a particular measure is irrelevant for ascertaining whether a measure is applied “so as to afford protection to domestic production”:

“This third inquiry under Article III:2, second sentence [‘so as to afford protection’], must determine whether ‘directly competitive or substitutable products’ are ‘not similarly taxed’ in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, ‘applied to imported or domestic products so as to afford protection to domestic production’. This is an issue of how the measure in question is *applied*.”³⁴²

225. In contrast to its statements in *Japan – Alcoholic Beverages II*, the Appellate Body in *Canada – Periodicals* did ascribe some significance to the statements of representatives of the Canadian executive about the policy objectives of the part of the Excise Tax Act at issue. The Appellate Body did so after finding that “the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive” and that “[t]here is also ample evidence that the very design and structure of the measure is such as to afford protection to domestic periodicals”:³⁴³

“The Canadian policy which led to the enactment of Part V.1 of the Excise Tax Act had its origins in the *Task Force Report*. It is clear from reading the *Task Force Report* that the design and structure of Part V.1 of the Excise Tax Act are to prevent the establishment of split-run periodicals in Canada, thereby ensuring that Canadian advertising revenues flow to Canadian magazines. Madame Monique Landry, Minister Designate of Canadian Heritage at the time the *Task Force Report* was released, issued the following statement summarizing the Government of Canada’s policy objectives for the Canadian periodical industry:

‘The Government reaffirms its commitment to protect the economic foundations of the Canadian periodical industry, which is a vital element of Canadian cultural expression. To achieve this objective, the

Government will continue to use policy instruments that encourage the flow of advertising revenues to Canadian magazines and discourage the establishment of split-run or “Canadian” regional editions with advertising aimed at the Canadian market. We are committed to ensuring that Canadians have access to Canadian ideas and information through genuinely Canadian magazines, while not restricting the sale of foreign magazines in Canada.’

Furthermore, the Government of Canada issued the following response to the *Task Force Report*:

‘The Government reaffirms its commitment to the long-standing policy of protecting the economic foundations of the Canadian periodical industry. To achieve this objective, the Government uses policy instruments that encourage the flow of advertising revenues to Canadian periodicals, since a viable Canadian periodical industry must have a secure financial base.’

During the debate of Bill C-103, An Act to Amend the Excise Tax Act and the Income Tax Act, the Minister of Canadian Heritage, the Honourable Michel Dupuy, stated the following:

‘... the reality of the situation is that we must protect ourselves against split-runs coming from foreign countries and, in particular, from the United States.’

Canada also admitted that the objective and structure of the tax is to insulate Canadian magazines from competition in the advertising sector, thus leaving significant Canadian advertising revenues for the production of editorial material created for the Canadian market. With respect to the actual application of the tax to date, it has resulted in one split-run magazine, *Sports Illustrated*, to move its production for the Canadian market out of Canada and back to the United States. Also, *Harrow-smith Country Life*, a Canadian-owned split-run periodical, has ceased production of its United States’ edition as a consequence of the imposition of the tax.”³⁴⁴

226. In *Korea – Alcoholic Beverages*, Korea appealed the Panel’s finding that the Korea tax measures were inconsistent with Article III:2, second sentence, on the ground that the Panel ignored the explanation provided by Korea of the structure of the subject Korean taxation on liquor products. The Appellate Body rejected Korea’s argument and expressed its agreement with the Panel’s approach:

“Although [the Panel] considered that the magnitude of the tax differences was sufficiently large to support a finding that the contested measures afforded protection to domestic production, the Panel also considered

³⁴² Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 27–28.

³⁴³ Appellate Body Report on *Canada – Periodicals*, p. 32.

³⁴⁴ Appellate Body Report on *Canada – Periodicals*, pp. 30–32.

the structure and design of the measures. In addition, the Panel found that, in practice, '[t]here is virtually no imported soju so the beneficiaries of this structure are almost exclusively domestic producers'. In other words, the tax operates in such a way that the lower tax brackets cover almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products. In such circumstances, the reasons given by Korea as to why the tax is structured in a particular way do not call into question the conclusion that the measures are applied 'so as to afford protection to domestic production'. Likewise, the reason why there is very little imported soju in Korea does not change the pattern of application of the contested measures."³⁴⁵

227. In *Chile – Alcoholic Beverages*, the Appellate Body examined Chile's claim that the subject taxation on alcoholic beverages was aimed at, among others, reducing the consumption of alcoholic beverages with higher alcohol content. The Appellate Body again refused to accept explanations of policy objectives which were not ascertainable from the objective design, architecture and structure of the measure and supported the Panel's attempts to "relate the observable structural features of the measure with its declared purposes":

"We recall once more that, in *Japan – Alcoholic Beverages*, we declined to adopt an approach to the issue of 'so as to afford protection' that attempts to examine 'the many reasons legislators and regulators often have for what they do'.³⁴⁶ We called for examination of the design, architecture and structure of a tax measure precisely to permit identification of a measure's objectives or purposes as revealed or objectified in the measure itself. Thus, we consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production. In the present appeal, Chile's explanations concerning the structure of the New Chilean System – including, in particular, the truncated nature of the line of progression of tax rates, which effectively consists of two levels (27 per cent *ad valorem* and 47 per cent *ad valorem*) separated by only 4 degrees of alcohol content – might have been helpful in understanding what *prima facie* appear to be anomalies in the progression of tax rates. The conclusion of protective application reached by the Panel becomes very difficult to resist, in the absence of countervailing explanations by Chile. The mere statement of the four objectives pursued by Chile does not constitute effective rebuttal on the part of Chile.

At the same time, we agree with Chile that it would be inappropriate, under Article III:2, second sentence, of the GATT 1994, to examine whether the tax measure is necessary for achieving its stated objectives or purposes. The Panel did use the word 'necessary' in this part of its

reasoning. Nevertheless, we do not read the Panel Report as showing that the Panel did, in fact, conduct an examination of whether the measure is necessary to achieve its stated objectives. It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production."³⁴⁷

Reference to GATT practice

228. For GATT practice on this subject-matter, see also GATT Analytical Index, pages 139–140.

4. Article III:4

(a) General

(i) *Test under paragraph 4*

229. In *Korea – Various Measures on Beef*, the Appellate Body explained the three elements of a violation of Article III:4:

"For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."³⁴⁸

230. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC's allocation method of tariff quota for bananas was inconsistent with Article III:4. The Appellate Body considered that an independent consideration of the phrase "so as [to] afford protection to domestic production" is not necessary under Article III:4:

"Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'. "³⁴⁹

(ii) *Burden of proof*

231. In *Japan – Film*, the Panel allocated the burden of proof under Article III:4 according to the general

³⁴⁵ Appellate Body Report on *Korea – Alcoholic Beverages*, para. 150.

³⁴⁶ (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, fn. 20.

³⁴⁷ Appellate Body Report on *Chile – Alcoholic Beverages*, paras. 71–72.

³⁴⁸ Appellate Body Report on *Korea – Various Measures on Beef*, para. 133.

³⁴⁹ Appellate Body Report on *EC – Bananas III*, para. 216. In this regard, see Panel Report on *Canada – Periodicals*, para. 5.38, where the Panel examined whether a measure at issue "afford[ed] protection to domestic production."

principle that it is for the party asserting a fact or claim to bear the burden of proving this fact or claim:

“As for the burden of proof . . . we note that it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence shifts to the other party to rebut the presumption.³⁵⁰ Thus, in this case, including the claims under Articles III . . . , it is for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it is for Japan to adduce sufficient evidence to rebut any such presumption.”³⁵¹

232. The Appellate Body confirmed this approach by the Panel on *Japan – Film* to the allocation of the burden of proof in its report in *EC – Asbestos*. In so doing, the Appellate Body referred to its finding on *US – Wool Shirts and Blouses*.³⁵²

“Applying these rules, it is our opinion that Canada, as the complaining party, should normally provide sufficient evidence to establish a presumption that there are grounds for each of its claims. If it does so, it will then be up to the EC to adduce sufficient evidence to rebut the presumption. When the EC puts forward a particular method of defence in the affirmative, it is up to them to furnish sufficient evidence, just as Canada must do for its own claims. If both parties furnish evidence that meets these requirements, it is the responsibility of the Panel to assess these elements as a whole. Where the evidence concerning a claim or a particular form of defence is, in general, equally balanced, a finding has to be made against the party on which the burden of proof relating to this claim or this form of defence is incumbent.”³⁵³

(iii) Relationship with other paragraphs of Article III

Relationship with paragraph 1

233. With respect to the relationship between Paragraphs 1 and 4 of Article III, see paragraphs 140–143 above. Also, in *EC – Bananas III*, the Appellate Body touched on this issue in discussing whether the independent consideration of “so as to afford protection to domestic production” is necessary under Article III:4. See paragraph 230 above. Further, this issue was touched upon by the Appellate Body in *EC – Asbestos* in relation to the interpretation of the term “like products” under paragraph 4. See paragraphs 237 and 239 below.

Relationship with paragraph 2

234. In *EC – Asbestos*, the Appellate Body considered that Article III:2 constitutes part of the context of Article III:4, and examined the relationship between these paragraphs. However, the Appellate Body concluded that Article III:1, rather than Article III:2, had “particu-

lar contextual significance” for the interpretation of Article III:4:

“To begin to resolve these [interpretative] issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products ‘in excess of those applied . . . to like domestic products.’ (emphasis added) In previous Reports, we have held that the scope of ‘like’ products in this sentence is to be construed ‘narrowly’.³⁵⁴ This reading of ‘like’ in Article III:2 might be taken to suggest a similarly narrow reading of ‘like’ in Article III:4, since both provisions form part of the same Article. However, both of these paragraphs of Article III constitute specific expressions of the overarching, ‘general principle’, set forth in Article III:1 of the GATT 1994.³⁵⁵ As we have previously said, the ‘general principle’ set forth in Article III:1 ‘informs’ the rest of Article III and acts ‘as a guide to understanding and interpreting the specific obligations contained’ in the other paragraphs of Article III, including paragraph 4.³⁵⁶ Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the ‘general principle’ pursued by that provision. Accordingly, in interpreting the term ‘like products’ in Article III:4, we must turn, first, to the ‘general principle’ in Article III:1, rather than to the term ‘like products’ in Article III:2.”³⁵⁷

235. After emphasizing the significance of Article III:1 for the interpretation of Article III:4, the Appellate Body in *EC – Asbestos* considered the different respective structures of Articles III:2 and III:4:

“In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to ‘like products’, the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of ‘like products’, while the second lays down obligations in respect of ‘directly competitive or substitutable’ products.³⁵⁸ By contrast,

³⁵⁰ (footnote original) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

³⁵¹ Panel Report on *Japan – Film*, para. 10.372.

³⁵² Panel Report on *EC – Asbestos*, para. 8.78.

³⁵³ Panel Report on *EC – Asbestos*, para. 8.79. With respect to burden of proof in general, see Chapter on the *DSU*, Section XXXVI.D.

³⁵⁴ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 112 and 113. See, also, Appellate Body Report on *Canada – Periodicals*, p. 473.

³⁵⁵ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 111.

³⁵⁶ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 111.

³⁵⁷ Appellate Body Report on *EC – Asbestos*, para. 94.

³⁵⁸ (footnote original) The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to “directly competitive or substitutable product[s]”.

Article III:4 applies only to 'like products' and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III.³⁵⁹

236. The Appellate Body on *EC – Asbestos* also recalled its report in *Japan – Alcoholic Beverages II*, where it had emphasized the need to interpret the two sentences of Article III:2 and the separate obligations contained therein in the light of the structure of Article III:2:

"For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term 'like products' in these two provisions. In *Japan – Alcoholic Beverages*, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term 'like products' in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase 'directly competitive or substitutable' products in the second sentence of that provision. We said in *Japan – Alcoholic Beverages*:

'Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of 'like products' in Article III:2, first sentence, should be construed narrowly.'³⁶⁰

In construing Article III:4, the same interpretive considerations do not arise, because the 'general principle' articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to 'like products'. Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Articles III:2 and III:4, the 'accordion' of 'likeness' stretches in a different way in Article III:4."³⁶¹

(b) "like products"

(i) *General*

Relationship with "like products" under Article III:2, first sentence

237. In *EC – Asbestos*, the Appellate Body interpreted the term "like" in Article III:4 by comparing the same

term as used in Article III:2. The Appellate Body emphasized the need for consistency between the general principle of Article III, contained in paragraph 1, and the interpretation of Article III:4. The Appellate Body then interpreted the term "like products" to refer to products which are in a competitive relationship:

"[T]here must be consonance between the objective pursued by Article III, as enunciated in the 'general principle' articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure 'equality of competitive conditions', the 'general principle' in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production.'

As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products, it follows that the word 'like' in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of 'competitiveness' or 'substitutability' of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are 'like products' under Article III:4. In ruling on the measure at issue, we also do not attempt to define the precise scope of the word 'like' in Article III:4. Nor do we wish to decide if the scope of 'like products' in Article III:4 is co-extensive with the combined scope of 'like' and 'directly competitive or substitutable' products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the 'general principle' in Article III:1. For

³⁵⁹ Appellate Body Report on *EC – Asbestos*, para. 94.

³⁶⁰ (*footnote original*) Appellate Body Report on *Japan – Alcoholic Beverages II*, pp. 112 and 113.

³⁶¹ Appellate Body Report on *EC – Asbestos*, paras. 95–96.

these reasons, we conclude that the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to 'like products', but also to products which are 'directly competitive or substitutable', and that Article III:4 extends only to 'like products'. In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994."³⁶²

238. The Appellate Body acknowledged that its interpretation resulted in giving Article III:4 "a relatively broad product scope". Nevertheless the Appellate Body pointed out that mere "likeness" of products and distinctions between "like products" in and of themselves would not lead to inconsistency with Article III:4; rather, "less favourable treatment" would also have to be established in order to find a violation of Article III:4:

"We recognize that, by interpreting the term 'like products' in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are 'like', that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of 'like' imported products 'less favourable treatment' than it accords to the group of 'like' domestic products. The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied . . . so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products. In this case, we do not examine further the interpretation of the term 'treatment no less favourable' in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us."³⁶³

239. Further, in *EC – Asbestos*, the Appellate Body also referred to the Report of the Working Party on *Border Tax Adjustment*. It confirmed that the criteria listed in this Report provide a framework for analysing the "likeness" of products on a case-by-case basis. However, the Appellate Body emphasized that these criteria were not treaty language nor did they constitute a "closed list" and that "the adoption of a particular framework to aid

in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence":

"We turn to consideration of how a treaty interpreter should proceed in determining whether products are 'like' under Article III:4. As in Article III:2, in this determination, '[n]o one approach . . . will be appropriate for all cases.'³⁶⁴ Rather, an assessment utilizing 'an unavoidable element of individual, discretionary judgement'³⁶⁵ has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing 'likeness' that has been followed and developed since by several panels and the Appellate Body.³⁶⁶ This approach has, in the main, consisted of employing four general criteria in analyzing 'likeness': (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.³⁶⁷ We note that these four criteria comprise four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the 'likeness' of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interre-

³⁶² Appellate Body Report on *EC – Asbestos*, paras. 98–99.

³⁶³ Appellate Body Report on *EC – Asbestos*, para. 100.

³⁶⁴ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 114.

³⁶⁵ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 113.

³⁶⁶ (footnote original) See, further, Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 113 and, in particular, fn. 46 See, also, Panel Report on *US – Gasoline*, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.

³⁶⁷ (footnote original) The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, [Panel Reports on] *EEC – Animal Proteins*, para. 4.2, and *Japan – Alcoholic Beverages I*, para. 5.6).

lated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

The kind of evidence to be examined in assessing the ‘likeness’ of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are ‘like’ in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term ‘like products’ is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.”³⁶⁸

240. In *Japan – Alcoholic Beverages II*, the Appellate Body found that the term “like product” evoked the image of an accordion whose width would vary depending on the provision under which the term was being interpreted. See paragraph 162 above.

Relationship with “like products” in other GATT provisions

241. With respect to the interpretation of “like products” under GATT Article I, see paragraphs 15–16 above.

(ii) *Relevant factors*

General

242. In *EC – Asbestos*, the Appellate Body reviewed the Panel’s approach to its “likeness” analysis, and criticised the Panel for not taking into account *all* of the relevant criteria:

“It is our view that, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as ‘like’. Yet, the Panel expressed a ‘conclusion’ that the products were ‘like’ after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion – without further analysis – before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a ‘conclusion’ after examining only one of the four criteria. By reaching a

‘conclusion’ without examining all of the criteria it had decided to examine, the Panel, in reality, expressed a conclusion after examining only some of the evidence. Yet, a determination on the ‘likeness’ of products cannot be made on the basis of a partial analysis of the evidence, after examination of just one of the criteria the Panel said it would examine. For this reason, we doubt whether the Panel’s overall approach has allowed the Panel to make a proper characterization of the ‘likeness’ of the fibres at issue.”³⁶⁹

243. In *EC – Asbestos*, the Appellate Body also disagreed with the Panel’s findings with respect to the examination of the first criteria of likeness – product properties. More specifically, the Appellate Body held that toxicity was a physical difference to be taken into account in the determination of “likeness” and linked this criterion to the criterion of competitive relationship between the products at issue:

“Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. . . .

. . .

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent. We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of “likeness” under Article III:4 of the GATT 1994.”³⁷⁰

244. Also, in *EC – Asbestos*, with respect to the criteria of end-use and consumer tastes and habits, the Appellate Body again established an explicit link to the criterion of a competitive relationship between products:

“Before examining the Panel’s findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers’ tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace.

³⁶⁸ Appellate Body Report on *EC – Asbestos*, paras. 101–103.

³⁶⁹ Appellate Body Report on *EC – Asbestos*, para. 109.

³⁷⁰ Appellate Body Report on *EC – Asbestos*, para. 114. In this regard, see also para. 278 of this Chapter. With respect to the minority’s opinion on this point, see Appellate Body Report on *EC – Asbestos*, paras. 151–154.

If there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the ‘likeness’ of those products under Article III:4 of the GATT 1994.”³⁷¹

245. After having found that the (degree of) toxicity of a product was a physical characteristic to be taken into account for the determination of likeness under Article III:4, the Appellate Body emphasized the significance of the toxicity of a subject product also in relation to consumers’ behaviour:

“In this case especially, we are also persuaded that evidence relating to consumers’ tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers’ behaviour with respect to the different fibres at issue.³⁷² We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers’ tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic. A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer’s decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers’ decisions will be influenced by other factors, such as the potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.”³⁷³

246. In *EC – Asbestos*, the Appellate Body rejected Canada’s argument that consumers’ tastes and habits were irrelevant in this dispute because “the existence of the measure has disturbed normal conditions of competition between the products”:³⁷⁴

“In our Report in *Korea – Alcoholic Beverages*, we observed that, “[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand’ for a product.³⁷⁵ We noted that, in such situations, ‘it may be highly relevant to examine

latent demand’ that is suppressed by regulatory barriers.³⁷⁶ In addition, we said that ‘evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition.’³⁷⁷ We, therefore, do not accept Canada’s contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers’ tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers’ tastes and habits irrelevant, as Canada contends.”³⁷⁸

247. Further, in *EC – Asbestos*, the Appellate Body acknowledged that an analysis of the various criteria for establishing “likeness” can produce “conflicting indications”; however, it emphasized that the fact that the analysis of a particular criterion may produce an unclear result does not relieve a panel of its duty to inquire into the relevant evidence:

“In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be ‘clear’ or, for that matter, because the parties agree that certain evidence is not relevant. In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers’ tastes and habits ‘would not provide clear results’, given that the Panel did not examine *any* evidence relating to this criterion.”³⁷⁹

³⁷¹ Appellate Body Report on *EC – Asbestos*, para. 117.

³⁷² (*footnote original*) We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

³⁷³ Appellate Body Report on *EC – Asbestos*, para. 122.

³⁷⁴ Appellate Body Report on *EC – Asbestos*, para. 123.

³⁷⁵ (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 115.

³⁷⁶ (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 120. We added that “studies of cross-price elasticity . . . involve an assessment of latent demand” (para. 121).

³⁷⁷ (*footnote original*) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 137.

³⁷⁸ Appellate Body Report on *EC – Asbestos*, para. 123.

³⁷⁹ Appellate Body Report on *EC – Asbestos*, para. 120.

“the situation of the parties dealing in [subject products]”

248. In *US – Gasoline*, the Panel addressed the respondent’s argument that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in gasoline must be taken into consideration:

“The Panel observed first that the United States did not argue that imported gasoline and domestic gasoline were not like *per se*. It had argued rather that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in the gasoline must be taken into consideration. The Panel, recalling its previous discussion of the factors to be taken into account in the determination of like product, noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. The Panel found therefore that chemically-identical imported and domestic gasoline are like products under Article III:4.”³⁸⁰

Likeness of products when origin is the sole distinctive criterion

249. In *India – Autos*, the Panel declared that, when origin is the sole distinguishing criterion, it is correct to treat products as “alike” within the meaning of Article III:4:

“The Panel notes that the only factor of distinction under the ‘indigenization’ condition between products which contribute to fulfilment of the condition and products which do not, is the origin of the product as either imported or domestic. India has not disputed the likeness of the relevant automotive parts and components of domestic or foreign origin for the purposes of Article III:4 of the GATT 1994. Origin being the sole criterion distinguishing the products, it is correct to treat such products as like products within the meaning of Article III:4.”³⁸¹

250. The Panel on *Canada – Wheat Exports and Grain Imports* confirmed this jurisprudence relying also on the Panel report in *Argentina – Hides and Leather*:

“In *Argentina – Hides and Leather*, in dealing with a claim under Article III:2 of the GATT 1994, the panel found that where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it is not necessary to examine the various likeness criteria. . . . While this finding is pertained to Article III:2, we consider that the same reasoning is applicable in this case *mutatis mutandi*.”³⁸²

(iii) Reference to GATT practice

251. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 171–172.

(c) “laws, regulations or requirements”

(i) Differences from “measures” under Article XXIII:1(b)

252. In *Japan – Film*, the Panel examined the relationship between the term “laws, regulations or requirements” under Article III:4 and the term “measures” under Article XXIII:1(b). The Panel opined that the concept of “measure” for the purposes of Article XXIII:1(b) is “equally applicable to the definitional scope of ‘all laws, regulations and requirements’ in Article III:4:

“A literal reading of the words *all laws, regulations and requirements* in Article III:4 could suggest that they may have a narrower scope than the word *measure* in Article XXIII:1(b). However, whether or not these words should be given as broad a construction as the word *measure*, in view of the broad interpretation assigned to them in the cases cited above, we shall assume for the purposes of our present analysis that they should be interpreted as encompassing a similarly broad range of government action and action by private parties that may be assimilated to government action. In this connection, we consider that our previous discussion of GATT cases on administrative guidance in relation to what may constitute a ‘measure’ under Article XXIII:1(b), specifically the panel reports on *Japan – Semi-conductors* and *Japan – Agricultural Products*, is equally applicable to the definitional scope of “all laws, regulations and requirements” in Article III:4.”³⁸³

(ii) Non-mandatory measures

253. In *Canada – Autos*, the Panel, in a finding subsequently not addressed by the Appellate Body, held that a measure can be subject to Article III:4 even if its compliance is not mandatory, and noted as follows:

“We note that it has not been contested in this dispute that, as stated by previous GATT and WTO panel and appellate body reports, Article III:4 applies not only to mandatory measures but also to conditions that an enterprise accepts in order to receive an advantage,³⁸⁴ including in cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product.³⁸⁵ The fact that compliance with the CVA

³⁸⁰ Panel Report on *US – Gasoline*, para. 6.9.

³⁸¹ Panel Report on *India – Autos*, para. 7.174.

³⁸² Panel Report on *Canada – Wheat Exports and Grain Imports*, footnote 246 to para. 6.164.

³⁸³ Panel Report on *Japan – Film*, para. 10.376.

³⁸⁴ The footnote to this sentence refers to, as an example, Panel Report on *EEC – Parts and Components*, para. 5.21.

³⁸⁵ (footnote original) See, e.g., Appellate Body Report on *EC – Bananas III*, para. 211.

requirements is not mandatory but a condition which must be met in order to obtain an advantage consisting of the right to import certain products duty-free therefore does not preclude application of Article III:4.”³⁸⁶

254. In *Canada – Wheat Exports and Grain Imports*, Canada argued that the measure at issue could only be found inconsistent if it mandated or required less favourable treatment. Making reference to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*³⁸⁷, the Panel made the following finding which was not challenged on appeal:

“Canada is of the view that since the United States in this case is challenging Section 57(c), as such, Section 57(c) would, under GATT/WTO practice, be inconsistent with Article III:4 only if it mandated, or required, less favourable treatment of foreign grain. Canada is referring here to the so-called “mandatory/discretionary” distinction which has been applied by numerous GATT and WTO panels. The United States did not specifically address this point. We note that the Appellate Body has not, as yet, expressed a view on whether the mandatory/discretionary distinction is a legally appropriate analytical tool for panels to use. In this case, our ultimate conclusion with respect to the United States’ challenge to Section 57(c) does not depend on whether or not the mandatory/discretionary distinction is valid. This said we will continue on the assumption that Section 57(c) is inconsistent with Article III:4 only if it mandates, or requires, less favourable treatment of imported grain.”³⁸⁸

(iii) *Action of private parties*

255. In *Canada – Autos*, the Panel examined the GATT-consistency of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehicles. Referring to the GATT Panel Reports on *Canada – FIRA* and *EEC – Parts and Components*³⁸⁹, the Panel analysed whether the action of private parties is subject to Article III:4. The Panel found that “[n]either legal enforceability [n]or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a ‘requirement’”:

“It is evident from the reasoning of the Panel Reports in *Canada – FIRA* and in *EEC – Parts and Components* that these Reports do not attempt to state general criteria for determining whether a commitment by a private party to a particular course of action constitutes a ‘requirement’ for purposes of Article III:4. While these cases are instructive in that they confirm that both legally enforceable undertakings and undertakings accepted by a firm to obtain an advantage granted by a government can constitute ‘requirements’ within the meaning of Article

III:4, we do not believe that they provide support for the proposition that either legal enforceability or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a ‘requirement.’ To qualify a private action as a ‘requirement’ within the meaning of Article III:4 means that in relation to that action a Member is bound by an international obligation, namely to provide no less favourable treatment to imported products than to domestic products.

A determination of whether private action amounts to a ‘requirement’ under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on *Canada – FIRA*, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on *EEC – Parts and Components*. We note in this respect that the word ‘requirement’ has been defined to mean ‘1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.’ The word ‘requirements’ in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of ‘requirements’ in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties.”³⁹⁰

(iv) *The term “requirement”*

256. In *India – Autos*, the Panel analysed the notion of “requirement” within Article III:4:

“An ordinary meaning of the term ‘requirement’, as articulated in the New Shorter Oxford Dictionary, is ‘Something called for or demanded; a condition which

³⁸⁶ Panel Report on *Canada – Autos*, para. 10.73.

³⁸⁷ In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in the context of an anti-dumping dispute, had expressly abstained from pronouncing generally on the continuing relevance or significance of the mandatory/discretionary distinction. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

³⁸⁸ Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.184.

³⁸⁹ GATT Panel Reports on *Canada – FIRA*, para. 5.4 and *EEC – Parts and Components*, para. 5.21.

³⁹⁰ Panel Report on *Canada – Autos*, paras. 10.106–10.107.

must be complied with'. The *Canada – FIRA* panel further suggested that there must be a distinction between 'regulations' and 'requirements' and that requirements could not be assumed to mean the same, i.e. 'mandatory rules applying across the board'.³⁹¹

257. In *India – Autos*, the Panel recalled that GATT jurisprudence "suggests two distinct situations which would satisfy the term 'requirement' in Article III:4: (i) obligations which an enterprise is 'legally bound to carry out'; [and (ii)] those which an enterprise voluntarily accepts in order to obtain an advantage from the government." It therefore stated that:

"A binding enforceable condition seems to fall squarely within the ordinary meaning of the word 'requirement', in particular as 'a condition which must be complied with'.³⁹² The enforceability of the measure in itself, independently of the means actually used or not to enforce it, is a sufficient basis for a measure to constitute a requirement under Article III:4 . . ."³⁹³

(v) *Reference to GATT practice*

258. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 173–174.

(d) "affecting the internal sale, offering for sale, purchase . . ."

259. In *EC – Bananas III*, the Appellate Body upheld the Panel's finding that the EC import licensing requirements concerning import quotas for bananas were inconsistent with Article III:4. The Panel had found that in answering the question whether Article III:4 was applicable to the EC import licensing requirements, it was important to distinguish between, on the one hand, the mere requirement to present a licence upon importation of a product as such and, on the other hand, the procedures applied by the European Communities in the context of the licence allocation. The latter procedures, in the view of the Panel, were internal laws, regulations and requirements affecting the internal sale of imported products.³⁹⁴ In this context, the Panel opined that the scope of application of Articles I and III was not necessarily mutually exclusive.³⁹⁵ The Appellate Body, in examining whether the measure at issue was subject to Article III:4, attached significance to the fact that the measure at issue went beyond "mere import licence requirements" and that the "intention" of the measure was to "cross-subsidize distributors of [certain] bananas":

"At issue in this appeal is not whether *any* import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the *distribution* of import licences for imported bananas among eligible operators *within* the European

Communities are within the scope of this provision. . . . These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect 'the internal sale, offering for sale, purchase, . . .' within the meaning of Article III:4, and therefore fall within the scope of this provision."³⁹⁶

260. In *Canada – Autos*, the Panel, in a finding subsequently not addressed by the Appellate Body, interpreted the term "affecting" as having a broad scope of application and as referring to measures which have an effect on imported goods:

"With respect to whether the CVA requirements affect the 'internal sale, . . . or use' of products, we note that, as stated by the Appellate Body, the ordinary meaning of the word 'affecting' implies a measure that has 'an effect on' and thus indicates a broad scope of application.³⁹⁷ The word 'affecting' in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.³⁹⁸

. . .

The idea that a measure which distinguishes between imported and domestic products can be considered to affect the internal sale or use of imported products only if such a measure is shown to have an impact under current circumstances on decisions of private firms with respect to the sourcing of products is difficult to reconcile with the concept of the 'no less favourable treatment' obligation in Article III:4 as an obligation addressed to governments to ensure effective equality of competitive opportunities between domestic and imported products, and with the principle that a showing of trade effects is not necessary to establish a violation of this obligation. In this respect, it should be emphasized that, contrary to what has been argued by Canada, the present case does not involve 'the possibility of a future change in circumstances creating the potential for discrimination' or 'discrimination that

³⁹¹ Panel Report on *India – Autos*, para. 7.174.

³⁹² (*footnote original*) New Oxford English Dictionary, as cited above.

³⁹³ Panel Report on *India – Autos*, paras. 7.190–7.191.

³⁹⁴ Panel Report on *EC – Bananas III*, para. 7.181.

³⁹⁵ Panel Report on *EC – Bananas III*, para. 7.176.

³⁹⁶ Appellate Body Report on *EC – Bananas III*, para. 211.

³⁹⁷ (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 220.

³⁹⁸ (*footnote original*) Panel Report on *Italy – Agricultural Machinery*, para. 12.

might exist after a change in circumstances that could occur at some unspecified time in the future.’ Rather, the present case clearly involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances. We therefore disagree with Canada’s assertion that the CVA requirements do not entail a ‘current potential for discrimination under present circumstances.’ As a consequence, whether or not in practice motor vehicle manufacturers can easily meet the CVA requirements of the MVTO 1998 and the SROs on the basis of labour costs alone does not alter our finding that the CVA requirements affect the internal sale or use of products. We therefore do not consider it necessary to examine the factual issues raised by the parties in support of their different views on this matter.

In light of the foregoing considerations, we find that the CVA requirements affect the internal sale or use in Canada of imported parts, materials and non-permanent equipment for use in the production of motor vehicles. We further consider that the CVA requirements accord less favourable treatment within the meaning of Article III:4 to imported parts, materials and non-permanent equipment than to like domestic products because, by conferring an advantage upon the use of domestic products but not upon the use of imported products, they adversely affect the equality of competitive opportunities of imported products in relation to like domestic products.”³⁹⁹

261. In the *Canada – Autos* case, the Panel found that the Canadian value added requirements, which stipulated that the amount of Canadian value added in the manufacturer’s local production of motor vehicles must be equal to or greater than the amount of Canadian value added in the production of motor vehicles, by the same manufacturer, during an earlier reference period, were in violation of Article III:4 of GATT 1994. The Panel also addressed another aspect of the Canadian measures, the so-called “ratio requirements”. Under these measures, the ratio of the net sales value of the vehicles *produced* in Canada to the net sales value of the vehicles *sold* for consumption in Canada during the relevant period had to be at least equal to the ratio in a reference year. The Panel found that the “ratio requirements” did not affect the sale of imported products:

“For purposes of Article III, the manner in which the ratio requirements affect the treatment accorded to motor vehicles with respect to the conditions of their importation is irrelevant. That there is a limitation on the net sales value of vehicles which can be imported duty-free therefore cannot constitute a grounds for finding a violation of Article III:4. The fact that internal sales of domestic vehicles are not subject to a ‘similar’ limitation

is also without relevance. By definition, a violation of Article III cannot be established on the basis of a comparison between the conditions of internal sale of domestic products with the conditions of importation of imported products.”⁴⁰⁰

262. In *India – Autos*, the Panel considered that, in order to rule on whether certain “indigenization” requirements were inconsistent with Article III:4 of GATT 1994, it had to determine, *inter alia*, whether the measures “affected” the “internal sale, purchase, transportation, distribution or use” of the products concerned. In that regard, the Panel recalled that the ordinary meaning of the term “affecting” has been understood to imply “a measure that has an effect on”. It went on to state that:

“[T]he fact that the measure applies only to imported products need not [be], in itself, an obstacle to its falling within the purview of Article III.⁴⁰¹ For example, an internal tax, or a product standard conditioning the sale of the imported but not of the like domestic product, could nonetheless ‘affect’ the conditions of the imported product on the market and could be a source of less favorable treatment. Similarly, the fact that a requirement is imposed as a condition on importation is not necessarily in itself an obstacle to its falling within the scope of Article III:4.⁴⁰²”⁴⁰³

263. In *US – FSC (Article 21.5 – EC)*, the Appellate Body shared the view that the word “affecting” in Article III:4 of the GATT 1994 has a “broad scope of application”:

“We observe that the clause in which the word ‘affecting’ appears – ‘in respect of all laws, regulations and requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use’ – serves to define the scope of application of Article III:4. (emphasis added) Within this phrase, the word ‘affecting’ operates as a link between identified types of gov-

³⁹⁹ Panel Report on *Canada – Autos*, paras. 10.80 and 10.84–10.85.

⁴⁰⁰ Panel Report on *Canada – Autos*, para. 10.149.

⁴⁰¹ (*footnote original*) Article III:1 refers to the application of measures “to imported or domestic products”, which suggests that application to both is not necessary.

⁴⁰² (*footnote original*) Thus, the “advantage” to be obtained could consist in a right to import a product. See for instance, the Report of the second GATT panel on *EC – Bananas II* as cited and endorsed in *EC – Bananas III*, WT/DS27/R/USA, adopted on 25 September 1997, as modified by the Appellate Body Report, para. 4.385 (DSR 1997:II, 943:

“The Panel further noted that previous panels had found consistently that this obligation applies to any requirement imposed by a contracting party, including requirements ‘which an enterprise voluntarily accepts to obtain an advantage from the government.’ In the view of the Panel, a requirement to purchase a domestic product in order to obtain the right to import a product at a lower rate of duty under a tariff quota is therefore a requirement affecting the purchase of a product within the meaning of Article III:4.”

⁴⁰³ Panel Report on *India – Autos*, para. 7.306.

ernment action ('laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use'). It is, therefore, not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which 'affect' the specific transactions, activities and uses mentioned in that provision. Thus, the word 'affecting' assists in defining the types of measure that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4.

The word 'affecting' serves a similar function in Article I:1 of the *General Agreement on Trade in Services* (the 'GATS'), where it also defines the types of measure that are subject to the disciplines set forth elsewhere in the GATS but does not, in itself, impose any obligation.⁴⁰⁴ In *EC – Bananas III*, we considered the meaning of the word 'affecting' in that provision of GATS. We stated:

[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a *broad scope of application*. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.⁴⁰⁵ (emphasis added, footnote omitted).⁴⁰⁶

(i) *Reference to GATT practice*

264. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 175–182.

(e) "treatment no less favourable"

(i) *General*

Equality of competitive opportunities

265. In *US – Gasoline*, the Panel, in a finding subsequently not addressed by the Appellate Body, found that the measure in question afforded to imported products less favourable treatment than that afforded to domestic products because sellers of domestic gasoline were authorized to use an individual baseline, while sellers of imported gasoline had to use the more onerous statutory baseline:

"The Panel observed that domestic gasoline benefited in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gaso-

line in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier panel report which stated that 'the words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.'⁴⁰⁷ The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline."⁴⁰⁸

266. In *Japan – Film*, the Panel reiterated the standard of equality of competitive conditions as a benchmark for establishing "no less favourable treatment":

"Recalling the statement of the Appellate Body in *Japan – Alcoholic Beverages* that 'Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products'⁴⁰⁹, we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the "no less favourable treatment" standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US – Section 337*⁴¹⁰, has been followed consistently in subsequent GATT and

⁴⁰⁴ (footnote original) Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services." (emphasis added)

⁴⁰⁵ (footnote original) Appellate Body Report, *supra*, footnote 47, para. 220. We made the same statement regarding the word "affecting" in Article I:1 of the GATS in our Report in *Canada – Autos*, *supra*, footnote 56, para. 150.

⁴⁰⁶ Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 208.

⁴⁰⁷ (footnote original) Panel Report on *US – Section 337*, para. 5.11.

⁴⁰⁸ Panel Report on *US – Gasoline*, para. 6.10.

⁴⁰⁹ (footnote original) Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16, citing Panel Reports on *US – Superfund*, para. 5.1.9 and *Japan – Alcoholic Beverages I*, para. 5.5(b).

⁴¹⁰ (footnote original) Panel Report on *US – Section 337*, para. 5.11.

WTO panel reports.⁴¹¹ The panel report on *US – Section 337* explains the test in very clear terms, noting that

‘the “no less favourable” treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words “treatment no less favourable” in paragraph 4 call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis’ (emphasis added).⁴¹² ⁴¹³

267. In *Korea – Various Measures on Beef*, the measure at issue established a dual retail distribution system for the sale of beef. *Inter alia*, imported beef was to be sold either in specialized stores selling only imported beef or, in the case of larger department stores, in separate sales. The Appellate Body first held that such different treatment of imported products did not necessarily lead to less favourable treatment:

“We observe . . . that Article III:4 requires only that a measure accord treatment to imported products that is ‘no less favourable’ than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is ‘no less favourable’. According ‘treatment no less favourable’ means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product.⁴¹⁴

This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:

‘On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal pro-

visions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.’⁴¹⁵ (emphasis added)

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated ‘less favourably’ than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.⁴¹⁶

268. In *EC – Asbestos*, the Appellate Body interpreted the term “no less favourable treatment” as requiring that the *group* of imported products not be accorded less favourable treatment than that accorded to the *group* of domestic like products:

“A complaining Member must still establish that the measure accords to the group of ‘like’ imported products ‘less favourable treatment’ than it accords to the group of ‘like’ domestic products. The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that internal regulations ‘should not be applied . . . so as to afford protection to domestic production’. If there is ‘less favourable treatment’ of the group of ‘like’ imported products, there is, conversely, ‘protection’ of the group of ‘like’ domestic products. However, a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ imported products

⁴¹¹ (*footnote original*) See e.g. Panel Report on *Canada – Provincial Liquor Boards*, paras. 5.12–5.14 and 5.30–5.31; and Panel Report on *US – Malt Beverages*, para. 5.30; Panel Report on *US – Gasoline*, para. 6.10; Panel Report on *Canada – Periodicals*, p. 75; and Panel Report on *EC – Bananas III*, paras. 7.179–7.180.

⁴¹² (*footnote original*) Panel Report on *US – Section 337*, paras. 5.11.

⁴¹³ Panel Report on *Japan – Film*, para. 10.379.

⁴¹⁴ This statement of the Appellate Body was made with respect to the following finding of the Panel:

“Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.”

Panel Report on *Korea – Various Measures on Beef*, para. 627.

⁴¹⁵ (*footnote original*) Panel Report on *US – Section 337*, para. 5.11.

⁴¹⁶ Appellate Body Report on *Korea – Various Measures on Beef*, paras. 135–137.

'less favourable treatment' than that accorded to the group of 'like' domestic products. In this case, we do not examine further the interpretation of the term 'treatment no less favourable' in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us."⁴¹⁷

Relationship with "upsetting the competitive relationship" under Article XXIII:1(b)

269. In *Japan – Film*, the Panel equated the standards of "upsetting effective equality of competitive opportunities" under Article III:4 and "upsetting the competitive relationship" under Article XXIII:1(b).

(ii) *Methodology of comparison*

Relevance of formal differences between imported and domestic products in legal requirements

270. In *Korea – Various Measures on Beef*, the Appellate Body addressed the relevance of formal regulatory differences between domestic and imported products and held that formally different treatment of imported and domestic goods did not, in and of itself, necessarily lead to less favourable treatment. See paragraph 267 above.

271. The Panel on *US – Gasoline* examined the consistency with Article III:4 of a United States environmental regulation on gasoline and its potential to result in formally different regulation for imported and domestic products. The Panel stated as follows:

"Although such a scheme could result in formally different regulation for imported and domestic products, the Panel noted that previous panels had accepted that this could be consistent with Article III:4.⁴¹⁸ The requirement under Article III:4 to treat an imported product no less favourably than the like domestic product is met by granting formally different treatment to the imported product, if that treatment results in maintaining conditions of competition for the imported product no less favourable than those of the like domestic product."⁴¹⁹

272. In *EC – Bananas III*, the Appellate Body agreed with the Panel's finding that the EC allocation method of tariff quota for bananas was inconsistent with Article III:4. The Appellate Body addressed, among other things, so-called hurricane licences, which authorize operators who include or represent European Communities' and African, Caribbean and Pacific (ACP) producers, or producer organizations "to import in compensation third-country bananas and non-traditional ACP bananas for the benefit of the operators who directly suffered damage as a result of the impossibility of the supplying the Community market with bananas originating in affected producer regions"⁴²⁰ because of the impact of tropical storms:

"Although [the] issuance [of subject import licences] results in increased exports from those countries, we note that hurricane licences are issued exclusively to EC producers and producer organizations, or to operators including or directly representing them. We also note that, as a result of the EC practice relating to hurricane licences, these producers, producer organizations or operators can expect, in the event of a hurricane, to be compensated for their losses in the form of 'quota rents' generated by hurricane licences. Thus, the practice of issuing hurricane licences constitutes an incentive for operators to market EC bananas to the exclusion of third-country and non-traditional ACP bananas. This practice therefore affects the competitive conditions in the market in favour of EC bananas. We do not dispute the right of WTO Members to mitigate or remedy the consequences of natural disasters. However, Members should do so in a manner consistent with their obligations under the GATT 1994 and the other covered agreements."⁴²¹

273. In *US – FSC (Article 21.5 – EC)*, the Appellate Body declared that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace:

"The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'.⁴²² This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace."⁴²³

In our view, the above conclusion is not nullified by the fact that the fair market value rule will not give rise to less favourable treatment for like imported products in each and every case . . . Even so, the fact remains that in an indefinite number of other cases, the fair market value rule operates, by its terms, as a significant constraint upon the use of imported input products. We are not entitled to disregard that fact."⁴²⁴

⁴¹⁷ Appellate Body Report on *EC – Asbestos*, para. 100.

⁴¹⁸ (footnote original) Panel Report on *US – Section 337*, para. 5.11.

⁴¹⁹ Panel Report on *US – Gasoline*, para. 6.25.

⁴²⁰ Panel Report on *EC – Bananas III*, para. 7.243.

⁴²¹ Appellate Body Report on *EC – Bananas III*, para. 213.

⁴²² (footnote original) Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, footnote 44, para. 142.

⁴²³ (footnote original) Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, footnote 116, at 110.

⁴²⁴ Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 215, 221.

Relevance of “treatment accorded to similarly situated domestic parties”

274. In *US – Gasoline*, the Panel, in a finding subsequently not addressed by the Appellate Body, “rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to domestic gasoline from *similarly situated* domestic parties.”⁴²⁵ In addition to pointing out that “[the] wording [of Article III:4] does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it”⁴²⁶, the Panel held that even if the approach of the United States were followed, there would be great uncertainty and indeterminacy of the basis of treatment:

“Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.

[E]ven if the US approach were to be followed, under any approach based on similarly situated parties’ the comparison could just as readily focus on whether imported gasoline from an identifiable *foreign* refiner was treated more or less favourably than gasoline from an identifiable US refiner. There were . . . many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were ‘similarly situated’. Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy of the basis of treatment underlined . . . the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above . . .”⁴²⁷

Relevance of “more favourable treatment of some imported products”

275. In *US – Gasoline*, the Panel rejected the US argument that the subject regulation treated imported products “equally overall”⁴²⁸, stating as follows:

“The Panel noted that, in these circumstances, the argument that on average the treatment provided was equiv-

alent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others.”⁴²⁹

Relationship with other methodologies of comparison

276. With respect to the methodology of comparison for “in excess of those applied” under the first sentence of Article III:2, see paragraphs 175–186 above. With respect to the methodology of comparison in identifying “directly competitive or substitutable products” under the second sentence of Article III:2, see paragraph 209 above. With respect to the methodology of comparison in examining the “dissimilar taxation” under the second sentence of Article III:2, see paragraphs 217–218 above.

(f) Relationship with other GATT provisions

(i) *Relationship with Article XX*

277. In *US – Gasoline*, the Appellate Body discussed the relationship between Article III:4 and Article XX in interpreting Article XX(g). The Appellate Body stated:

“Article XX(g) and its phrase, ‘relating to the conservation of exhaustible natural resources,’ need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase ‘relating to the conservation of exhaustible natural resources’ may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the ‘General Exceptions’ listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.”⁴³⁰

⁴²⁵ Panel Report on *US – Gasoline*, para. 6.11.

⁴²⁶ Panel Report on *US – Gasoline*, para. 6.11.

⁴²⁷ Panel Report on *US – Gasoline*, paras. 6.12–6.13.

⁴²⁸ Panel Report on *US – Gasoline*, para. 6.14.

⁴²⁹ Panel Report on *US – Gasoline*, para. 6.14. In support of its proposition, the Panel cited GATT Panel Report on *US – Section 337*, BISD 36S/345, para. 5.14.

⁴³⁰ Appellate Body Report on *US – Gasoline*, p. 18.

278. In *EC – Asbestos*, the Appellate Body found that “carcinogenicity, or toxicity, constitutes . . . a defining aspect of the physical properties of [the subject products]”. See paragraph 243 above. The Appellate Body disagreed with the Panel’s finding that considering the health risks associated with a product under Article III:4 would negate the effect of Article XX(b):

“We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to ‘adopt and enforce’ a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to ‘adopt and enforce’ measures ‘necessary to protect human . . . life or health’. Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly ‘like’ products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a Member has a sufficient basis for ‘adopting or enforcing’ a WTO-inconsistent measure on the grounds of human health.”⁴³¹

(ii) *Relationship with Article XXIII:1(b)*

279. In *Japan – Film*, the Panel did not find a significant distinction between the standard it had set out for Article XXIII:1(b) and the standard of “upsetting effective equality of competitive opportunities” under Article III:4:

“We recall our earlier findings that none of the eight distribution ‘measures’ cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed

at the time when a relevant tariff concession was granted). In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of ‘upsetting the competitive relationship’ – may be different from the standard of ‘upsetting effective equality of competitive opportunities’ applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently.”⁴³²

(g) Reference to GATT practice

280. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 162–171.

5. Article III:8

(a) Item (b)

(i) “*the payment of subsidies exclusively to domestic producers*”

281. In the *Canada – Periodicals* dispute, one of the measures at issue related to postal rates charged by the Canadian Post Corporation, a Crown Corporation controlled by the Canadian Government. Canada Post applied reduced postal rates to Canadian-owned and Canadian-controlled periodicals meeting certain requirements. These lower postal rates were funded by the Department of Canadian Heritage, which provided funds to Canada Post so that this agency could in turn offer the reduced postal rates to eligible Canadian periodicals. Canada argued that the reduced postal rate was exempted from the strictures of Article III:4 by virtue of Article III:8(b), because the reduced postal rate represented “payment of subsidies exclusively to domestic producers”. The Panel agreed with Canada and found that the funds provided by the Department of Canadian Heritage passed through Canada Post directly to the eligible Canadian publishers and that therefore, Canada’s funded rate scheme on periodicals qualified under Article III:8 (b). The Appellate Body reversed the Panel’s finding and found that Article III:8(b) applied only to the payment of subsidies which involves the expenditure of revenue by a government:

“In examining the text of Article III:8(b), we believe that the phrase, ‘including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases

⁴³¹ Appellate Body Report on *EC – Asbestos*, para. 115.

⁴³² Panel Report on *Japan – Film*, para. 10.380.

of domestic products' helps to elucidate the types of subsidies covered by Article III:8(b) of the GATT 1994. It is not an exhaustive list of the kinds of programmes that would qualify as 'the payment of subsidies exclusively to domestic producers', but those words exemplify the kinds of programmes which are exempted from the obligations of Articles III:2 and III:4 of the GATT 1994.

Our textual interpretation is supported by the context of Article III:8(b) examined in relation to Articles III:2 and III:4 of the GATT 1994. Furthermore, the object and purpose of Article III:8(b) is confirmed by the drafting history of Article III. In this context, we refer to the following discussion in the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning the provision of the Havana Charter for an International Trade Organization that corresponds to Article III:8(b) of the GATT 1994:

'This sub-paragraph was redrafted in order to make it clear that nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article 18 would override the provisions of Section C of Chapter IV.'⁴³³

We do not see a reason to distinguish a reduction of tax rates on a product from a reduction in transportation or postal rates. Indeed, an examination of the text, context, and object and purpose of Article III:8(b) suggests that it was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government."⁴³⁴

282. In *Indonesia – Autos*, the Panel examined the consistency of certain tax exemption to domestically produced automobiles. The Panel rejected Indonesia's argument that tax exemptions are excluded from the scope of Article III by virtue of Article III:8(b), stating:

"In line with its two previous arguments, Indonesia maintains the view that 'the payment of subsidies' in Article III:8(b) of GATT must refer to all subsidies identified in Article 1 of the SCM Agreement, not merely to the subset of 'direct' subsidies. Under this approach, any measure which constitutes a subsidy within the meaning of the SCM Agreement would not be subject to Article III of GATT. In Indonesia's view, only this interpretation avoids rendering the SCM Agreement meaningless.

...

We consider that the purpose of Article III:8(b) is to confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products. In our view the wording 'payment of subsidies exclusively to domestic producers' exists so as to ensure

that only subsidies provided to producers, and not tax or other forms of discrimination on products, be considered subsidies for the purpose of Article III:8(b) of GATT. This is in line with previous GATT panels⁴³⁵ and WTO Appellate Body⁴³⁶ reports.

We recall also that the type of interpretation sought by Indonesia was explicitly excluded by the drafters of Article III:8(b) when they rejected a proposal by Cuba at the Havana Conference to amend the Article so as to read:

'The provisions of this Article shall not preclude the exemption of domestic products from internal taxes as a means of indirect subsidization in the cases covered under Article [XVI]'.⁴³⁷

The arguments submitted by Indonesia that its measures are only governed by the SCM Agreement clearly do not find any support in the wording of Article III:8(b) of GATT. On the contrary, Article III:8(b) confirms that the obligations of Article III and those of Article XVI (and the SCM Agreement) are different and complementary: subsidies to producers are subject to the national treatment provisions of Article III when they discriminate between imported and domestic products."⁴³⁸

(b) Reference to GATT practice

283. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 194–197.

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

284. The Panel on *US – Gasoline* did not examine a claim under GATT Article I, considering that it was unnecessary in view of the findings it had reached on the violation of Article III:4 for the subject measure.⁴³⁹

2. Article II

285. In *EC – Bananas III*, the Appellate Body found the EC import licensing system for bananas inconsistent with Article III:4. The European Communities claimed that Article III:4 was not applicable to the import licens-

⁴³³ (*footnote original*) The Appellate Body cited Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 66. Article 18 and Section C of Chapter IV of the Havana Charter for an International Trade Organization correspond, respectively, to Article III and Article XVI of the GATT 1947.

⁴³⁴ Appellate Body Report on *Canada – Periodicals*, pp. 33–34.

⁴³⁵ (*footnote original*) Panel Reports on *EEC – Oilseeds*, *Italy – Agriculture Machinery*; and *US – Malt Beverages*.

⁴³⁶ (*footnote original*) Appellate Body Report on *Canada – Periodicals*.

⁴³⁷ (*footnote original*) E/CONF.2/C.3/6, page 17; E/CONF.2/C.3/A/W.32, page 2.

⁴³⁸ Panel Report on *Indonesia – Autos*, paras. 14.41–14.45. Also, the Panel referred to the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in para. 300 of this Chapter. Panel Report on *Indonesia – Autos*, para. 14.28.

⁴³⁹ Panel Report on *US – Gasoline*, para. 6.19.

ing system because it was a border measure. The Appellate Body noted the existence of the “operator category rules” and the “activity function rules”, which both affected the allocation of licences. The Appellate Body held that “these rules go far beyond the mere import licence requirements needed to administer the tariff quota . . . and therefore fall within the scope of [Article III:4]”. See paragraph 125 above.

286. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding a certain practice of the Korean state trading agency for beef under Articles III:4 and XVII after having found a violation of Articles XI and II:1(a) for that practice. See paragraph 477 below.

(a) Reference to GATT practice

287. With respect to GATT practice on this subject, see also GATT Analytical Index, pages 198–202.

3. Article VI

288. In *US – 1916 Act (EC)*, exercising judicial economy, the Panel found that the subject United States act was inconsistent with GATT Article VI and did not examine the EC claim that it was also inconsistent with GATT Article III. The Appellate Body did not address the issue upon appeal. The Panel first stated that Article VI was, with respect to the 1916 Act, the more specific provision, such that it had to be addressed first:

“It is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it.⁴⁴⁰ As a result, one way to reply to the question above is to determine which article more specifically addresses the 1916 Act. We agree that this will require us to touch upon the substance of the case, but we recall that this test is used here for purely procedural reasons, that is to determine the order of our review. Such a *prima facie* analysis is, of course, without prejudice to the final findings on the issue of the applicability of Articles III:4 and VI, to be reached after a more detailed review of the scope of each provision, as necessary.

As mentioned above, our understanding is that Article III:4 and Article VI are based on two different premises. The applicability of Article III:4 seems to depend primarily on whether the measure applied pursuant to the law at issue is an internal measure or not. In contrast, the applicability of Article VI seems to be based on the nature of the trade practice which is addressed. Under Article VI, the type of sanction eventually applied does not seem to be relevant for a measure to be considered as an anti-dumping measure, or not. We note in this respect that, for the EC, the fact that the 1916 Act imposes other sanctions than duties is insufficient to

make that law fall outside the scope of Article VI and, for the United States, under Article VI, dumping does not have to be counteracted exclusively with duties. Consequently, it seems to us that the fact that a law imposes measures that can be qualified as ‘internal measures’, such as fines, damages or imprisonment, does not appear to be sufficient to conclude that Article VI is not applicable to that law.

We also note that the parties agree that the 1916 Act deals with transnational price discrimination. Furthermore, the United States argues that it does not merely address dumping, and that other requirements under the 1916 Act make that law fall outside the scope of Article VI. We note that Article III:4 states that imported products

‘shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’⁴⁴¹

289. The Panel held that damages, fines or imprisonment could theoretically accord less favourable treatment to imported products, but opined that the terms of Article III:4 were less specific than Article VI with respect to the case before it:

“Determining that damages, fines or imprisonment, which are imposed on persons, may accord less favourable treatment to imported products with respect to their internal sale, offering for sale, purchase, transportation, distribution or use, is not *a priori* impossible and has actually been done by previous panels. However, a preliminary examination of the scope of application of Article III:4 (i.e. internal sale, offering for sale, purchase, transportation, distribution or use) would tend to show that the terms of Article III:4 are less specific than those of Article VI when it comes to the notion of transnational price discrimination.

In application of the principle recalled by the Appellate Body in *European Communities – Bananas* and by the Permanent Court of International Justice in the *Serbian Loans* case, there would be reasons to reach the preliminary conclusion that we should review the applicability of Article VI to the 1916 Act in priority, as that article apparently applies to the facts at issue more specifically. This preliminary conclusion is based on our understanding of the arguments of the parties and on a preliminary review of the terms of Articles III:4 and VI. Since the fact

⁴⁴⁰ (*footnote original*) See Appellate Body Report on *EC – Bananas III*, para. 204, and the judgement of the Permanent Court of International Justice in the *Serbian Loans* case (1929), where the PCIJ stated that “the special words, according to elementary principles of interpretation, control the general expression” (PCIJ, Series A, No. 20/21, at p. 30). See also György Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), p. 191.

⁴⁴¹ Panel Report on *US – 1916 Act (EC)*, paras. 6.76–6.78; Panel Report on *US – 1916 Act (Japan)*, paras. 6.75–6.76.

that the 1916 Act provides for the imposition of internal measures does not seem to be sufficient as such to differentiate the scope of application of Article III:4 and that of Article VI, we had to consider the other terms of these articles."⁴⁴²

290. The Panel on *US – 1916 Act (EC)* then held, after finding that the 1916 Act fell under the scope, and was in violation of, Article VI, that it was no longer necessary to consider whether some elements of the 1916 Act could also be subject to Article III:4:

"We recall that we decided to proceed first with a review of whether Article VI applied to the 1916 Act because Article VI seemed to address more specifically the terms of the 1916 Act. We found that the 1916 Act, because it targets "dumping" within the meaning of Article VI of the GATT 1994, was fully subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not evade the disciplines of Article VI by the mere fact that it had anti-trust objectives or included requirements of an anti-trust nature. We therefore find it unnecessary to determine whether some elements of the 1916 Act could be subject to Article III:4.

We also found that the 1916 Act violates the provisions of Article VI and certain provisions of the Anti-Dumping Agreement. We consider these findings sufficiently complete to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance 'in order to ensure effective resolution of disputes to the benefit of all Members.'⁴⁴³ Therefore, we are entitled to exercise judicial economy in accordance with WTO panel and Appellate Body practice and decide not to review the EC claims under Article III:4."⁴⁴⁴

291. The Panel on *US – 1916 Act (Japan)* further elaborated on the precise relationship between Article VI and Article III:

"When we considered the relationship between Article VI and Article III:4 of the GATT 1994, we noted that Article VI seemed to address the basic feature of the 1916 Act (i.e. transnational price discrimination) more directly than Article III:4. In our findings, we concluded that Article VI applies to a measure whenever that measure objectively addresses a situation of transnational price discrimination, as defined in Article VI:1. Thus, we found that the 1916 Act was *fully* subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not escape the disciplines of Article VI by the mere fact that it had anti-trust objectives, did not address *injurious dumping* as such, included additional requirements of an anti-trust nature or led to the imposition of measures other than anti-dumping duties that were not border adjustment measures.

However, even though we considered that Article VI deals specifically with the type of price discrimination at issue, we did not address the question whether Article VI applied to the 1916 Act *to the exclusion* of Article III:4.

In this regard, we recall that, in its report on *European Communities – Bananas*, the Appellate Body noted that:

'Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.'⁴⁴⁵"⁴⁴⁶

292. After recalling the findings of the Appellate Body in *EC – Bananas III*, the Panel on *US – 1916 Act* went on to distinguish the subject-matter at issue in that case from the case before it. The Appellate Body did not address the finding of the Panel that it was entitled to exercise judicial economy with respect to the claims under Article III:4:

"We are mindful of the fact that Article X:3(a) of the GATT 1994 deals with the way domestic trade laws in general should be applied, whereas Article 1.3 of the Agreement on Import Licensing Procedures deals with the way rules should be applied in the specific sector of import licensing. In contrast, it may be said that Articles III:4 and VI do not share the same purpose. However, we view the Appellate Body statement as applying the general principle of international law *lex specialis derogat legi generali*. This is particularly clear from its remark that the *Agreement* on Import Licensing Procedures 'deals specifically, and in detail, with the administration of import licensing procedures'. In our opinion, Article VI and the Anti-Dumping Agreement 'deals specifically, and in detail, with the administration of' anti-dumping. In the present case, the question of the applicability of Article III:4 was essentially raised by the type of measures imposed under the 1916 Act. On the basis of the reasoning of the Appellate Body, we conclude that, even assuming that Article III:4 is applicable, in light of our findings under Article VI and the Anti-Dumping Agreement, we do not need to make findings under Article III:4 of the GATT 1994.

We nevertheless recall that, as stated by the Appellate Body in its report on *Australia – Measures Affecting Importation of Salmon*,⁴⁴⁷ our findings must be complete enough to enable the DSB to make sufficiently pre-

⁴⁴² Panel Report on *US – 1916 Act (EC)*, paras. 6.78–6.79; Panel Report on *US – 1916 Act (Japan)*, paras. 6.76–6.77. With respect to judicial economy in general, see Chapter on DSU, Section XXXVI.F.

⁴⁴³ (footnote original) See Appellate Body Report on *Australia – Salmon*, para. 223.

⁴⁴⁴ Panel Report on *US – 1916 Act (EC)*, paras. 6.219–6.220.

⁴⁴⁵ (footnote original) Appellate Body Report on *EC – Bananas III*, para. 204.

⁴⁴⁶ Panel Report on *US – 1916 Act (Japan)*, paras. 6.268–6.269; Panel Report on *US – 1916 Act (EC)*, para. 6.219.

⁴⁴⁷ (footnote original) Appellate Body Report on *Australia – Salmon*, para. 223.

cise recommendations and rulings so as to allow for prompt compliance 'in order to ensure effective resolution of disputes to the benefit of all Members.'

Having regard to our findings under Article VI and the Anti-Dumping Agreement, and keeping in mind that, in our view, Article VI and the Anti-Dumping Agreement deal specifically and in detail with laws addressing dumping as such, we do not consider that making *additional* findings under Article III:4 is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow prompt compliance by the United States in order to ensure an effective resolution of this dispute.

Therefore, we find that we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article III:4 of the GATT 1994.⁴⁴⁸

4. Article XI

293. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding a certain practice of the Korean state trading agency for beef under Articles III:4 and XVII after having found a violation of Articles XI and II:1(a) for that practice. See paragraph 477 below.

294. In *EC – Asbestos*, the Panel rejected Canada's argument that the French ban on the manufacture, imports and exports, and domestic sales and transfer of certain asbestos and asbestos-containing products was not covered by *Note Ad Article III*, and thus, subject to Article XI:1 as well as Article III:4.⁴⁴⁹ See paragraphs 401–402 below.

295. In *India – Autos*, the Panel recalled the Panel Report on *Canada – FIRA* when it stated that Articles III and XI of GATT 1994 have distinct scopes of application. It quoted from that Panel that "the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous."⁴⁵⁰⁴⁵¹

296. In *India – Autos*, the Panel did, however, consider that under certain circumstances, specific measures may have an impact upon both the importation of products (Article XI) and the competitive conditions of imported products on the internal market (Article III):

"[I]t therefore cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there

may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions, as was suggested in the case of state trading. . .

. . .

. . . there may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4.⁴⁵² This is also in keeping with the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements."⁴⁵³

(a) Reference to GATT practice

297. With respect to GATT practice on this subject-matter, see also GATT Analytical Index, pages 201–204.

5. Article XVII

298. The Panel on *Korea – Various Measures on Beef* discussed the relationship between GATT Articles III and XVII. See paragraphs 138 above and 477 below.

(a) Reference to GATT practice

299. With respect to GATT practice, see GATT Analytical Index, page 204.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. General

300. In *Japan – Alcoholic Beverages II*, in discussing the purpose of Article III, the Appellate Body stated:

"The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*."⁴⁵⁴

2. SPS Agreement

301. In *EC – Hormones (US)*, the Panel examined the consistency of certain sanitary measures of the European

⁴⁴⁸ Panel Report on *US – 1916 Act (Japan)*, paras. 6.269–6.272.

⁴⁴⁹ Panel Report on *EC – Asbestos*, para. 8.91.

⁴⁵⁰ (*footnote original*) Panel Report, L/5504, adopted on 7 February 1987, para. 5.14.

⁴⁵¹ Panel Report on *India – Autos*, para. 7.220.

⁴⁵² (*footnote original*) The Panel notes that the TRIMS Agreement Illustrative List envisages measures relating to export requirements both in the context of Article XI:1, as noted above in the context of our analysis under Article XI:1, and in the context of Article III:4 of the GATT 1994, by listing as inconsistent with that provision measures which require "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports" TRIMS Illustrative List, Item 1 (b).

⁴⁵³ Panel Report on *India – Autos*, paras. 7.224 and 7.296.

⁴⁵⁴ Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 16.

Communities with Articles I and III of the *GATT 1994* and certain provisions of the *SPS Agreement*. With respect to the relationship between Article III of the *GATT 1994* and *SPS Agreement*, the Panel, in a finding subsequently not addressed by the Appellate Body, stated as follows:

“Since we have found that the EC measures in dispute are inconsistent with the requirements of the *SPS Agreement*, we see no need to further examine whether the EC measures in dispute are also inconsistent with Article I or III of *GATT*.

As noted above in paragraph 8.42, if we were to find an inconsistency with Article I or III of *GATT*, we would then need to examine whether this inconsistency could be justified, as argued by the European Communities, under Article XX(b) of *GATT* and would thus necessarily need to revert to the *SPS Agreement* under which we have already found inconsistencies. Since the European Communities has not invoked any defence under *GATT* other than Article XX(b), an inconsistency with Article I or III of *GATT* would, therefore, in any event, not be justifiable.”⁴⁵⁵

3. TBT Agreement

302. In *EC – Sardines*, the Panel considered that, in this case, the analysis of the claims under the *TBT Agreement* would precede any examination of the claims under Article III:4 of *GATT 1994*. In doing so, the Panel recalled the Appellate Body’s statement in *EC – Bananas III* which declared “that the panel ‘should’ have applied the Licensing Agreement first because this agreement deals ‘specifically, and in detail’ with the administration of import licensing procedures”. In the Panel’s view, the Appellate Body is suggesting that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement.”⁴⁵⁶ Using that same rationale, the Panel concluded that since “[a]rguably, the *TBT Agreement* deals ‘specifically, and in detail’ with technical regulations”, and considering the parties claims, “then the analysis under the *TBT Agreement* would precede any examination under [Article III:4 of] the *GATT 1994*.”⁴⁵⁷

4. SCM Agreement

303. In *Indonesia – Autos*, the Panel examined the consistency with Article III of measures contained in the Indonesian National Car Programme, including a luxury tax exemptions given to certain domestically produced cars. Indonesia argued that the challenged measures were subsidies, which were exclusively governed by Article XVI of *GATT* and the *SCM Agreement*. Referring to the finding of the Appellate Body in *Japan – Alcoholic Beverages II* referenced in paragraph 300 above⁴⁵⁸, the Panel concluded that there is no general

conflict between Article III and the *SCM Agreement* for the following reasons:

“[W]e think that Article III of *GATT 1994* and the WTO rules on subsidies remain focused on different problems. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does not ‘proscribe’ nor does it ‘prohibit’ the provision of any subsidy *per se*. By contrast, the *SCM Agreement* prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the *SCM Agreement*. In short, Article III prohibits discrimination between domestic and imported products while the *SCM Agreement* regulates the provision of subsidies to enterprises.

Contrary to what Indonesia claims, the fact that a government gives a subsidy to a firm does not imply that the subsidy itself will necessarily discriminate between imported and domestic products in contravention of Article III of *GATT*. Article III:8(b) of *GATT* makes clear that a government may use the proceeds of taxes collected equally on all imported and domestic products in order to provide a subsidy to domestic producers (to the exclusion of producers abroad).

Finally, the fact that, as a result of the Uruguay Round, the *SCM Agreement* to some extent covers subject matters that were already covered by other *GATT* disciplines is not unique. This situation is similar to the relationship between *GATT 1994* and *GATS*. In *Periodicals* and in *Bananas III*, the defending parties argued that since a set of rules on services exists now in *GATS*, the provisions of Article III:4 of *GATT* on distribution and transportation have ceased to apply. Twice the Appellate Body has ruled that the scope of Article III:4 was not reduced by the fact that rules on trade in services are found in *GATS*: ‘The entry into force of the *GATS*, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the *GATT 1994*.’

Accordingly, we consider that Article III and the *SCM Agreement* have, generally, different coverage and do not impose the same type of obligations.⁴⁵⁹ Thus there

⁴⁵⁵ Panel Report on *EC – Hormones (US)*, paras. 8.272–8.273; Panel Report on *EC – Hormones (Canada)*, paras. 8.275–8.276.

⁴⁵⁶ Panel Report on *EC – Sardines*, para. 7.15.

⁴⁵⁷ Panel Report on *EC – Sardines*, para. 7.16.

⁴⁵⁸ Panel Report on *Indonesia – Autos*, para. 14.28.

⁴⁵⁹ (*footnote original*) This conclusion is confirmed, amongst other provisions, by the footnote to Article 32.1 of the *SCM Agreement* which recognizes that actions against subsidies remain possible under *GATT 1994*. Article 32.1 of the *SCM Agreement* reads as follows: “No specific action against a subsidy of another Member can be taken except in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement”. The footnote 56 to this Article reads as follows: “This paragraph is not intended to preclude action under other relevant provisions of *GATT 1994*, where appropriate”.

is no general conflict between these two sets of provisions."⁴⁶⁰

304. The Panel on *Indonesia – Autos*, in the context of discussing the relationship between Article III and the *SCM Agreement*, considered in which manner “direct” taxes (taxes on individuals and economic entities) and “indirect” taxes (taxes on products) are covered by Article III of *GATT 1994*:

“When subsidies to producers result from exemptions or reductions of indirect taxes on products, Article III:2 of GATT is relevant. In contrast, subsidies granted in respect of direct taxes are generally not covered by Article III:2, but may infringe Article III:4 to the extent that they are linked to other conditions which favour the use, purchase, etc. of domestic products.”⁴⁶¹

305. The Panel on *Indonesia – Autos* also rejected Indonesia’s argument that if Article III applied to the subject measures, the *SCM Agreement* would be reduced to “inutility”:

“This is to say that the only subsidies that would be affected by the provisions of Article III are those that would involve discrimination between domestic and imported products. While Article III of GATT and the *SCM Agreement* may appear to overlap in respect of certain measures, the two sets of provisions have different purposes and different coverage. Indeed, they also offer different remedies, different dispute settlement time limits and different implementation requirements. Thus, we reject Indonesia’s argument that the application of Article III to subsidies would reduce the *SCM Agreement* to ‘inutility’.

We note further that Indonesia’s argument would imply that every time a measure involves tax discrimination in respect of products, that measure should be considered a subsidy governed exclusively by the *SCM Agreement* to the exclusion of Article III:2. It appears to us that this line of argument would reduce Article III:2 to ‘inutility’, since the very explicit (and arguably only) purpose of Article III:2 is to deal with tax discrimination in respect of products.”⁴⁶²

306. In *Indonesia – Autos*, the Panel also addressed the significance of Article III:8(b) in the context of the relationship between Article III and the *SCM Agreement*. See paragraph 282 above.

5. TRIMs Agreement

307. The Panel on *Indonesia – Autos* addressed claims that certain Indonesian local content requirements for import duty exemptions to automobiles and their parts and components were inconsistent with the *TRIMs Agreement* and Article III:4 of the *GATT 1994*:

“The complainants have claimed that the local content requirements under examination, and which we find are

inconsistent with the *TRIMs Agreement*, also violate the provisions of Article III:4 of *GATT*. Under the principle of judicial economy,⁴⁶³ a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the *WTO Agreement*. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the *TRIMs Agreement*. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia’s obligations under the *TRIMs Agreement* would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of *GATT*. We recall our conclusion that non applicability of Article III would not affect as such the application of the *TRIMs Agreement*. We consider therefore that we do not have to address the claims under Article III:4, nor any claim of conflict between Article III:4 of *GATT* and the provisions of the *SCM Agreement*.”⁴⁶⁴

308. In *Canada – Autos*, following the finding of a violation of Article III:4, the Panel opined that a finding under the *TRIMs Agreement* was not necessary. The Appellate Body did not address this issue:

“[W]e do not consider it necessary to make a specific ruling on whether the CVA requirements provided for in the MVTO 1998 and the SROs are inconsistent with Article 2.1 of the *TRIMs Agreement*. We believe that the Panel’s reasoning in *EC – Bananas III* as to why it did not make a finding under the *TRIMs Agreement* after it had found that certain aspects of the EC’ licensing procedures were inconsistent with Article III:4 of the *GATT* also applies to the present case.⁴⁶⁵ Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the *TRIMs Agreement* would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the *GATT* since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the *TRIMs Agreement*.”⁴⁶⁶

309. In *India – Autos*, the Panel was dealing with separate claims under both the *GATT 1994* and the *TRIMs Agreement*. It noted that previous panels confronted with concurrent claims concerning these two agreements had taken differing approaches to the choice of order of analysis of such claims. The Panel recognized

⁴⁶⁰ Panel Report on *Indonesia – Autos*, paras. 14.33–14.36.

⁴⁶¹ Panel Report on *Indonesia – Autos*, para. 14.38. As to the context of this paragraph, see paras. 303–306 of this Chapter.

⁴⁶² Panel Report on *Indonesia – Autos*, paras. 14.39–14.40.

⁴⁶³ (footnote original) Appellate Body Report on *US – Shirts and Blouses*, pp. 17–20.

⁴⁶⁴ Panel Report on *Indonesia – Autos*, para. 14.93.

⁴⁶⁵ (footnote original) Panel Report on *EC – Bananas III*, para. 7.186.

⁴⁶⁶ Panel Report on *Canada – Autos*, para. 10.91.

that, in some circumstances, there may be a practical significance in determining a particular order for the examination of claims based on the TRIMS and GATT 1994; for example if a party claimed as a defence that a measure had been notified under the TRIMs Agreement. Since that was not the case in this dispute, the Panel did not find any particular reason to start its examination on any particular order, nor did it consider that the end result would be affected by either determination of order of analysis. In fact, the Panel was not persuaded that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions, and stated:

“As a general matter, even if there was some guiding principle to the effect that a specific covered Agreement might appropriately be examined before a general one where both may apply to the same measure, it might be difficult to characterize the TRIMs Agreement as necessarily more ‘specific’ than the relevant GATT provisions. Although the TRIMs Agreement ‘has an autonomous legal existence’, independent from the relevant GATT provisions, as noted by the *Indonesia – Autos* panel,⁴⁶⁷ the substance of its obligations refers directly to Articles III and XI of the GATT, and clarifies their meaning, *inter alia*, through an illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the GATT 1994. On the other hand, the TRIMs Agreement also introduces rights and obligations that are specific to it, through its notification mechanism and related provisions. An interpretative question also arises in relation to the TRIMs Agreement as to whether a complainant must separately prove that the measure in issue is a ‘trade-related investment measure’. For either of these reasons, the TRIMs Agreement might be arguably more specific in that it provides additional rules concerning the specific measures it covers.⁴⁶⁸ The Panel is therefore not convinced that, as a general matter, the TRIMs Agreement could inherently be characterized as more specific than the relevant GATT provisions.”⁴⁶⁹

310. The Panel on *India – Autos* ultimately decided to examine the GATT claims first, since both complainants had addressed their claims under GATT 1994 prior to their claims under the TRIMs Agreement, and the order selected for examination of the claims could have an impact on the potential to apply judicial economy. In effect, the Panel stated:

“It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy. Even if no violation was found under the GATT claims, that also seems an efficient start-

ing point since it would be difficult to imagine that if no violation has been found of Articles III or XI, a violation could be found of Article 2 of the TRIMs Agreement, which refers to the same provisions. Conversely, if no violation of the TRIMs Agreement were found, this would not necessarily preclude the existence of a violation of GATT Articles III:4 or XI:1 because the scope of the GATT provisions is arguably broader if India’s argument was accepted that there is a need to prove that a measure is an investment measure and its assertion that this is not the case with the measures before this Panel.”⁴⁷⁰

6. GATS

311. In *Canada – Periodicals*, the Appellate Body examined the Panel’s finding that Canada was in violation of Article III:2 in imposing an excise tax on split-run editions of periodicals, i.e. those editions which “contain[...] an advertisement that is primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical[s] that were distributed in the periodical[s] country of origin.”⁴⁷¹ Canada claimed that the excise tax was subject to the GATS, and thus, not subject to Article III:2 of the GATT 1994.⁴⁷² Rejecting this argument, the Appellate Body stated:

“The entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994. . . .

We agree with the Panel’s statement:

‘The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the *WTO Agreement*, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.’⁴⁷³

312. In *EC – Bananas III*, the Appellate Body also addressed the question of “whether the GATS and the GATT 1994 are mutually exclusive agreements”, as follows:

⁴⁶⁷ (*footnote original*) Panel Report on *Indonesia – Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.63 (DSR 1998:VI, 2201).

⁴⁶⁸ (*footnote original*) To say, for instance, that the TRIMs Agreement is more specific because it contains a specific criterion of the presence or absence of a trade-related investment measure depends upon whether that is a distinct criterion and whether the lack of such a criterion in Articles III and XI of GATT 1994 makes these provisions more general as opposed to merely having a broader range of coverage on the same criteria. The only practical difference and potential advantage in looking at the TRIMs agreement first in this instance seems to be the possible utilization of the Illustrative List, to the extent that it would be relevant to the claims at issue and may facilitate the identification of a violation of Articles III:4 or XI:1 of GATT 1994.

⁴⁶⁹ Panel Report on *India – Autos*, para. 7.157.

⁴⁷⁰ Panel Report on *India – Autos*, para. 7.161.

⁴⁷¹ Panel Report on *Canada – Periodicals*, para. 2.2.

⁴⁷² Appellate Body Report on *Canada – Periodicals*, p. 17.

⁴⁷³ Appellate Body Report on *Canada – Periodicals*, p. 19.

"The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada – Periodicals*.⁴⁷⁴⁴⁷⁵

313. The finding that the scope of application of *GATT* and *GATS*, respectively, may or may not overlap, was reiterated by the Appellate Body in *Canada – Autos*.⁴⁷⁶

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

- (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of

screen time per theatre per year or the equivalent thereof;

- (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
- (c) Notwithstanding the provisions of subparagraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of subparagraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
- (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

314. With respect to GATT practice concerning Article IV, see GATT Analytical Index, page 210.

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V

Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No

⁴⁷⁴ (footnote original) Appellate Body Report on *Canada – Periodicals*, p. 19.

⁴⁷⁵ Appellate Body Report on *EC – Bananas III*, para. 221.

⁴⁷⁶ Appellate Body Report on *Canada – Autos*, para. 159.

distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

B. TEXT OF AD ARTICLE V

Ad Article V Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

C. INTERPRETATION AND APPLICATION OF ARTICLE V

No jurisprudence or decision of a relevant WTO body.

1. Reference to GATT practice

315. With respect to GATT practice concerning Article V, see GATT Analytical Index, pages 214–217.

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly,

on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary com-

modity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

B. TEXT OF AD ARTICLE VI

Ad Article VI Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

C. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. Scope of Article VI

(a) Investigation initiated before entry into force of *WTO Agreement*

316. In *Brazil – Desiccated Coconut*, the Appellate Body upheld the Panel's finding that Article VI of *GATT 1994* does not apply to countervailing duty measures imposed as a result of an investigation initiated pursuant to an application made before the entry into force of the *WTO Agreement*. Having found that pursuant to Article 28 of the Vienna Convention on the Law of Treaties, “[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force”, the Appellate Body based its finding on the interpretation of Article 32.3 of the *SCM Agreement*, which sets forth that “the provisions of this Agreement shall apply to investigations . . . initiated pursuant to applications have been made on or after the date of entry into force for a WTO Agreement of the WTO Agreement”. The Appellate Body stated that “[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term ‘this Agreement’ in Article 32.3 means ‘this [SCM] Agreement and Article VI of the *GATT 1994*.’”⁴⁷⁷ With reference to Articles 10 and 32.1 of the *SCM Agreement*, the Appellate Body went on to state:

“From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the *GATT 1994* and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed ‘in accordance with the provisions of *GATT 1994*, as interpreted by this Agreement’. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the *GATT 1994*, taken together.”⁴⁷⁸

317. After making the finding quoted in paragraph 316 above, the Appellate Body referred to the omission of note 2 to the preamble of the Tokyo Round SCM Code, which states “[w]herever in this Agreement there is reference to ‘the terms of this Agreement’ or the ‘articles’ or

‘provisions of this Agreement’ it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement”, from the *SCM Agreement*. The Preamble, together with footnote 2, had not been retained in the new *SCM Agreement*. The Philippines argued that this omission was evidence that the term “this Agreement” in Article 32.3 was to be understood to refer only to the *SCM Agreement*. The Appellate Body was unconvinced:

“This note related to a provision in the preamble to the *Tokyo Round SCM Code* which demonstrated the Tokyo Round signatories’ desire ‘to apply fully and to interpret the provisions of Articles VI, XVI and XXIII’ of the *GATT 1947*. The preamble was not retained in the new text of the *SCM Agreement*. Consequently, the note also disappeared. The *SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the *GATT 1947*. The title to the *SCM Agreement* was also modified in this respect. Like the Panel, ‘we do not consider that the exclusion of this provision from the *SCM Agreement* sheds much light on the question before us’.⁴⁷⁹”⁴⁸⁰

318. In further support of its view that the term “this Agreement” referred to both the *SCM Agreement* and Article VI of the *GATT 1994*, the Appellate Body cited the following finding of the Panel, with the understanding that “the Panel’s reference to ‘*SCM Agreements*’ in this paragraph referred to the *SCM Agreement* and the Tokyo Round SCM Code”:⁴⁸¹

“Article VI of *GATT 1947* and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of *GATT 1994* and the *SCM Agreement* represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective *SCM Agreements* impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The *SCM Agreements* do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the *SCM Agreements* and Article VI together define, clarify and in some cases modify the whole package of rights

⁴⁷⁷ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17. Appellate Body later noted that Article 18.3 of the *Anti-Dumping Agreement* is an identical provision to Article 32.3 of the *SCM Agreement*. Appellate Body Report on *Brazil – Desiccated Coconut*, fn. 23.

⁴⁷⁸ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.

⁴⁷⁹ (footnote original) Panel Report on *Brazil – Desiccated Coconut*, fn. 62.

⁴⁸⁰ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.

⁴⁸¹ Appellate Body Report on *Brazil – Desiccated Coconut*, fn. 21.

and obligations of a potential user of countervailing measures.”⁴⁸²

319. In this regard, the Appellate Body noted that “[t]he fact that Article VI of the GATT 1947 could be invoked independently of the Tokyo Round SCM Code under the previous GATT system⁴⁸³ does not mean that Article VI of GATT 1994 can be applied independently of the *SCM Agreement* in the context of the WTO.”⁴⁸⁴ The Appellate Body went on to state that “[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system”⁴⁸⁵, referring to the preamble and Article II:2 of the Marrakesh Agreement. Further, the Appellate Body stated that “. . . the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews⁴⁸⁶ at a different point in time from that for other general measures.”⁴⁸⁷⁴⁸⁸

320. In addition, the Appellate Body rejected the Philippines’ argument that that “the transitional decisions⁴⁸⁹ [of the Tokyo Round SCM Code signatories] recognize the right of WTO Members to invoke WTO norms even in situations involving elements that occurred prior to the entry into force of the *WTO Agreement*.”⁴⁹⁰ The Appellate Body opined that “[a]t the time the *Tokyo Round SCM Code* signatories agreed to these decisions, they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement*.”⁴⁹¹

321. Lastly, the Appellate Body noted that its finding on the scope of Article VI of *GATT 1994* would not result in leaving Members without a right of action against those countervailing duty measures which are not covered by Article 32.3 of the *SCM Agreement*.⁴⁹²

Rather, the Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code, adopted by the Tokyo Round Subsidies and Countervailing Measures Committee, extended dispute settlement under the Tokyo Round SCM Code for two years, one year beyond the legal termination of the Tokyo Round SCM Code which occurred on 31 December 1995.

(b) Anti-dumping measures other than anti-dumping duties

322. In *US – 1916 Act*, the Appellate Body reviewed the Panels’ finding that the United States’ 1916 Antidumping Act was inconsistent with Article VI, and rejected the United States’ appeal to the Panels’ finding that the Act was to counteract “dumping” and thus, fell under the scope of Article VI. The Appellate Body considered that the issue depended on “whether Article VI regulates all possible measures Members can take in response to dumping.”⁴⁹³ In answering this question, the Appellate Body noted that “Article VI of the GATT 1994 must be read together with the provisions of the *Anti-Dumping Agreement*”⁴⁹⁴ and referred to the text of Article 1 of the *Anti-Dumping Agreement*; specifically, the Appellate Body stated that “[s]ince ‘an anti-dumping measure’ must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to ‘an anti-dumping measure’, i.e., a measure against dumping.”⁴⁹⁵ The Appellate Body went on to state that “the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*”⁴⁹⁶, and indicated that “. . . Article VI is applicable to any ‘specific action against dumping’ of exports, i.e., action

⁴⁸² Panel Report on *Brazil – Desiccated Coconut*, para. 246.

⁴⁸³ (*footnote original*) As demonstrated by the *US – Canadian Pork* panel.

⁴⁸⁴ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.

⁴⁸⁵ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.

⁴⁸⁶ (*footnote original*) There is an identical provision to Article 32.3 of the *SCM Agreement* contained in Article 18.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “*Anti-Dumping Agreement*”). Similarly, there are mirror transitional decisions approved by the Tokyo Round Committee on Anti-dumping Measures, in the Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization, ADP/131, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, ADP/132, 16 December 1994.

⁴⁸⁷ (*footnote original*) In its appellant’s submission dated 9 January 1997, at p. 37, para. 59, the Philippines argues that in *United States – Gasoline*, both the panel and the Appellate Body assessed the pre-WTO domestic regulatory process that led to the imposition of the United States’ environmental measure at issue in that dispute. We note that, in that case, there was no issue with

respect to the temporal application of the measure in dispute, nor did the panel or the Appellate Body examine the applicability of the *Agreement on Technical Barriers to Trade*.

⁴⁸⁸ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 18.

⁴⁸⁹ (*footnote original*) By “transitional decisions”, we refer to the Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement, PC/12–L/7583, 13 December 1994; the Decision on Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization (the “Decision on Transitional Co-existence of the Tokyo Round SCM Code and the WTO Agreement”), SCM/186, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the “Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code”), SCM/187, 16 December 1994.

⁴⁹⁰ Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 4–5.

⁴⁹¹ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 20.

⁴⁹² Appellate Body Report on *Brazil – Desiccated Coconut*, pp. 20–21.

⁴⁹³ Appellate Body Report on *US – 1916 Act*, para. 109.

⁴⁹⁴ Appellate Body Report on *US – 1916 Act*, para. 118.

⁴⁹⁵ Appellate Body Report on *US – 1916 Act*, para. 120.

⁴⁹⁶ Appellate Body Report on *US – 1916 Act*, para. 121.

that is taken in response to situations presenting the constituent elements of ‘dumping’”:

“[T]he ordinary meaning of the phrase ‘specific action against dumping’ of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of ‘dumping’. ‘Specific action against dumping’ of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of ‘dumping’ are present. Since intent is not a constituent element of ‘dumping’, the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is ‘specific action against dumping’ of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

Footnote 24 to Article 18.1 of the *Anti-Dumping Agreement* states:

‘This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.’

We note that footnote 24 refers generally to ‘action’ and not, as does Article 18.1, to ‘specific action against dumping’ of exports. ‘Action’ within the meaning of footnote 24 is to be distinguished from ‘specific action against dumping’ of exports, which is governed by Article 18.1 itself.

Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any ‘specific action against dumping’ of exports when such specific action is not ‘in accordance with the provisions of GATT 1994, as interpreted by this Agreement’. Since the only provisions of the GATT 1994 ‘interpreted’ by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any ‘specific action against dumping’ of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.

We recall that footnote 24 to Article 18.1 refers to ‘*other* relevant provisions of GATT 1994’ (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the ‘provisions of GATT 1994’ referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.

We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any ‘specific action against dumping’ be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any ‘specific action against dumping’ of exports, i.e., action that is taken in response to situations presenting the constituent elements of ‘dumping’.⁴⁹⁷

323. The Appellate Body on *US – 1916 Act* rejected the United States’ argument that the term “may” in Article

VI:2 indicates that Members may choose to impose other types of anti-dumping measures than anti-dumping duties, in which case they are not bound by the rules of Article VI, stating as follows:

“[I]t is not obvious to us, based on the wording of Article VI:2 alone, that the verb ‘may’ also implies that a Member is permitted to impose a measure other than an anti-dumping duty.

We believe that the meaning of the word ‘may’ in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* on the ‘Imposition and Collection of Anti-dumping Duties’. Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an ‘Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994’. Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9.

...

In light of this provision, the verb ‘may’ in Article VI:2 of the GATT 1994 is, in our opinion, properly understood as giving Members a choice between imposing an anti-dumping duty *or not*, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty. We find no support in Article VI:2, read in conjunction with Article 9 of the *Anti-Dumping Agreement*, for the United States’ argument that the verb ‘may’ indicates that Members, to counteract dumping, are permitted to take measures other than the imposition of anti-dumping duties.”⁴⁹⁸

324. The Appellate Body further elaborated upon this jurisprudence in *US – Offset Act (Byrd Amendment)*. With regard to the term “specific” in the phrase “specific action against dumping or a subsidy”, the Appellate Body made reference to its report in *US – 1916 Act* (see paragraph 322 above) and further specified that “the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. Such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself.”⁴⁹⁹ With regard to the specific measure at issue in *US – Offset Act (Byrd Amendment)*, the Appellate Body agreed with the Panel’s finding that the Offset Act was a

⁴⁹⁷ Appellate Body Report on *US – 1916 Act*, paras. 122–126. In addition to the foregoing reasoning of the Appellate Body, the Panel, which reached the same conclusion on the scope of Article VI:2, discussed the object and purpose of the *GATT 1994*, of the *Anti-Dumping Agreement*, or of the *WTO Agreement*, and the preparatory work for Article VI:2. Panel Report on *US – 1916 Act (Japan)*, paras. 6.223–6.229. See also Panel Report on *US – 1916 Act (EC)*, paras. 6.200–6.203.

⁴⁹⁸ Appellate Body Report on *US – 1916 Act*, paras. 113–116.

⁴⁹⁹ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 238–239.

specific action related to dumping as defined in Article VI:1 of the *GATT 1994* and Article 18.1 of the *Anti-Dumping Agreement*:

“It is clear from the text of the CDSOA [the Offset Act], in particular from Section 754(a) of the Tariff Act⁵⁰⁰, that the CDSOA offset payments are inextricably linked to, and strongly correlated with, a determination of dumping, as defined in Article VI:1 of the *GATT 1994* and in the *Anti-Dumping Agreement*, or a determination of a subsidy, as defined in the *SCM Agreement*. The language of the CDSOA is unequivocal. *First*, CDSOA offset payments can be made *only* if anti-dumping duties or countervailing duties have been collected. *Second*, such duties can be collected *only* pursuant to an anti-dumping duty order or countervailing duty order. *Third*, an anti-dumping duty order can be imposed *only* following a determination of dumping, as defined in Article VI:1 of the *GATT 1994* and in the *Anti-Dumping Agreement*. *Fourth*, a countervailing duty order can be imposed only following a determination that exports have been subsidized, according to the definition of a subsidy in the *SCM Agreement*. In the light of the above elements, we agree with the Panel that ‘there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments’, and we believe the same to be true for subsidization. In other words, it seems to us unassailable that CDSOA offset payments can be made only following a determination that the constituent elements of dumping or subsidization are present. Therefore, consistent with the test established in *US – 1916 Act*, we find that the CDSOA is ‘specific action’ related to dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.”⁵⁰¹

325. In *US – Offset Act (Byrd Amendment)*, the Appellate Body further rejected the United States’ argument, that an action that falls within the scope of footnote 24 of the *Anti-Dumping Agreement* cannot be characterized as a “specific action” within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and therefore would not be prohibited. The Appellate Body made reference to its interpretation of footnote 24 in *US – 1916 Act* (see paragraph 322 above), where it found that “action” in the sense of footnote 24 has to be distinguished from “specific action against dumping” as in Article 18.1 of the *Anti-Dumping Agreement*⁵⁰² and continued to say:

“The United States’ reasoning is tantamount to treating footnotes 24 [of the *Anti-Dumping Agreement*] and 56 [of the *SCM Agreement*] as the primary provisions, while according Articles 18.1 [of the *Anti-Dumping Agreement*] and 32.1 [of the *SCM Agreement*] residual status. This not only turns the normal approach to interpretation on its head, but it also runs counter to our finding in *US – 1916 Act*. In that case, we provided guidance for

determining whether an action is specific to dumping (or to a subsidy): an action is specific to dumping (or a subsidy) when it may be taken *only* when the constituent elements of dumping (or a subsidy) are present, or, put another way, when the measure is inextricably linked to, or strongly correlates with, the constituent elements of dumping (or of a subsidy). This approach is based on the texts of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, and not on the accessory footnotes. Footnotes 24 and 56 are clarifications of the main provisions, added to avoid ambiguity; they confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* ‘specific’ within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.”⁵⁰³

326. With regard to the term “against” in the phrase “specific action against dumping or a subsidy”, the Appellate Body agreed with the Panel that “there is no requirement that the measure must come into direct contact with the imported product, or entities connected to, or responsible for, the imported good such as the importer, exporter or foreign producer” and further agreed with the Panel that the test should focus on dumping or subsidization “as practices”. The Appellate Body further specified that for determining the meaning of “against” in the present context:

“[I]t is necessary to assess whether the design and structure of a measure is such that the measure is ‘opposed to’, has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices. In our view, the CDSOA [Offset Act] has exactly those effects because of its design and structure. The CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors. This is demonstrated by the following elements of the CDSOA regime. *First*, the CDSOA offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters. *Second*, the CDSOA

⁵⁰⁰ (footnote original) Section 754(a) of the Tariff Act provides:

“Duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the “continued dumping and subsidy offset.”

⁵⁰¹ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 242.

⁵⁰² See above, para. 322.

⁵⁰³ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 262.

offset payments are made to an 'affected domestic producer', defined in Section 754(b) of the Tariff Act as 'a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered' and that 'remains in operation'. In response to our questioning at the oral hearing, the United States confirmed that the 'affected domestic producers' which are eligible to receive payments under the CDSOA, are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or countervail order. *Third*, under the implementing regulations issued by the United States Commissioner of Customs ('Customs') on 21 September 2001, the 'qualifying expenditures' of the affected domestic producers, for which the CDSOA offset payments are made, 'must be related to the production of the same product that is the subject of the related order or finding, with the exception of expenses incurred by associations which must relate to a specific case.' *Fourth*, Customs has confirmed that there is no statutory or regulatory requirement as to how a CDSOA offset payment to an affected domestic producer is to be spent, thus indicating that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position *vis-à-vis* their competitors, including the foreign competitors subject to anti-dumping or countervailing duties. All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*."

327. The Appellate Body on *US – Offset Act (Byrd Amendment)* rejected the United States' argument that contrary to *US – 1916 Act*, the language of the Offset Act does not refer to the constituent elements of dumping and clarified that the finding in *US – 1916 Act* was not to be interpreted as to "require that the language of the measure include the constituent elements of dumping". On the contrary, the test established in *US – 1916 Act* "is met not only when constituent elements of dumping are 'explicitly built into' the actions at issue, but also

where . . . they are implicit in the express conditions for taking such action."⁵⁰⁴

2. Reference to GATT practice

328. With respect to the further treatment of this subject-matter under GATT 1947, see GATT Analytical Index, pages 237–238.

3. Interpretative materials

(a) Tokyo Round Agreements

329. In *Brazil – Desiccated Coconut*, the Panel considered that Article VI of *GATT 1994* does not apply, in isolation from the *SCM Agreement*, to countervailing duty cases where the investigation has been initiated pursuant to an application made before the entry into force of the *WTO Agreement*. The Panel's finding and reasoning were subsequently upheld by the Appellate Body. See paragraphs 316–321 above. The Appellate Body, however, found it unnecessary to address one particular reason the Panel had given for its finding, namely that if Article VI were to apply independently from the *SCM Agreement*, Members might be subject to "a package of rights and obligations that were potentially more onerous than those to which they were subject under Article VI in conjunction with the Tokyo Round SCM Code when they initiated the investigation."⁵⁰⁵ The Panel noted that the Tokyo Round SCM Code did not only impose additional *obligations* on a contracting party imposing countervailing duties, but also clarified and added some *rights* for such contracting party, such that certain obligations imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the *SCM Agreement* were less stringent and easier to meet than obligations imposed by Article VI in isolation.⁵⁰⁶ In this regard, the Panel also rejected the argument by the Philippines that Article VI of *GATT 1994*, as opposed to Article VI of *GATT 1947*, could be interpreted in the light of the Tokyo Round SCM Code and practice of the Code signatories; the Philippines were arguing that this interpretation would avoid the risk that Members would, through the application of Article VI of *GATT 1994* in isolation, be subject to obligations beyond those imposed by Article VI of *GATT 1947* in

⁵⁰⁴ Appellate Body Report on *United States – Offset Act (Byrd Amendment)*, para. 244 quoting the European Communities', India's, Indonesia's and Thailand's appellee's submission at para. 14.

⁵⁰⁵ Panel Report on *Brazil – Desiccated Coconut*, para. 253. The Appellate Body upheld the Panel's conclusion on the applicability of Article VI of GATT 1994 to this dispute, however, on different grounds, and thus, stated that "it is not necessary to determine whether applying Article VI of the GATT 1994 independently of the *SCM Agreement* would be more onerous than applying them together." Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

⁵⁰⁶ Panel Report on *Brazil – Desiccated Coconut*, paras. 246–253.

conjunction with the Tokyo Round SCM Code. The Panel noted:

"[W]e do not consider that it would be appropriate to interpret Article VI of GATT 1994 in light of the Tokyo Round SCM Code. Article 31:3(a) of the Vienna Convention on the Law of Treaties ('the Vienna Convention'), which is generally held to reflect customary principles of international law regarding treaty interpretation, provides that 'any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions' may be taken into account when interpreting a treaty. The Tokyo Round SCM Code may constitute such a subsequent agreement among Tokyo Round SCM Code signatories regarding the interpretation of Article VI of GATT 1947. However, Article II:4 of the WTO Agreement provides that the GATT 1994 is 'legally distinct' from the GATT 1947. While GATT 1994 consists of, *inter alia*, 'decisions of the CONTRACTING PARTIES to GATT 1947,' the Tokyo Round SCM Code is not a 'decision' of the CONTRACTING PARTIES. Thus, the Tokyo Round SCM Code does not represent a subsequent agreement regarding interpretation of Article VI of GATT 1994. For the Panel to conclude to the contrary would in effect convert that Code into a 'covered agreement' under Appendix 1 of the DSU. If such an approach were followed, WTO Members that were Tokyo Round Code signatories would find that their Code obligations were now enforceable under the WTO dispute settlement system.

Article XVI:1 of the WTO Agreement provides that, '[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947'. We recognize that the Pork [i.e. *US – Canadian Pork*] Panel had indicated, in passing, that the Tokyo Round SCM Code represents 'practice' under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 31.3 clearly distinguishes between the use of subsequent agreements and of subsequent practice as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent 'customary practice' of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994

itself; rather, only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994."⁵⁰⁷

330. The relationships between Article VI, and the Tokyo Round SCM Agreement and the *SCM Agreement* were discussed by the Appellate Body in *Brazil – Desiccated Coconut*. See paragraphs 316–319 above.

(b) Anti-Dumping Agreement

331. In *US – 1916 Act (EC)*, the Panel examined whether the US 1916 Antidumping Act was consistent with Article VI, and emphasized the "close link" between Article VI and the *Anti-Dumping Agreement*:

"The official title of the Anti-Dumping Agreement is 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconut* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that 'the context for the purpose of the interpretation of a treaty shall comprise, [. . .] the text [of the treaty], including its preamble and annexes . . .'. We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law."⁵⁰⁸ ⁵⁰⁹

332. With respect to the finding of the Appellate Body in *Brazil – Desiccated Coconut* concerning the relationship between the *SCM Agreement* and GATT Article VI as referenced in paragraph 316 above, see the Chapter on the *WTO Agreement*, Section III.B.1(a), which deals with the issue of the "single undertaking".

(c) SCM Agreement

333. In *Brazil – Desiccated Coconut*, the Appellate Body referred to the *SCM Agreement* in the context of clarifying the scope of Article VI. See the excerpts referenced in paragraphs 316 and 318 above.

⁵⁰⁷ Panel Report on *Brazil – Desiccated Coconut*, paras. 255–256.

⁵⁰⁸ (*footnote original*) Like the panel in *India – Quantitative Restrictions*, our intention is not to make findings under Articles 1 and 18.1 of the Anti-Dumping Agreement in this context. As a result, the requirements of Article 6.2 and 7 of the DSU are not relevant in that situation.

⁵⁰⁹ Panel Report on *US – 1916 Act (EC)*, para. 6.195.

4. Challenge against a law as such under Article VI

334. In *US – 1916 Act*, the Appellate Body rejected the United States' argument that the Panels had no jurisdiction to consider the claims that the Act as such was inconsistent with Article VI. Noting that the complainants had brought their claims of inconsistency with Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* pursuant to Article XXIII of the *GATT 1994* and Article 17 of the *Anti-Dumping Agreement*, the Appellate Body explained:

"Articles XXII and XXIII of the *GATT 1994* serve as the basis for consultations and dispute settlement under the *GATT 1994* and, through incorporation by reference, under most of the other agreements in Annex 1A to the *WTO Agreement*.⁵¹⁰ According to Article XXIII:1(a) of the *GATT 1994*, a Member can bring a dispute settlement claim against another Member when it considers that a benefit accruing to it under the *GATT 1994* is being nullified or impaired, or that the achievement of any objective of the *GATT 1994* is being impeded, as a result of the failure of that other Member to carry out its obligations under that Agreement.

Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the *GATT 1947* allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such.⁵¹¹ In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of *GATT* obligations can be found as such to be inconsistent with those obligations. We consider the application of this distinction to the present cases in section IV(B) below.

Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the *GATT 1947*. We consider that the case law articulating and applying this practice forms part of the *GATT acquis* which, under Article XVI:1 of the *WTO Agreement*, provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of *GATT 1947*'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances.⁵¹²⁵¹³

335. In this connection, in *US – 1916 Act*, the Appellate Body examined whether challenge against a law as such

is permissible under the *Anti-Dumping Agreement*. See the Chapter on the *Anti-Dumping Agreement*, Section XVII.B.1(b).

336. In *Guatemala – Cement I*, the Appellate Body discussed the specificity requirements for the terms of reference under Article 17.4 of the *Anti-Dumping Agreement*. See the Chapter on the *Anti-Dumping Agreement*, Section XVII.B.5(a).

5. Article VI:1

(a) Elements of Paragraph 1

337. In *US – 1916 Act*, in discussing the United States' appeal to the Panels' finding that the Act was to counteract "dumping" and thus, fell under the scope of Article VI, the Appellate Body noted as follows:

"[U]nder Article VI:1 of the *GATT 1994* and Article 2 of the *Anti-Dumping Agreement*, neither the intent of the persons engaging in 'dumping' nor the injurious effects that 'dumping' may have on a Member's domestic industry are constituent elements of 'dumping'."⁵¹⁴

(b) Material injury

338. In *US – 1916 Act (EC)*, the Panel stated that "Article VI:1 of the *GATT 1994* requires the establishment of material injury or a threat thereof."⁵¹⁵

6. Paragraph 2

(a) Permissible responses to dumping

339. In *US – 1916 Act*, the Appellate Body interpreted Article VI:2 in addressing the question of whether Members may choose to impose other types of anti-dumping measures than anti-dumping duties. The

⁵¹⁰ (*footnote original*) We note, however, that, as discussed in our Report in *Guatemala – Cement I*, the *Anti-Dumping Agreement* does not incorporate by reference Articles XXII and XXIII of the *GATT 1994*: Appellate Body Report on *Guatemala – Cement I*, para. 64 and footnote 43.

⁵¹¹ (*footnote original*) See, for example, Panel Report on *US – Superfund*; Panel Report on *US – Section 337*; Panel Report on *Thailand – Cigarettes*; Panel Report on *US – Malt Beverages*; and Panel Report on *US – Tobacco*. See also Panel Report on *US – Wine and Grape Products*, examining this issue in the context of a claim brought under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement of Tariffs and Trade.

⁵¹² (*footnote original*) See, for example, Panel Report on *Japan – Alcoholic Beverages II*, as modified by the Appellate Body Report; Panel Report on *Canada – Periodicals*, as modified by the Appellate Body Report; Panel Report on *EC – Hormones*, as modified by the Appellate Body Report; Panel Report on *Korea – Alcoholic Beverages*, as modified by the Appellate Body Report; Panel Report on *Chile – Alcoholic Beverages*, as modified by the Appellate Body Report; Panel Report on *US – FSC*, as modified by the Appellate Body Report; and Panel Report on *US – Section 110(5) Copyright Act*.

⁵¹³ Appellate Body Report on *US – 1916 Act*, paras. 59–61.

⁵¹⁴ Appellate Body Report on *US – 1916 Act*, para. 107.

⁵¹⁵ Panel Report on *US – 1916 Act (EC)*, para. 6.180. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.252.

Appellate Body stated that “Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings.”⁵¹⁶ See also paragraph 323 above, with respect to the discussion concerning the term “may” contained in Article VI:2. Further, the Panel on *US – 1916 Act (Japan)* discussed this issue taking into consideration preparatory works of the WTO Agreement.⁵¹⁷

(b) Methodology of investigation

340. In *EC – Tube or Pipe Fittings* the issue arose whether Article VI:2 of the *GATT 1994* prescribes a certain methodology for the investigation of dumping under the *Anti-Dumping Agreement*. In this particular case, the European Communities used a period of investigation of one year in its investigation of imports from Brazil. Towards the end of this year, the Brazilian Real was devalued by 42 per cent. Brazil argued, that the devaluation of the Real had “eliminated dumping by the Brazilian exporter” and that the Commission had failed to consider whether dumping existed ‘in the present’. The Panel concluded that events occurring during the period of investigation did not require investigation authorities to reassess a determination. The Appellate Body upheld the Panel’s finding and rejected Brazil’s argument that Article VI:2 of the *GATT 1994* required investigation authorities to “anticipate the level of anti-dumping duty that is strictly necessary to prevent dumping in the future [by making] a reasonable assumption for the future on the basis of the data collected in the [Period of Investigation]”. According to the Appellate Body, the words “in order to offset or prevent dumping” in Article VI:2 of the *GATT 1994* do not prescribe the selection of a particular methodology in the anti-dumping investigation.

“We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the *GATT 1994* to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a “reasonable assumption for the future”, or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2.”⁵¹⁸

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

341. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Article I (and II) of *GATT 1994*, which were derived from claims of inconsistency with Article VI of *GATT 1994*, could not succeed.⁵¹⁹ The

Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.⁵²⁰

2. Article II

342. The Panel on *Brazil – Desiccated Coconut* found that because Article VI of *GATT 1994* did not constitute applicable law for the purposes of the dispute, the claims made under Article II (and I) of *GATT 1994*, which were derived from claims of inconsistency with Article VI of *GATT 1994*, could not succeed.⁵²¹ The Appellate Body on *Brazil – Desiccated Coconut* confirmed this finding.⁵²²

3. Article III

343. In *US – 1916 Act (EC)* and *US – 1916 (Japan)*, exercising judicial economy, the Panel found that the United States’ 1916 Act was inconsistent with Article VI of the *GATT 1994*. However, the Panel did not also examine the EC claim that it was inconsistent with Article III of *GATT 1994*. See paragraph 288 above.

4. Article XI

344. In *US – 1916 Act (Japan)*, exercising judicial economy, the Panel did not examine a claim under Article XI of *GATT 1994*, after having found a violation of Article VI. See paragraph 420 below.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Anti-Dumping Agreement

345. As the complainant had not established a *prima facie* case of a violation of Articles 2.1 and 2.2 of the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (EC)* stated that “[t]he fact that we found a violation of Article VI:1 of the *GATT 1994* is not as such sufficient to conclude that Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* have been breached, in the absence of more specific arguments and evidence.”⁵²³

346. In *US – 1916 Act (Japan)*, the Panel was faced with the question whether it could make findings under Article VI, without, at the same time, making a finding under a provision of the *Anti-Dumping Agreement* or whether “the link between Article VI and the *Anti-Dumping Agreement* is such as to make impossible a finding under Article VI only”. The Panel referred

⁵¹⁶ Appellate Body Report on *US – 1916 Act*, para. 137.

⁵¹⁷ Panel Report on *US – 1916 Act (Japan)*, paras. 6.226–6.229.

⁵¹⁸ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 76. For further arguments to in support of this finding see paras. 78 – 82.

⁵¹⁹ Panel Report on *Brazil – Desiccated Coconut*, para. 281.

⁵²⁰ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

⁵²¹ Panel Report on *Brazil – Desiccated Coconut*, para. 281.

⁵²² Appellate Body Report on *Brazil – Desiccated Coconut*, p. 21.

⁵²³ Panel Report on *US – 1916 Act (EC)*, para. 6.209.

to the findings of the Panel on *India – Quantitative Restrictions* and of the Appellate Body in *Brazil – Desiccated Coconut* and distinguished these two cases from the issue before it. The Panel then concluded that it could “make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*”:

“Regarding the relationship between Article VI and the Anti-Dumping Agreement and, in particular, the question whether we could make findings regarding Article VI independently from the Anti-Dumping Agreement, we note that the issue addressed by the panel and the Appellate Body in *Brazil – Desiccated Coconut*, to which the United States refers, must be differentiated from the one before us. In *Brazil – Desiccated Coconut*, the question was one of application of Article VI of the GATT when the WTO Agreement on Subsidies and Countervailing Measures did not apply. In the present case, the issue is whether the Panel can make findings in relation to Article VI only or whether the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only.

We note that the panel in the *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*⁵²⁴ case did not make findings under Article XVIII:11 of the GATT 1994 in isolation from the Understanding on Balance-of-Payments Provisions of the GATT 1994. Likewise, we have no intention to address Article VI in isolation from the Anti-Dumping Agreement. In the present case, the complainant has made claims based on the violation of provisions of Article VI and the Anti-Dumping Agreement. In our opinion, if the panel in *Brazil – Desiccated Coconut* confirmed that Article VI and the Agreement on Subsidies and Countervailing Measures were an ‘inseparable package of rights and obligations’, this is because the solution proposed by the complainant would have led to apply Article VI in total disregard of the Agreement on Subsidies and Countervailing Measures. Such a solution cannot even be considered in our case. Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention, the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an “inseparable package of rights and obligations” and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning.⁵²⁵ However, this obligation does not prevent us from making findings in relation to Article VI only, as the panel did in its report on *India – Quantitative Restrictions*.

We conclude that we can make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*. However, the fact that Article VI and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines requires that we interpret each of the provisions invoked by Japan in its claims in conjunction with the other relevant provisions of this ‘inseparable package’, so as to give meaning to all of them.”⁵²⁶

347. Also, the Panel on *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

“Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of ‘material injury’ contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice.”⁵²⁷

2. Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade

348. The Panel on *Brazil – Desiccated Coconut* discussed the legal relevance of the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade to Article VI of the *GATT 1994*. See paragraphs 317–321 above.

3. SCM Agreement

349. In the *Brazil – Desiccated Coconut* dispute, the Panel was faced with the question “whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of *GATT 1994* and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction.”⁵²⁸ In phrasing this issue, the Panel on *Brazil – Desiccated Coconut* made clear that the *SCM Agreement* did not supersede Article VI of *GATT 1994* as the basis for the WTO discipline of countervailing measures. The Panel stated:

⁵²⁴ (footnote original) Panel Report on *India – Quantitative Restrictions*, paras. 5.18–5.19.

⁵²⁵ (footnote original) Appellate Body Report on *Brazil – Desiccated Coconut*, paras. 74 and 81–83.

⁵²⁶ Panel Report on *US – 1916 Act (Japan)*, paras. 6.92–6.94.

⁵²⁷ Panel Report on *US – 1916 Act (EC)* para. 6.211. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.254.

⁵²⁸ Panel Report on *Brazil – Desiccated Coconut*, para. 227.

"It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect, and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods . . . is demonstrated by a general interpretive note to Annex 1A of the WTO Agreement. The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point. Thus, the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994."⁵²⁹

350. The Appellate Body on *Brazil – Desiccated Coconut* confirmed the statement by the Panel that the *SCM Agreement* did not supersede Article VI of *GATT 1994*⁵³⁰, and stated:

"The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994."⁵³¹

351. The Appellate Body on *Brazil – Desiccated Coconut*, in addressing the issue of the scope of Article VI of the *GATT 1994*, noted that "[t]he relationship between the *SCM Agreement* and Article VI of *GATT 1994* is set out in Articles 10 and 32.1 of the *SCM Agreement*."⁵³² See paragraph 316 above. With respect to the Appellate Body's other findings on this issue, see the excerpts referenced in the Chapter on the *SCM Agreement*, Section X.B.3.

352. In *Brazil – Desiccated Coconut*, the Appellate Body further touched on the relationship between Article VI of the *GATT 1994* and the *SCM Agreement* in clarifying the scope of Article VI. See paragraphs 318–319 above.

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII

Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.*

(b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.*

(c) When the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the

⁵²⁹ Panel Report on *Brazil – Desiccated Coconut*, para. 227.

⁵³⁰ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.

⁵³¹ Appellate Body Report on *Brazil – Desiccated Coconut*, p. 14.

⁵³² Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.

par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(b) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the Contracting Parties, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

(d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

B. TEXT OF AD ARTICLE VII

Ad Article VII *Paragraph 1*

The expression "or other charges" is not to be regarded as including internal taxes or equivalent charges imposed on or in connection with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of "actual value" and plus any abnormal discount or other reduction from the ordinary competitive price.

2. It would be in conformity with Article VII, paragraph 2 (b), for a contracting party to construe the phrase "in

the ordinary course of trade . . . under fully competitive conditions", as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.

3. The standard of "fully competitive conditions" permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.

4. The wording of subparagraphs (a) and (b) permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

C. INTERPRETATION AND APPLICATION OF ARTICLE VII

No jurisprudence or decision of a relevant WTO body.

1. Reference to GATT practice

353. With respect to GATT practice concerning Article VII, see GATT Analytical Index, pages 259–265.

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII

*Fees and Formalities connected with Importation and Exportation**

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without

fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

- (a) consular transactions, such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

B. TEXT OF AD ARTICLE VIII

Ad Article VIII

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 (a) of Article XV fully safeguard its position.

2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

C. INTERPRETATION AND APPLICATION OF ARTICLE VIII

1. Article VIII:1(a)

354. In *Argentina – Textiles and Apparel*, the Panel addressed an Argentine *ad valorem* tax on imports of 3 per cent, called a “statistical tax”, described by Argentina as designed to cover the cost of providing a statistical service in the form of a reliable database for foreign trade operators. The Panel found that this statistical tax was inconsistent with the substantive requirements of Article VIII:1(a) of *GATT 1994*. (Argentina subsequently did not appeal this finding, but claimed that the Panel had failed to take properly into account a relevant obligation by Argentina towards the IMF.) The Panel emphasized that an *ad valorem* tax, by its very design, is not “limited in amount to the approximate cost of services rendered”, as required by Article VIII:1(a):

“The meaning of Article VIII was examined in detail in the Panel Report on *United States – Customs User Fee*.⁵³³ The panel found that Article VIII’s requirement that the charge be ‘limited in amount to the approximate cost of services rendered’ is ‘actually a dual requirement, because the charge in question must first involve a ‘service’ rendered, and then the level of the charge must not exceed the approximate cost of that ‘service’.”⁵³⁴ According to the panel report, the term ‘services rendered’ means ‘services rendered to the individual importer in question’.⁵³⁵ In the present case Argentina states that the service is not rendered to the individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.

An *ad valorem* duty with no fixed maximum fee, by its very nature, is not ‘limited in amount to the approximate cost of services rendered’. For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered. For example, in the *Customs User Fee* report, the panel examined the consistency with Article VIII of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The panel concluded that ‘the term ‘cost of services rendered’ . . . in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with Article VIII:1(a) to the extent that it caused fees to be levied in excess of costs’⁵³⁶.⁵³⁷

355. In support of its finding that an *ad valorem* tax could not be said to be commensurate with the “cost of services rendered”, the Panel on *Argentina – Textiles and Apparel* referred to the Report of the Working Party on *Accession of the Democratic Republic of the Congo*.⁵³⁸ The Panel also rejected Argentina’s argument that its tax had been enacted for “fiscal purposes”:

“Argentina’s statistical tax is levied on an *ad valorem* basis with no ceiling. As described in paragraph 6.70 above, Argentina’s tax is clearly not related to the cost of a service rendered to the specific importers concerned. The tax as assessed on many goods is not in proportion

⁵³³ (footnote original) Panel Report on *US – Customs User Fee*.

⁵³⁴ (footnote original) Panel Report on *US – Customs User Fee*, para. 69.

⁵³⁵ (footnote original) Panel Report on *US – Customs User Fee*, para. 80.

⁵³⁶ (footnote original) Panel Report on *US – Customs User Fee*, para. 86.

⁵³⁷ Panel Report on *Argentina – Textiles and Apparel*, paras. 6.74–6.75.

⁵³⁸ (footnote original) Adopted on 29 June 1971, BISD 18S/89, para. 5.

to the cost of any service rendered. The tax purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs 'for the individual entry in question' since it will also benefit exports and exporters.⁵³⁹

As to Argentina's argument that it was collecting this tax for 'fiscal' purposes in the context of its undertakings with the IMF, we note that not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered."⁵⁴⁰

356. Argentina did not appeal the findings of the Panel on *Argentina – Textiles and Apparel*, quoted in paragraphs 354–355 above. However, before the Appellate Body, Argentina argued that the Panel erred in law in failing to take account Argentina's obligations to the IMF in the Panel's interpretation of Article VIII. Specifically, Argentina claimed that a "Memorandum of Understanding" between Argentina and the IMF included an "undertaking" or an "obligation" on the part of Argentina to collect a specified amount in the form of a statistical tax. Argentina pointed to a statement in the aforementioned memorandum according to which the fiscal measures to be adopted by Argentina include "... increases in import duties, including a temporary 3 per cent surcharge on imports". Argentina also argued that paragraph 10 of the Agreement between the IMF and the WTO⁵⁴¹ and paragraph 5 of the so-called Declaration on Coherence⁵⁴² require that the imposition on governments of "cross-conditionality or additional conditions" must be avoided. The Appellate Body found that Argentina had failed to demonstrate an "irreconcilable conflict between its "Memorandum of Understanding" with the IMF and its obligations under Article VIII of GATT:

"[T]he Panel does not appear to have been convinced that Argentina had a legally binding agreement with the IMF at all. From the panel record in this case, it does not appear possible to determine the precise legal nature of this Memorandum on Economic Policy, nor the extent to which commitments undertaken by Argentina in this Memorandum constitute legally binding obligations. We note that page 7 of the Memorandum on Economic Policy refers to "a temporary 3 percent surcharge on imports", which is not necessarily the same thing as the 3 per cent statistical tax levied on imports. Argentina did not show an irreconcilable conflict between the provisions of its "Memorandum of Understanding" with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that

Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994."⁵⁴³

357. The Panel on *US – Certain EC Products* examined the consistency with several GATT provisions of the increased bonding requirements imposed by the United States on imports from the European Communities in order to secure the collection of additional import duties that were only later authorized by the DSB. The Panel considered that the costs relating to the bonding requirements upon importation could not constitute the "approximate cost of services rendered" in the sense of Article VIII:

"The meaning of Article VIII was examined in the adopted Panel Report on United States – *Customs Users Fee*⁵⁴⁴ and in the adopted Appellate Body and Panel Reports on *Argentina – Textiles*. It was found that Article VIII's requirement that the charge be 'limited in amount to the approximate cost of services rendered' is 'actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'.'⁵⁴⁵ The term 'services rendered' means 'services rendered to the individual importer in question.'⁵⁴⁶

Although very briefly in its rebuttals, the United States argued that bonding requirements could be viewed as a form of fee for services rendered (the services being the 'early release of merchandise') and therefore should benefit from the carve-out of Article II:2(c) of GATT, the United States has not submitted any data on the second requirement. There is no evidence that what was required from importers represented any such approximate costs of any service. It is also difficult to understand why the costs of such service would have suddenly increased on 3 March (did the United States provide more services to importers on 3 March?), and then only for listed imports from the European Communities."⁵⁴⁷

2. Reference to GATT practice

358. With respect to GATT practice concerning Article VIII:1, see GATT Analytical Index, pages 268–281.

⁵³⁹ (*footnote original*) Panel Report on *US – Customs User Fee*, paras. 84–86.

⁵⁴⁰ Panel Report on *Argentina – Textiles and Apparel*, paras. 6.77–6.78.

⁵⁴¹ Agreement between the International Monetary Fund and the World Trade Organization, WT/L/195, Annex I.

⁵⁴² Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking.

⁵⁴³ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 69.

⁵⁴⁴ (*footnote original*) Panel Report on *US – Customs User Fee*.

⁵⁴⁵ (*footnote original*) Panel Report on *US – Customs User Fee*, para. 69.

⁵⁴⁶ (*footnote original*) Panel Report on *US – Customs User Fee*, para. 80.

⁵⁴⁷ Panel Report on *US – Certain EC Products*, paras. 6.69–6.70.

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. WTO Agreement

359. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that there is nothing in the Agreement between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund or the so-called Declaration on Coherence⁵⁴⁸ which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994.⁵⁴⁹ See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

2. Agreement between the IMF and the WTO

360. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that there is nothing in the Agreement between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994.⁵⁵⁰ See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

3. Declaration on Coherence

361. In *Argentina – Textiles and Apparel*, the Appellate Body agreed that there is nothing in the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking (Declaration on Coherence) which would justify a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994.⁵⁵¹ See Chapter on the *WTO Agreement*, Section IV.B.5(iii).

X. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX
Marks of Origin

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.
2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT Practice

362. With respect to GATT practice concerning Article VIII:1, see GATT Analytical Index, pages 288–289.

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X
Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements,

⁵⁴⁸ With respect to the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy-making, see Chapter on *WTO Agreement*, Section XIX

⁵⁴⁹ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

⁵⁵⁰ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

⁵⁵¹ Appellate Body Report on *Argentina – Textiles and Apparel*, para. 70.

restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. General

363. In *EC – Poultry*, the Appellate Body rejected Brazil's claim that the retroactive application of transitional safeguard measures under the Agreement on Textiles and Clothing was prohibited by Article X. The Appellate Body briefly discussed the scope of Article X as follows:

"Article X relates to the *publication and administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the *substantive content* of such measures.⁵⁵² . . .

Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication or administration*, that appeal falls outside the scope of Article X of the GATT 1994."⁵⁵³

2. Article X:1

(a) "of general application"

(i) Interpretation

364. In *US – Hot-Rolled Steel*, the Panel was confronted with an alleged violation of Article X:3(a). However, before addressing this question the Panel ruled, in a preliminary finding not reviewed by the Appellate Body, that the anti-dumping measure did not constitute a measure "of general application" within the meaning of Article X:1. The Panel held:

"[F]inally, we have been presented with arguments alleging violation of Article X:3(a) of GATT 1994 which relate to the actions of the United States in the context of a single anti-dumping investigation. We doubt whether the final anti-dumping measure before us in this dispute can be considered a measure of "general application". In this context, we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law. While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider that the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question. Moreover, we consider it unlikely that such a conclusion could be reached where the actions in the single case in question were, themselves, consistent

⁵⁵² Following this sentence, the Appellate Body cited the Appellate Body Report on *EC – Bananas III*, para. 200, which is referenced in para. 373 of this Chapter.

⁵⁵³ Appellate Body Report on *EC – Poultry*, para. 115.

with more specific obligations under other WTO Agreements.”⁵⁵⁴

365. In *US – Underwear*, the Appellate Body agreed with the following finding of the Panel on the term “of general application”:⁵⁵⁵

“We note that Article X:1 of GATT 1994, which also uses the language ‘of general application’, includes ‘administrative rulings’ in its scope. The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.”⁵⁵⁶

366. In *EC – Poultry*, the Appellate Body reviewed the Panel’s finding that certain import licensing of the European Communities on certain poultry products was not inconsistent with Article X because “the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT.”⁵⁵⁷ In upholding the Panel’s finding, the Appellate Body discussed the term “of general application” as follows:

“Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules ‘of general application’. It is clear to us that the EC rules pertaining to import licensing set out in Regulation 1431/94 are rules ‘of general application’ . . .

. . .

. . . Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure ‘of general application’ within the meaning of Article X. The Panel cited the following passage from the panel report in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*:

‘The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, includ-

ing domestic and foreign producers, we find it to be a measure of general application.’”⁵⁵⁸

We agree with the Panel that “conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure ‘of general application’ within the meaning of Article X.”⁵⁵⁹

367. In *Japan – Film*, the Panel, referring to the Panel Report on *US – Underwear* referenced in paragraph 364 above, interpreted the term “of general application” as follows:

“[I]t stands to reason that inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases. At the same time, we consider that it is incumbent upon the United States in this case to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases.”⁵⁶⁰

(ii) *Reference to GATT practice*

368. For GATT practice on this subject-matter, see GATT Analytical Index, pages 294–295.

3. Article X:2

(a) General

369. In *US – Underwear*, the Appellate Body described the policy underlying Article X:2 as pertaining to transparency and due process:

“Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.”⁵⁶¹

⁵⁵⁴ Panel Report on *US – Hot-Rolled Steel*, para. 7.268.

⁵⁵⁵ Appellate Body Report on *US – Underwear*, p. 21.

⁵⁵⁶ Panel Report on *US – Underwear*, para. 7.65.

⁵⁵⁷ Panel Report on *EC – Poultry*, para. 269.

⁵⁵⁸ (footnote original) Panel Report on *US – Underwear*, para. 7.65.

In that case, we agreed with the panel’s finding that the safeguard measure restraint imposed by the United States was “a measure of general application” within the contemplation of Article X:2 of the GATT 1994. See Appellate Body Report on *US – Underwear*, p. 21.

⁵⁵⁹ Appellate Body Report on *EC – Poultry*, paras. 111 and 113.

⁵⁶⁰ Panel Report on *Japan – Film*, para. 10.388.

⁵⁶¹ Appellate Body Report on *US – Underwear*, p. 21.

370. The Panel on *US – Underwear* was called on to find whether a Member is entitled, when taking transitional safeguard measures under Article 6 of the ATC, to backdate the application of such measures to the date of publication of its request for consultations. The Panel opined that Article 6.10 of the ATC, the relevant provision, was “silent” as to this question and turned to Article X of the GATT. The Panel concluded that “if the importing country publishes the proposed restraint period and restraint level after the request for consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint”.⁵⁶² Upon review, the Appellate Body disagreed with the Panel’s finding that Article 6.10 of the ATC was “silent” as to whether a transitional safeguard measure could be backdated or not and found that Article 6.10 prohibited such backdating. With respect to the Panel’s finding that Article X of GATT permitted such backdating, the Appellate Body held that prior publication of a measure, as required under Article X of GATT, could not, in and of itself, justify the retroactive effect of a restrictive governmental measure:

“[W]e are bound to observe that Article X:2 of the *General Agreement*, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just ATC safeguard restraint measures sought to be applied retrospectively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the *General Agreement*.”⁵⁶³

4. Article X:3

(a) General

371. In *US – Shrimp*, the Appellate Body ruled that the lack of transparency of the disputed legislation was contrary to the spirit of Article X:3. The Appellate Body held:

“[T]he provision of Article X:3 of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the “laws, regulations, judicial decisions and administrative rulings of general application” described in Article X:1. Inasmuch there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due

process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other members.

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.”⁵⁶⁴

(i) Scope of paragraph 3

372. In *EC – Bananas III*, the Panel rejected the EC argument that Article X:3 applies only to internal measures, but not to licensing regulations for tariff quotas. In its finding, the Panel referred to Article X:1 and held that it “defines the coverage of Article X:3(a)”.⁵⁶⁵

(b) Article X:3(a)

(i) Scope of Article X:3(a)

373. In *EC – Bananas III*, the Appellate Body examined the European Communities’ appeal against the Panel’s finding that the imposition of different import licensing systems on like products imported from different Members was inconsistent with Article X:3(a). In upholding the Panel’s finding, the Appellate Body defined the scope of paragraph 3(a) by drawing a distinction between laws, regulations, decisions and rulings *themselves* and their *administration*:

“The text of Article X:3(a) clearly indicates that the requirements of ‘uniformity, impartiality and reasonableness’ do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled ‘Publication and Administration of Trade Regulations’, and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of

⁵⁶² Panel Report on *US – Underwear*, para. 7.69.

⁵⁶³ Appellate Body Report on *US – Underwear*, p. 21.

⁵⁶⁴ (Original footnote omitted) Appellate Body Report on *US – Shrimp*, paras. 182 – 183.

⁵⁶⁵ Panel Report on *EC – Bananas III*, para. 7.206. Also, Panel Report on *EC – Bananas III*, para. 7.225.

laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.”⁵⁶⁶

374. The Appellate Body on *EC – Poultry* confirmed the above line of interpretation and found that “to the extent that Brazil’s appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.”⁵⁶⁷

375. The Panel on *Argentina – Hides and Leather* rejected Argentina’s argument that Article X:3(a) only applies in situations when there is discrimination in treatment with respect to, for example, exports to two or more Members. The Panel stated:

“In our view, there is no requirement that Article X:3(a) be applied only in situations where it is established that a Member has applied its Customs laws and regulations in an inconsistent manner with respect to the imports of or exports to two or more Members.

Furthermore, Article X:3(a), by its terms, calls for a uniform, impartial and reasonable administration of trade-related regulations. Nowhere does it refer to Members or products originating in or destined for certain Members’ territories, as is explicitly contained in other GATT 1994 Articles such as I, II and III. Indeed, Article X:1 requires the prompt publication of trade-related regulations ‘so as to enable governments and traders to become acquainted with them.’ Similarly, Article X:3(b) requires Members to provide for domestic review procedures relating to customs matters to which normally only private traders, not Members would have access.⁵⁶⁸ These references undercut Argentina’s argument that Article X can only apply in situations where there is discrimination between WTO Members.”⁵⁶⁹

376. Further, in *Argentina – Hides and Leather*, the Panel disagreed with Argentina’s argument that a violation of Article X:3(a) can be found not in the substance of a regulation but in its administration. The Panel was reviewing an Argentine measure which authorized the presence of representatives of certain industrial associations during customs controls of bovine raw hides and certain other hides before export. The Panel found that Article X:3(a) applied to the measure at issue, because it did not contain “substantive Customs rules for enforcement of export laws”, but rather “provide[d] for a certain manner of applying those substantive rules”:

“If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what

could ever be challenged under Article X. First, there is no requirement in Article X:3(a) that it apply only to ‘unwritten’ rules. Again, this would be contrary to that provision’s own language linking it to Article X:1. Second, such an approach would also likely run counter to the other aspect of the Appellate Body’s holding in *European Communities – Poultry* regarding Article X, to the effect that it applies to rules of general application and not to specific shipments.⁵⁷⁰ Looking only to individual Customs officers’ enforcement actions, rather than measures such as Resolution 2235, as Argentina implies, would almost certainly require a review of a specific instance of abuse rather than the general rule applicable.⁵⁷¹ This would effectively write Article X:3(a) out of existence, which we cannot agree with.⁵⁷²

Thus, we are left with a situation where we have a written provision, Resolution 2235, and we need to determine whether this Resolution is substantive or administrative. In our view it is administrative in nature and therefore properly subject to review under Article X:3(a). Resolution 2235 does not establish substantive Customs rules for enforcement of export laws. Argentina has pointed out that those are contained primarily in the Customs Code (Law No. 22415), Resolution (ANA) No. 1284/95 and Resolution (ANA) No. 125/97.⁵⁷³ Rather, Resolution 2235 provides for a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules, namely, the rules on classification and export duties. Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules. This measure clearly is administrative in nature.”⁵⁷⁴

377. In *US – Corrosion-Resistant Steel Sunset Review*, Japan argued that the United States’ sunset review laws were administrative in nature and consequently could be challenged under Article X:3(a) of the GATT 1994.

⁵⁶⁶ Appellate Body Report on *EC – Bananas*, para. 200. See also Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.289.

⁵⁶⁷ Appellate Body Report on *EC – Poultry*, para. 115.

⁵⁶⁸ (*footnote original*) In fact, Article X:3(b), in its second sentence, uses the word “importer”.

⁵⁶⁹ Panel Report on *Argentina – Hides and Leather*, paras. 11.67–11.68.

⁵⁷⁰ (*footnote original*) In *EC – Poultry*, the Appellate Body further stated that Article X is relevant only to measures “of general application” and not to the particular treatment of each individual shipment. See Appellate Body Report on *EC – Poultry*, paras. 111 and 113.

⁵⁷¹ (*footnote original*) We make this statement *arguendo* and do not imply agreement with Argentina’s implicit assumption of no violation in such instances.

⁵⁷² (*footnote original*) See Appellate Body Reports on *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *Argentina – Footwear (EC)*, para. 81.

⁵⁷³ (*footnote original*) Even some of these provisions arguably are procedural in nature.

⁵⁷⁴ Panel Report on *Argentina – Hides and Leather*, paras. 11.71–11.72.

Japan had asserted that the United States' administration of its sunset review laws was inconsistent with Article X:3(a) as the United States legislation mandated self-initiation of sunset reviews without sufficient evidence. Japan also claimed that the United States' administration of sunset review laws was not uniform with different approaches with regard to Article 11.2 reviews and sunset reviews being taken. The Panel ruled, in a finding not reviewed by the Appellate Body, that Japan's allegations under Article X:3(a) related to United States laws and regulations rather than its administration and accordingly was not within the scope of Article X:3(a):

"On the first point, i.e. self-initiation of sunset reviews without any, or sufficient, evidence, Japan argues that the US statute and regulations, which mandate such self-initiation, are 'unreasonable' because they allow the DOC to disregard the substantive requirements for the initiation. Japan further submits that such self-initiation renders the administration of US law 'partial' because it favours the US domestic industry. We note that Japan made a substantive claim challenging both the US law as such and its application in this particular sunset review regarding self-initiation of sunset reviews without sufficient evidence. We recall our finding above that self-initiation of sunset reviews under Article 11.3 is not subject to the evidentiary requirements of Article 5.6. This indicates that the substantive content of this aspect of US law, i.e. evidentiary standards applicable to the self-initiation of sunset reviews, can be, and in fact has in this case been, challenged by Japan. Therefore, deriving guidance from the ruling of the Appellate Body, in *EC – Poultry*, we find that this aspect of US law cannot be challenged under Article X:3(a) of GATT 1994 because it relates to the *substance* rather than the administration of US law.

With regard to the second 'as such' allegation of Japan, i.e., different approaches taken by the United States regarding Article 11.2 and 11.3 reviews, even assuming that this argument legitimately falls within the scope of application of Article X:3(a), we understand that Japan has based its "as such" allegations here exclusively upon the Sunset Policy Bulletin. We have found above that the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*. We therefore examine no further Japan's 'as such' allegations relying solely on the Sunset Policy Bulletin.

We therefore conclude that the administration of the US sunset review law as such was not inconsistent with Article X:3(a) of GATT 1994."⁵⁷⁵

378. In *US – Corrosion-Resistant Steel Sunset Review* Japan argued that the application of the US laws and regulations with regard to the sunset reviews was unreasonable and partial, and hence inconsistent with Article X:3(a). Japan based its contention on that less information was required from United States domestic produc-

ers compared with exporters. The Panel recalled WTO case law that matters relating to the substantive nature of laws and regulations go beyond the scope of Article X:3(a):

"Japan further argues that the fact that not as much information is requested from domestic producers renders the administration of US law partial.

The nature and quantity of the information that will be in the possession of foreign exporters and producers will necessarily differ from the information possessed by the domestic industry, and this information will be used for different purposes by the investigating authority. This is because generally, in investigations (and reviews), foreign exporters will be the main source of information regarding the dumping, or likelihood of continuation or recurrence of dumping, component of the determination that must be made, while domestic producers will possess more information relevant to the injury component of the determination that must be made. Consequently, we find that this aspect of Japan's claim also falls outside the scope of Article X:3(a)."⁵⁷⁶

379. In *US – Hot-Rolled Steel*, the Panel pointed out that, for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.⁵⁷⁷

(ii) "administer in a uniform, impartial and reasonable manner"

380. In *Argentina – Hides and Leather*, the Panel explained the nature of the obligation under Article X:3(a) by distinguishing between transparency between WTO Members and transparency with respect to individual traders:

"In applying these tests, it is important to recall that we are not to duplicate the substantive rules of the GATT 1994. Thus, for example, the test generally will not be whether there has been discriminatory treatment in favor of exports to one Member relative to another. Indeed, the focus is on the treatment accorded by government authorities to the traders in question. This is explicit in Article X:1 which requires, *inter alia*, that all provisions 'shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.' (emphasis added). While it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically refer-

⁵⁷⁵ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.293–7.295.

⁵⁷⁶ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.305–7.306.

⁵⁷⁷ Panel Report on *US – Hot-Rolled Steel*, para. 7.268. See also, Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.307.

ences the importance of transparency to individual traders.”⁵⁷⁸

381. In *Argentina – Hides and Leather*, the Panel addressed the concept of “uniformity” with respect to the requirement in Article X:3(a) that laws and regulations shall be administered “in a uniform, impartial and reasonable manner”. The Panel opined “that this provision should not be read as a broad anti-discrimination provision.” Rather, the Panel read this requirement to stipulate “uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places”:

“The term ‘uniform’ appears in the GATT 1994 only with respect to administration of Customs laws. Article VII:2(b) provides that when assessing Customs valuation on the basis of ‘actual value’ variations may exist based on quantities provided that such prices are uniformly related to quantities in other transactions.

In addition to the term appearing in paragraph 3(a) of Article X, it also appears in paragraph 2 of that Article requiring uniform practices for certain changes in applying Customs laws. Finally, *Ad Article I*, paragraph 4, provides for uniform practices in re-application of tariff classifications and imposition of certain new classifications at the time of the provisional applications of the GATT 1947.

It is obvious from these uses of the terms that it is meant that Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places.

We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not think this provision should be read as a general invitation for a panel to make such distinctions.”⁵⁷⁹

382. In *Argentina – Hides and Leather*, the Panel addressed an argument put forward by the European Communities based on the interpretation of the terms “impartial, contained in Article X:3(a). The European Communities argued that the Argentine measure

authorizing the presence of representatives of domestic industrial associations at customs controls of bovine raw hides and certain other hides before export, persons which according to the European Communities were “partial and interested”, was not an impartial application of the relevant custom rules. The Panel agreed with the European Communities:

“Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of representatives [of the relevant industrial associations] in such processes. It all depends on what that person is permitted to do. In our view, the answer to this question is related directly to the question of access to information as part of the product classification process as discussed in the previous Section. Our concern here is focussed on the need for safeguards to prevent the inappropriate flow of one private person’s confidential information to another as a result of the administration of the Customs laws, in this case the implementing Resolution 2235.

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.

While this situation could be remedied by adequate safeguards, we do not consider that such safeguards presently are in place. Therefore, Resolution 2235 cannot be considered an impartial administration of the Customs laws, regulations and rules described in Article X:1 and, thus, is inconsistent with Article X:3(a) of the GATT 1994.⁵⁸⁰

383. With respect to the same Argentine measure, described in paragraph 381 above, the European Communities was also claiming that the requirement of “reasonableness” under Article X:3(a) was infringed. The Panel on *Argentina – Hides and Leather* again agreed with the European Communities:

“[W]e must conclude that a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a).”⁵⁸¹

⁵⁷⁸ Panel Report on *Argentina – Hides and Leather*, para. 11.76.

⁵⁷⁹ Panel Report on *Argentina – Hides and Leather*, paras. 11.81–11.84.

⁵⁸⁰ Panel Report on *Argentina – Hides and Leather*, para. 11.99–11.101.

⁵⁸¹ Panel Report on *Argentina – Hides and Leather*, para. 11.94.

384. In *US – Stainless Steel*, the Panel rejected Korea's claim that the United States violated Article X:3(a) by departing from its own established policy with respect to the determination of the prices of local sales which are to be compared to alleged dumping exports. The Panel held that Article X:3(a) was not "intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice":

"We note at the outset of our examination that we have grave doubts as to whether Article X:3(a) can or should be used in the manner advocated by Korea. As the United States correctly points out, the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'.⁵⁸² It was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system,⁵⁸³ and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.

In any event, we do not consider that the DOC in this investigation committed the 'unprecedented departure' from 'established policy' alleged by Korea such that its behaviour was either non-uniform or unreasonable. In our view, the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts."⁵⁸⁴

(iii) *Reference to GATT practice*

385. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 297–298.

(c) Article X:3(c)

(i) "the date of this Agreement"

386. With respect to GATT practice concerning the phrase "the date of this Agreement", see GATT Analytical Index, page 298.

C. RELATIONSHIP WITH OTHER ARTICLES

1. General

387. In *EC – Bananas III*, the Appellate Body explained the relationship between Article X and other GATT pro-

visions. See the excerpt referenced in paragraph 373 above. This finding of the Appellate Body was also cited by the Panel on *Argentina – Hides and Leather*.⁵⁸⁵

2. Article I

388. In *Indonesia – Autos*, the Panel examined whether a series of measures taken by Indonesia to develop its domestic automobile industry was inconsistent with Article X as well as Articles I and III. After having found that the Indonesian National Car Programme violated "the provisions of Article I and/or Article III of GATT", the Panel did not consider it necessary to examine Japan's claims under Article X of GATT.⁵⁸⁶

389. In *Argentina – Hides and Leather*, the Panel rejected Argentina's argument that Article X:3(a) only applies in situations when there is discrimination in treatment with respect to, for example, exports to two or more Members. See the excerpt referenced in paragraph 374 above.

3. Article III

390. In *Indonesia – Autos*, the Panel discussed the relationship between Articles III and X. See the excerpt referenced in paragraph 388 above.

4. Reference to GATT practice

391. With respect to GATT practice in the context of the relationship between Article X of GATT and other Articles, see GATT Analytical Index, pages 298–299.

D. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Licensing Agreement

392. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import licensing system on imports of bananas was in violation of Article X as well as Article 1.3 of the *Licensing Agreement*. The Appellate Body stated that "the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage":

⁵⁸² (footnote original) DSU Article 3.2.

⁵⁸³ (footnote original) It is for this reason that both Article X:3(b) of GATT 1994 and Article 13 of the *AD Agreement* require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.

⁵⁸⁴ Panel Report on *US – Stainless Steel*, paras. 6.50–6.51.

⁵⁸⁵ Panel Report on *Argentina – Hides and Leather*, para. 11.60. The Panel went on to state:

"See also the Appellate Body Report on *European Communities – Poultry*, *supra*, at para. 115, wherein the Appellate Body emphasized that to the extent Brazil's appeal related to the substantive content of the EC rules rather than to their publication or administration, it fell outside of Article X."

Panel Report on *Argentina – Hides and Leather*, fn. 366.

⁵⁸⁶ Panel Report on *Indonesia – Autos*, para. 14.152.

“Article X:3(a) of the GATT 1994 applies to all ‘laws, regulations, decisions and rulings of the kind described in paragraph 1’ of Article X, which includes those, *inter alia*, ‘pertaining to . . . requirements, restrictions or prohibitions on imports . . .’. The EC import licensing procedures are clearly regulations pertaining to requirements on imports and, therefore, are within the scope of Article X:3(a) of the GATT 1994. As we have concluded, the *Licensing Agreement* also applies to the EC import licensing procedures. We agree, therefore, . . . that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. In comparing the language of Article 1.3 of the *Licensing Agreement* and of Article X:3(a) of the GATT 1994, we note that there are distinctions between these two articles. The former provides that ‘the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner’. The latter provides that each Member shall ‘administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]’.

We attach no significance to the difference in the phrases ‘neutral in application and administered in a fair and equitable manner’ in Article 1.3 of the *Licensing Agreement* and ‘administer in a uniform, impartial and reasonable manner’ in Article X:3(a) of the GATT 1994. In our view, the two phrases are, for all practical purposes, interchangeable. We agree, therefore, . . . that the provisions of Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* have identical coverage.

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.”⁵⁸⁷

2. Anti-Dumping Agreement

393. In *US – DRAMS*, Korea, the complainant, claimed that a particular United States anti-dumping duty order was in violation of Article X of GATT as well as several Articles of the *Anti-Dumping Agreement*. Having already found a violation of Article 11.2 of the *Anti-Dumping Agreement*, the Panel exercised judicial economy with respect to Articles I and X of the *GATT 1994*.⁵⁸⁸

394. In *US – Stainless Steel*, Korea, the complainant, argued that the United States violated Article X:3(a) of GATT as well as Article 2.4.1 of the *Anti-Dumping Agreement* by performing an unnecessary “double con-

version” in calculating the prices of certain local sales which are to be compared to the alleged dumping exports. After having found a violation of Article 2.4.1 in this regard, the Panel exercised judicial economy with respect to Korea’s claim under Article X:3(a).⁵⁸⁹

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

*Article XI**

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

⁵⁸⁷ Appellate Body Report on *EC – Bananas III*, paras. 203–204.

⁵⁸⁸ Panel Report on *US – DRAMS*, para. 6.92.

⁵⁸⁹ Panel Report on *US – Stainless Steel*, para. 6.55.

- (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

B. TEXT OF AD ARTICLE XI

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

Ad Article XI Paragraph 2 (c)

The term “in any form” in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last subparagraph

The term “special factors” includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

C. INTERPRETATION AND APPLICATION OF ARTICLE XI

1. General

(a) Status of Article XI in GATT

395. The Panel on *Turkey – Textiles*, in a finding not reviewed by the Appellate Body, elaborated on the systemic significance of Article XI in the GATT framework. The Panel first stressed that Article XI was a reflection of the preference of the GATT system for tariffs over quotas among forms of border protection; it then con-

sidered the historical evolution of quantitative restrictions since the early years of GATT and emphasized the effort of the Uruguay Round to establish mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing:

“The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the ‘most-favoured-nation’ (MFN) clause). Article I, which requires MFN treatment, and Article II, which specifies that tariffs must not exceed bound rates, constitute Part I of GATT. Part II contains other related obligations, *inter alia* to ensure that Members do not evade the obligations of Part I. Two fundamental obligations contained in Part II are the national treatment clause and the prohibition against quantitative restrictions. The prohibition against quantitative restrictions is a reflection that tariffs are GATT’s border protection ‘of choice’. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement (further discussed below). Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.⁵⁹⁰

Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-

⁵⁹⁰ (footnote original) Panel Report on *EEC – Imports Restrictions*.

of-Payments Provisions⁵⁹¹, the Agreement on Safeguards⁵⁹², the Agreement on Agriculture where quantitative restrictions were eliminated⁵⁹³ and the Agreement on Textiles and Clothing (further discussed below) where MFA derived restrictions are to be completely eliminated by 2005.⁵⁹⁴

(b) Burden of proof

396. In *India – Quantitative Restrictions*, the Panel examined whether the Indian import licensing system was inconsistent with Article XI and, in case of inconsistency, whether it was justified by Article XVIII. Referring to the Appellate Body Report on *US – Wool Shirts and Blouses* and the Appellate Body Report on *EC – Hormones*, the Panel stated on the issue of the burden of proof under Article XI:

“In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie* case that the Indian balance-of-payments measures are not justified by reference to Articles XI:1 and XVIII:11 of GATT 1994.⁵⁹⁵ Should the United States do so, India would have to respond in order to rebut the claim.”⁵⁹⁶

(c) Reference to GATT practice

397. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, pages 317–319.

2. Article XI:1

(a) General

398. In *Canada – Periodicals*, the Panel found a complete ban on imports of a certain product to be inconsistent with Article XI:1 of GATT:

“Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of GATT 1994.”⁵⁹⁷

399. In *India – Autos*, India had argued that since Article XI of the *GATT 1994* dealt with border measures and the disputed Public Notice No. 60 did not deal with any such measure, it could not violate Article XI. However, the Panel found that as it required acceptance of the so-called “trade balancing condition” it imposed a restriction on imports and therefore was inconsistent with Article XI:1 of the *GATT 1994*:

“[I]n determining whether Public Notice No. 60 is inconsistent with Article XI:1 of the *GATT 1994*, the Panel

recalls its earlier analysis of the trade balancing condition as contained in the previous section.

First, it recalls its conclusion that Public Notice No. 60, as a governmental measure requiring manufacturers to accept certain conditions in order to be allowed to import restricted automotive kits and components, constituted a ‘measure’ within the meaning of Article XI:1. This conclusion remains relevant to this analysis and the Panel confirms its earlier conclusion in this respect.

Second, in order to establish whether Public Notice No. 60, in itself, can be considered to be inconsistent with Article XI:1, it has to be established that it constitutes a ‘restriction . . . on importation’ within the meaning of that provision. The Panel recalls in this respect its earlier conclusion that the trade balancing condition, as contained both in Public Notice No. 60 and in the MOUs signed thereunder, constituted a restriction on importation contrary to Article XI:1 in that it effectively limits the amount of imports that a manufacturer may make by linking imports to commitment to undertake a certain amount of exports. Under such circumstance, an importer is not free to import as many restricted kits or components as he otherwise might so long as there is a finite limit to the amount of possible exports.

. . .

The Panel therefore concludes that Public Notice No. 60 in itself, to the extent that it requires the acceptance of the trade balancing condition in order to gain the advantage of importing the restricted products, imposes a restriction on imports and is inconsistent with Article XI:1 of the *GATT 1994*.⁵⁹⁸

⁵⁹¹ As an example, the footnote to this sentence refers to paras. 2 and 3 of the *GATT 1994* Understanding on the Balance-of-Payments Provisions, which both, according to the Panel, “provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes.”

⁵⁹² (*footnote original*) The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures “should take the form of tariff increases” and Article 11 prohibits the use of voluntary export restraints.

⁵⁹³ (*footnote original*) Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a “tariffication” exercise to transform quantitative restrictions into tariff based measures.

⁵⁹⁴ Panel Report on *Turkey – Textiles and Clothing*, paras. 9.63–9.65.

⁵⁹⁵ (*footnote original*) Appellate Body Report on *Australia – Salmon*, paras. 257–259.

⁵⁹⁶ Panel Report on *India – QR*, para. 5.119. The Panel on *US – Shrimp* also allocated the burden of proof to the complainant, referring to the Appellate Body Report on *US – Wool Shirts and Blouses*. Panel Report on *US – Shrimp*, para. 7.14. Further, the Panel on *Argentina – Hides and Leather* followed this practice. Panel Report on *Argentina – Hides and Leather*, paras. 11.11–11.14.

⁵⁹⁷ Panel Report on *Canada – Periodicals*, para. 5.5.

⁵⁹⁸ Panel Report on *India – Autos*, 7.318 – 7.322.

(b) “prohibitions or restrictions . . . on the importation of any product”

(i) *Scope*

400. The Panel on *US – Shrimp* found that the United States violated Article XI by imposing an import ban on shrimp and shrimp products harvested by vessels of foreign nations where such exporting country had not been certified by United States’ authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel stated with reference to the term “prohibitions or restrictions” as follows:

“[T]he US statutory provision in question] expressly requires the imposition of an import ban on imports from non-certified countries. We further note that in its judgement of December 1995, the CIT directed the US Department of State to prohibit, no later than 1 May 1996, the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations of the Secretary of Commerce. Furthermore, the CIT ruled that the US Administration has to apply the import ban, *including to TED-caught shrimp*, as long as the country concerned has not been certified. In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be ‘prohibitions or restrictions’ within the meaning of Article XI.⁵⁹⁹”⁶⁰⁰

401. The Panel on *EC – Asbestos* examined the WTO-consistency of a French ban on the manufacture, import and export, and domestic sales and transfer of certain asbestos and asbestos-containing products. In this context, the question arose whether the French measure fell under the scope of Article III or Article XI. The Panel’s findings on this issue were not appealed and thus were not reviewed by the Appellate Body. The complainant, Canada, argued that this case was not addressed by the interpretative Note *Ad Article III*. Specifically, Canada was arguing that the interpretative Note *Ad Article III* only applies if the measure is applicable to the imported product and to the domestic product. However, in Canada’s view, the explicit import ban did not apply to the domestic product because the domestic product was of course not imported. Moreover, since France neither produced nor mined asbestos fibres on its territory, the ban on manufacturing, processing, selling and domestic marketing was, in practical terms, equivalent to a ban on importing chrysotile asbestos fibres. The Panel first indicated, contrary to Canada’s claim, that the Note *Ad Article III* applied to this case, stating:

“[T]he word ‘comme’ in the French text of Note *Ad Article III* [‘and’ in the English text] implies in the first place that the measure applies to the imported product and to the like domestic product.⁶⁰¹ The Panel notes in this connection that the fact that France no longer produces asbestos or asbestos-containing products does not suffice to make the Decree a measure falling under Article XI:1. It is in fact because the Decree prohibits the manufacture and processing of asbestos fibres that there is no longer any French production. The cessation of French production is the consequence of the Decree and not the reverse. Consequently, the Decree is a measure which ‘applies to an imported product and to the like domestic product’ within the meaning of Note *Ad Article III*.

Secondly, the Panel notes that the words ‘any law, regulation or requirement [. . .] which applies to an imported product and [‘comme’ in the French text] to the like domestic product’ in the Note *Ad Article III* could also mean that the same regime must apply to the imported product and the domestic product.⁶⁰² In this case, under the Decree, the domestic product may not be sold, placed on the domestic market or transferred under any title, possessed for sale, offered or exported. If we follow Canada’s reasoning, products from third countries are subject to a different regime because, as they cannot be imported, they cannot be sold, placed on the domestic market, transferred under any title, possessed for sale or offered. Firstly, the regulations applicable to domestic products and foreign products lead to the same result: the halting of the spread of asbestos and asbestos-containing products on French territory. In practice, in one case (domestic products), they cannot be placed on the domestic market because they cannot be transferred under any title. In the other (imported products), the import ban also prevents their marketing.”⁶⁰³

402. In this regard, the Panel rejected Canada’s argument that an *identical* measure must be applied to the

⁵⁹⁹ (*footnote original*) See Panel Report on *US – Tuna (EEC)*, para. 5.17–5.18, and Panel Report on *US – Tuna (Mexico)*, para. 5.10. Speaking of the relevance for panels of previous reports, the Appellate Body has stated, with respect to adopted panel reports:

“Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute”. (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 14)

Regarding unadopted panel reports, the Appellate Body agreed with the panel in the same case that:

“a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant”. (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 15)

⁶⁰⁰ Panel Report on *US – Shrimp*, para 7.16.

⁶⁰¹ (*footnote original*) *Le Nouveau Petit Robert*, op. cit., p. 411.

⁶⁰² (*footnote original*) “In the same way as”, “to the same extent as” are among the alternative meanings for the word “comme” in the French text (*Le Nouveau Petit Robert*, op. cit., p. 411). [In the English text the word is “and”].

⁶⁰³ Panel Report on *EC – Asbestos*, paras. 8.91–8.92.

domestic product and the like imported product if the measure applicable to the imported product is to fall under Article III:

“We note that the relevant part of the English text of Note *Ad Article III* reads as follows: ‘Any [. . .] law, regulation or requirement [. . .] which applies to an imported product *and* to the like domestic product’.⁶⁰⁴ The word ‘and’ does not have the same meaning as ‘in the same way as’, which can be another meaning for the word ‘comme’ in the French text. We therefore consider that the word ‘comme’ cannot be interpreted as requiring an identical measure to be applied to imported products and domestic products if Article III is to apply.

We note that our interpretation is confirmed by practice under the GATT 1947. In *United States – Section 337 of the Tariff Act of 1930*⁶⁰⁵, the Panel had to examine measures specifically applicable to imported products suspected of violating an American patent right. In this case, referring to Note *Ad Article III*, the Panel considered that the provisions of Article III:4 did apply to the special procedures prescribed for imported products suspected of violating a patent protected in the United States because these procedures were considered to be ‘laws, regulations and requirements’ affecting the internal sale of the imported products, within the meaning of Article III of the GATT. It should be noted that in this case the procedures examined were not the same as the equivalent procedures applicable to domestic products.⁶⁰⁶⁶⁰⁷

403. In the context of the issue whether the French asbestos ban fell under Article III or Article XI, Canada cited the GATT Panel Report on *Canada – Provincial Liquor Boards (EEC)*. Canada quoted this report in support of its proposition that even if the French measure was an internal measure within the meaning of Article III and Note *Ad Article III*, this did not prevent the French decree from also falling under the scope of Article XI. Specifically, Canada pointed out that in the aforementioned case, the Panel had refrained from making a ruling on Article III:4; Canada argued that this confirmed the non-applicability of Article III:4 to the part of an internal measure dealing with the treatment of imported products. The Panel was unconvinced by this argument and pointed out that the case quoted by Canada concerned restrictions made effective through state-trading operations:

“We note that in paragraph 4.24 of the Report, the Panel [*Canada – Provincial Liquor Boards (EEC)*] considered that according to the Note *Ad Articles XI, XII, XIII, XIV and XVIII*, restrictions made effective through state-trading operations were ‘import restrictions’ or ‘export restrictions’. It considered that, in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made between restrictions affecting the importation of products and restrictions affecting imported products

lost much of its significance since both types of restriction could be made effective through decision by the monopoly. In this case, the Decree did not institute a monopoly on the import or distribution of asbestos and like products, so the Note *Ad Articles XI, XII, XIII, XIV and XVIII* is not relevant to settlement of this matter.

As regards Canada’s reference to paragraph 4.26 of the aforementioned report⁶⁰⁸, we consider that it does not substantiate Canada’s position in this case either. In this paragraph, the Panel refrains from ruling on a violation of Article III:4. It appears to do so, however, for reasons of legal economy because it simultaneously recognizes that Article III:4 could apply to state-trading transactions. Contrary to Canada’s assertion, this paragraph does not confirm the non-applicability of Article III:4 to the part of an internal measure dealing with the treatment of imported products. At the most, it could confirm the application of both provisions. Nevertheless, as explained in the preceding paragraph, the Panel found that Article XI:1 applied, referring to the Note *Ad Articles XI, XII, XIII, XIV and XVIII*. This Note only applies to state-trading transactions. In the present case, however, there is no question of a measure applied in the context of state-trading activities.”⁶⁰⁹

⁶⁰⁴ (footnote original) Emphasis added. In the place of “and” and “comme”, the Spanish version uses the conjunction “y” (“et” in French).

⁶⁰⁵ (footnote original) See the Report of the Panel in *US – Section 337*.

⁶⁰⁶ (footnote original) The Panel gave the grounds for its decision in para. 5.10 as follows:

“The fact that Section 337 is used as a means for the enforcement of United States Patent Law at the border does not provide an escape from the applicability of Article III:4; the interpretative Note to Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported. For these reasons, the Panel found that the procedures under Section 337 come within the concept of ‘laws, regulations and requirements’ affecting the internal sale of imported products, as set out in Article III of the General Agreement.”

⁶⁰⁷ Panel Report on *EC – Asbestos*, paras. 8.94–8.95.

⁶⁰⁸ (footnote original) “The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *a contrario* by the wording of Article III:8(a).”

⁶⁰⁹ Panel Report on *EC – Asbestos*, paras. 8.97–8.98.

- (c) “prohibitions or restrictions . . . on the exportation or sale for export of any product”

404. In *Argentina – Hides and Leather*, the European Communities argued that Argentina’s measure was inconsistent with Article XI:1 by authorizing the presence of domestic tanners’ representatives in the customs inspection procedures for hides destined for export operations, and thus, imposing *de facto* restrictions on exports of hides.⁶¹⁰ The Panel noted:

“There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.⁶¹¹ It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of ‘other measures’.”⁶¹²

405. Citing the Panel Report on *Japan – Film*, the Panel on *Argentina – Hides and Leather* went on to state:

“It is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1. This said, we recall the statement of the panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* to the effect that:

‘[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.’⁶¹³

We agree with the view expressed by the panel in *Japan – Film*. However, we do not think that it follows either from that panel’s statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.⁶¹⁴⁶¹⁵

406. The Panel on *Argentina – Hides and Leather* had to determine, *inter alia*, whether the presence of representatives of the domestic hide tanning industry in the Argentine customs inspection procedures for hides destined for export was an export restriction. The Panel discussed the relevance of the actual trade effect of the measure and found that although actual trade effects did not have to be proven in order to establish a violation of Article XI:1, trade effects carried weight, as an evidentiary matter, for establishing the existence of a *de facto* restriction

“[A]s to whether Resolution 2235 makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive

opportunities of imported products, not trade flows.⁶¹⁶ In order to establish that Resolution 2235 infringes Article XI:1, the European Communities need not prove actual trade effects. However, it must be borne in mind that Resolution 2235 is alleged by the European Communities to make effective a *de facto* rather than a *de jure* restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.

Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions,⁶¹⁷ it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports.⁶¹⁸ In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports.”⁶¹⁹

- (d) “restrictions made effective through state-trading operations”

407. The Panel on *India – Quantitative Restrictions*, in examining the contested Indian measures, addressed the phrase “restrictions made effective through state-trading operations”. In its analysis, which was subsequently not reviewed by the Appellate Body, the Panel

⁶¹⁰ With respect to this measure in the light of Article X, see para. 382 of this Chapter.

⁶¹¹ (*footnote original*) See the Panel Report on *Japan – Semi-Conductors*, paras. 105–109. In other contexts, see the Appellate Body Report on *EC – Bananas III*, paras. 232–234, citing *EEC – Imports of Beef; Spain – Unroasted Coffee*, and *Japan – SPF Dimension Lumber*.

⁶¹² Panel Report on *Argentina – Hides and Leather*, para. 11.17. (*footnote original*) Panel Report on *Japan – Film*, para. 10.56.

⁶¹⁴ (*footnote original*) As we understand it, Article XI:1 does not incorporate an obligation to exercise “due diligence” in the introduction and maintenance of governmental measures beyond the need to ensure the conformity with Article XI:1 of those measures taken alone.

⁶¹⁵ Panel Report on *Argentina – Hides and Leather*, para. 11.18.

⁶¹⁶ (*footnote original*) See the Appellate Body Reports on *Japan – Alcoholic Beverages II*, at p.16; *Korea – Alcoholic Beverages*, at paras. 119–120 and 127.

⁶¹⁷ (*footnote original*) For example, it will be recalled that in the present case there is an export duty on raw hides which has not been challenged.

⁶¹⁸ (*footnote original*) The Appellate Body in *EC – Poultry* similarly required of the complaining party in that case a demonstration of a causal relationship between the imposition of an EC licensing procedure and the alleged trade distortion. See the Appellate Body Report on *EC – Poultry*, at paras. 126–127. While this interpretation related to a claim under the Agreement on Import Licensing Procedures, it is not apparent why the logic should be any different in the case of a claim under Article XI:1 of the GATT 1994.

⁶¹⁹ Panel Report on *Argentina – Hides and Leather*, paras. 11.20–11.21. In this line, the Panel did not find an export restriction made effective by the measure at issue. See Panel Report on *Argentina – Hides and Leather*, paras. 11.22–11.55.

emphasized that the fact that imports were effected through state-trading operations did not *per se* mean that imports were being restricted:

“In analyzing the US claim, we note that violations of Article XI:1 can result from restrictions made effective through state trading operations. This is made very clear in the Note Ad Articles XI, XII, XIII, XIV and XVIII, which provides that ‘Throughout Article XI, XII; XIII; XIV; and XVIII, the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through state-trading operations.’ It should be noted however, that the mere fact that imports are effected through state trading enterprises would not in itself constitute a restriction. Rather, for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.”⁶²⁰

As noted above, the United States has shown in some instances that there have been zero imports of products reserved to state trading enterprises by India. We note, however, that canalization *per se* will not necessarily result in the imposition of quantitative restrictions within the meaning of Article XI:1, since an absence of importation of a given product may not always be the result of the imposition of a prohibitive quantitative restriction. For instance, the absence of importation of snow ploughs into a tropical island cannot be taken as sufficient evidence of the existence of import restrictions, even if the right to import those products is granted to an entity with exclusive or special privileges.”⁶²¹

408. The Panel on *Korea – Various Measures on Beef*, in a finding not reviewed by the Appellate Body, examined various practices of the Korean state trading agency for beef – an agency which held both an importation and a distribution monopoly – and discussed the *Ad Note* to Article XI in the following terms:

“[I]n the special case where a state-trading enterprise possesses an import monopoly and a distribution monopoly, any restriction it imposes on the distribution of imported products will lead to a restriction on importation of the particular product over which it has a monopoly. In other words, the effective control over both importation and distribution channels by a state-trading enterprise means that the imposition of any restrictive measure, including internal measures, will have an adverse effect on the importation of the products concerned. The *Ad Note* to Article XI therefore prohibits a state-trading enterprise enjoying monopoly right over both importation and distribution from imposing any internal restriction against such imported products.”⁶²²

409. In *EC – Asbestos*, the Panel referred to Note *Ad Articles XI, XII, XIII, XIV and XVIII* in its rejection of Canada’s argument that the measure at issue was subject to Article XI:1 as well as Article III:4. See paragraph 403 above.

(e) Bonding requirements

410. In *US – Certain EC Products*, the measures at issue were increased bonding requirements imposed by the United States on imports from the European Communities. The increased bonding requirements were imposed in order to secure the future collection of additional import duties which were only later authorized by the Dispute Settlement Body under Article 22.6 of the DSU. While the majority of the Panel found that this bonding requirement constituted a duty or charge under Article II, one panelist found that this measure fell under Article XI of GATT:

“Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure, which are reflected on the charts contained in paragraph 2.37 of this Panel Report, confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a ‘restriction’, contrary to Article XI of GATT, rather than a duty or charge under Article II.”⁶²³

(f) Licensing requirements

411. In *India – Quantitative Restrictions*, the Panel, in a finding not reviewed by the Appellate Body, held that Article XI:1 had a broad scope and covered discretionary or non-automatic import licensing requirements:

“[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’. As was noted by the panel in *Japan – Trade in Semiconductors*, the wording of Article XI:1 is comprehensive: it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.’⁶²⁴ The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation’.

Under the GATT 1947, panels have examined whether import and export licensing systems are restrictions

⁶²⁰ (footnote original) Panel Report on *Korea – Various Measures on Beef*, para 115: “The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1.”

⁶²¹ Panel Report on *India – Quantitative Restrictions*, paras. 5.134–5.135.

⁶²² Panel Report on *Korea – Various Measures on Beef*, para. 751.

⁶²³ Panel Report on *US – Certain EC Products*, para. 6.61.

⁶²⁴ (footnote original) GATT Panel Report on *Japan – Semiconductors*, para. 104.

under Article XI:1. For example, in a case involving a so-called 'SLQ' regime, which concerned products subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or value, permit applications being granted upon request, the panel noted 'that the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the *automatic* issuance of licences'.⁶²⁵ A similar conclusion was reached in the above-cited *Japan – Trade in Semi-conductors*, where the panel found that 'export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI'.⁶²⁶ These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."⁶²⁷

412. In *Korea – Various Measures on Beef*, the Panel, in a finding not reviewed by the Appellate Body, rejected the United States' claim that "Korea's regulatory regime [on beef imports], and thus its licensing system, by granting exclusive authority to [certain Korean agencies] to import beef, effectively establishes a non-automatic import licensing system in violation of Article XI:1 ...". The Panel held that discretionary licensing used in conjunction with a quantitative restriction does not necessarily provide an additional level of restriction to the quantitative restriction:

"[W]here a quota is in place, the use of a discretionary licensing system need not necessarily result in any additional restriction. Where a discretionary licensing system is implemented in conjunction with other restrictions, such as in the present dispute, the manner in which the discretionary licensing system is operated may create additional restrictions independent of those imposed by the principal restriction. Since this issue was not considered in the *India – Quantitative Restrictions* report, that case does not provide authority for the proposition that a discretionary licensing system, used in conjunction with a quantitative restriction, necessarily provides some additional level of restriction over and above the inherent restriction on access created through the imposition of a quantitative restriction."⁶²⁸

(g) Reference to GATT practice

413. For GATT practice on this subject-matter, see the GATT Analytical Index, pages 315–325.

3. Notification requirements

414. At its meeting on 31 October 1995, the Committee on Market Access adopted two Decisions relating to non-tariff measures: (1) Notification procedures of quantitative restrictions, and (2) Reverse notification on non-tariff measures.⁶²⁹ At its meeting on 24 June 1997, the Committee further adopted a format for the submissions of notifications of quantitative restrictions.⁶³⁰

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

415. In *US – Shrimp*, exercising judicial economy, the Panel did not examine a claim under Article I (and Article XIII) after having found a violation of Article XI. See paragraphs 421 and 446 below.

2. Article II

416. In *US – Certain EC Products*, the majority of the Panel found the increased bonding requirements imposed on imports in order to secure the collection of additional import duties to be a duty or charge under Article II. One panelist found the measure at issue to be a restriction within the meaning and scope of Article XI. See paragraph 410 above.

3. Article III

417. In *Korea – Various Measures on Beef*, the Panel examined the United States' claim that the prohibition of cross-trading between end-users in respect of beef was inconsistent with GATT Articles III and XI. After finding that this prohibition was contrary to Article III:4 of GATT, the Panel exercised judicial economy with respect to the claim that the same measure also violated Article XI of GATT.⁶³¹

418. In *EC – Asbestos*, the Panel rejected Canada's argument that the French ban on the manufacture, importation and exportation, and domestic sales and transfer of certain asbestos products was subject to Article XI:1 as well as Article III:4. See paragraphs 401–403 above.

419. In *India – Autos*, the Panel recalled the Panel Report on *Canada – FIRA* regarding the differing scopes

⁶²⁵ (footnote original) GATT Panel Report on *EEC – Import Restrictions*, para. 31. See also Panel Report on *EEC – Minimum Import Prices*, para. 4.9.

⁶²⁶ (footnote original) GATT Panel Report on *Japan – Semi-Conductors*, para. 118.

⁶²⁷ Panel Report on *India – Quantitative Restrictions*, paras. 5.129–5.130.

⁶²⁸ Panel Report on *Korea – Various Measures on Beef*, para. 782.

⁶²⁹ G/MA/M/3, para. 3. The text of the adopted decisions can be found in G/L/59 and G/L/60.

⁶³⁰ G/MA/M/10, para. 3. The text of the approved format can be found in G/MA/NTM/QR/2.

⁶³¹ Panel Report on *Korea – Various Measures on Beef*, para. 705.

of Article III and XI of GATT 1994. See paragraphs 295–296 above.

4. Article VI

420. In *US – 1916 Act (Japan)*, after finding a violation of Article VI, the Panel held that in the case before it, Article VI addressed the “basic feature” of the measure at issue more directly than Article XI; however, the Panel stated explicitly that this did not mean that Article VI applied to the exclusion of Article XI:1. Nevertheless, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.⁶³²

5. Article XIII

421. The Panel on *US – Shrimp*, in an exercise of judicial economy, did not examine a claim under GATT Articles I and XIII after having found a violation of Article XI. See paragraph 446 below. Also, in *India – Quantitative Restrictions*, exercising judicial economy, the Panel did not examine a claim under GATT Article XIII after having found a violation of Article XI. See paragraph 447 below.

6. Article XVII

422. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding certain practices of the Korean state trading agency for beef under Articles III:4 and XVII, after it had found that this practice was inconsistent with Articles XI and II:1(a). See paragraph 481 below.

423. The interpretation and application of Note *Ad* Article XI, XII, XIII, XIV and XVIII, which clarifies that the terms “import restrictions” or “export restrictions” used in these Articles include “restrictions made effective through state-trading operations”, was discussed in *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See the excerpt(s) referenced in paragraphs 407–408 above.

7. Reference to GATT practice

424. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, page 348.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. SPS Agreement

425. In *Australia – Salmon*, the Panel examined the Canadian claim that the import prohibition of uncooked salmon was inconsistent with Article XI of the GATT as well as with several provisions of the SPS Agreement. After finding that the Australian measure was inconsistent with the requirements of the SPS

Agreement, the Panel did not find it necessary to also examine the measure in the light of Article XI.⁶³³

2. Anti-Dumping Agreement

426. The Panel on *US – 1916 Act (Japan)*, after finding that the measure at issue was inconsistent with provisions of the *Anti-Dumping Agreement* (and Article VI of the GATT), did not find it necessary to address the same measure also in the light of Article XI. See also paragraph 420 above.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

*Article XII**

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

- (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
- (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of

⁶³² Panel Report on *US – 1916 Act (Japan)*, para. 6.281

⁶³³ Panel Report on *Australia – Salmon*, para. 8.185. With respect to judicial economy in general, see Chapter on the DSU, Section XXXVI.F.

payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

- (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*
- (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and
- (iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one

year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special

external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

B. TEXT OF AD ARTICLE XII

Ad Article XII

The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3 (c)(i)

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this subparagraph at the time envisaged, they may determine a later date; Provided that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 (e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

C. UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

[The text of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 can be found at Section C following the text of Article XVIII below.]

D. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. BOP Understanding

427. With respect to the interpretation and application of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, see paragraphs 508–509 and 515–516 below.

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article XVII

428. The interpretation and application of the note *Ad Article XI, XII, XIII, XIV and XVIII*, which clarifies that the terms “import restrictions” or “export restrictions” used in these Articles include “restrictions made effective through state-trading operations”, was discussed by the Panels on *India – Quantitative Restrictions* and on *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Article XVIII

429. In *India – Quantitative Restrictions*, the Panel explained the relationship between Articles XII and XVIII:B in clarifying the function of Article XVIII:B. See paragraph 488 below.

3. Reference to GATT practice

430. With respect to GATT practice on Article XII, see GATT Analytical Index, pages 356–392.

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

*Article XIII**

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such

product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

- (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;
 - (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
 - (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;
 - (d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*
3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.
- (b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the

restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

(c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors* affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

B. TEXT OF AD ARTICLE XIII

Ad Article XIII Paragraph 2 (d)

No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking

agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to “special factors” in connection with the last subparagraph of paragraph 2 of Article XI.

C. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. General

(a) Scope of application

431. In *EC – Bananas III*, the Appellate Body reviewed the Panel’s finding that the EC import regime for bananas was inconsistent with Article XIII in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. The European Communities claimed that “there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas” and argued that “the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes.”⁶³⁴ Rejecting this argument, the Appellate Body applied Article XIII to the whole import regime as follows:

“The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.”⁶³⁵

(b) Object and purpose

432. In *EC – Bananas III*, the Panel, in a finding not reviewed by the Appellate Body, held that the object and purpose of Article XIII:2 is to minimize the impact of quantitative restrictions on trade flows:

“In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of

the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions—the general ban on quotas and other non-tariff restrictions contained in Article XI.”⁶³⁶

2. Article XIII:1

433. In *EC – Bananas III*, the Appellate Body found a violation of Article XIII:1 in the European Communities’ import regime for bananas, stating as follows:

“[A]llocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is ‘similarly’ restricted.”⁶³⁷

434. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 399–400.

3. Article XIII:2

(a) Chapeau

435. In *US – Line Pipe*, the Panel established that because the safeguard measure investigation was not based on historical trade patterns, and did not reflect an intent of approaching the shares that the members could have been expected to obtain in the absence of the measure, there was a violation of the chapeau of Article XIII:2. The Panel held:

“[I]n our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.

There is nothing in the record before the Panel to suggest that the line pipe measure was based in any way on

⁶³⁴ Appellate Body Report on *EC – Bananas III*, para. 189.

⁶³⁵ Appellate Body Report on *EC – Bananas III*, para. 190.

⁶³⁶ Panel Report on *EC – Bananas III*, para. 7.68.

⁶³⁷ Appellate Body Report on *EC – Bananas III*, para. 161.

historical trade patterns in line pipe, or that the United States otherwise “aim[ed] at a distribution of trade . . . approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of” the line pipe measure. Instead, as noted by Korea, “the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)”.⁶³⁸ For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2.⁶³⁹

436. In *EC – Bananas III*, the Appellate Body found a violation of Article XIII:2 in respect of the European Communities’ import regime for bananas and, more specifically, in respect of the treatment granted to countries which had concluded with the European Communities the so-called Banana Framework Agreement (BFA). A quota share not utilized by one of the BFA countries could, at the joint request of all BFA countries, be transferred to another BFA country. No equivalent regulation existed with respect to banana exporting countries that were not part of the BFA. The Panel found that this aspect of the measure was inconsistent with the requirement to approximate, in the administration of a quantitative restriction, the relative trade flows which would exist in the absence of the measure at issue:

“Pursuant to these reallocation rules, a portion of a tariff quota share not used by the BFA country to which that share is allocated may, at the joint request of the BFA countries, be reallocated to the other BFA countries. . . . [T]he reallocation of unused portions of a tariff quota share exclusively to other BFA countries, and not to other non-BFA banana-supplying Members, does not result in an allocation of tariff quota shares which approaches ‘as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions’. Therefore, the tariff quota reallocation rules of the BFA are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994.”⁶⁴⁰

437. In *EC – Poultry*, Brazil challenged the European Communities’ calculation of the tariff quota shares because imports from China – at that time not a Member of the WTO – had been included in this allocation of tariff quota shares. The Panel, in a finding expressly endorsed by the Appellate Body⁶⁴¹, found that nothing in Article XIII required the calculation of tariff quota shares only on the basis of imports from WTO Members:

“We note that Article XIII carefully distinguishes between Members (‘contracting parties’ in the original text of GATT 1947) and ‘supplying countries’ or ‘source’. There is nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from

Members only.⁶⁴² If the purpose of using past trade performance is to approximate the shares in the absence of the restrictions as required under the chapeau of Article XIII:2, exclusion of a non-Member, particularly if it is an efficient supplier, would not serve that purpose.

This interpretation is also confirmed by the use in Article XIII:2(d) of the term ‘of the total quantity or value of imports of the product’ without limiting the total quantity to imports from Members.

The conclusion above is not affected by the fact that the TRQ in question was opened as compensatory adjustment under Article XXVIII because Article XIII is a general provision regarding the non-discriminatory administration of import restrictions applicable to any TRQs regardless of their origin.”⁶⁴³

(b) Article XIII:2(a)

438. Regarding the question of whether tariff quotas were subject to the disciplines set out in Article XIII:2(a), the Panel on *US – Line Pipe*, in a finding not reviewed by the Appellate Body, held that they do constitute “quotas” within the meaning of Article XIII:2(a):

“Irrespective of whether or not tariff quotas constitute “quotas” within the meaning of Article XIII:2(a), tariff quotas are necessarily subject to the disciplines contained in Article XIII:2(a) as a result of the express language of Article XIII:5. Thus, Article XIII:2(a) must have meaning in the context of tariff quotas. We believe that, in respect of tariff quotas, Article XIII:2(a) requires Members to fix, wherever practicable, the total amount of imports permitted at the lower tariff rate.”⁶⁴⁴ ⁶⁴⁵

⁶³⁸ Korea’s first written submission, para. 155.

⁶³⁹ Panel Report on *US – Pipe Line*, paras. 7.53–7.55.

⁶⁴⁰ Appellate Body Report on *EC – Bananas III*, para. 163.

⁶⁴¹ Appellate Body Report on *EC – Poultry*, para. 106.

⁶⁴² (*footnote original*) We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): “The consequence of the foregoing analysis is that Members may be effectively required to use a general ‘others’ category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned”. See Panel Reports on *EC – Bananas III*, para. 7.75. The quoted passage, particularly the use of the phrase “all suppliers other than Members with a substantial interest in supplying the product” (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.

⁶⁴³ Panel Report on *EC – Poultry*, paras. 230–232.

⁶⁴⁴ (*footnote original*) The obligation cannot extend to fixing the total amount of permitted imports at the higher tariff rate, because that would effectively undermine the distinction between tariff quotas and quantitative restrictions.

⁶⁴⁵ Panel Report on *US – Line Pipe*, para. 7.58.

(c) Article XIII:2(d)

(i) *Allocation of import quotas to Members who have no "substantial interest"*

439. The Panel on *EC – Bananas III* addressed the question whether country-specific shares can also be allocated to Members that do not have a substantial interest in supplying the product and, if so, what the specific method of allocation should be. The Panel, in a finding not addressed by the Appellate Body, answered this question in the affirmative, but emphasized that any allocation to Members not having a substantial interest in supplying the product at issue would have to comply with the principle of non-discrimination:

"As to the first point, we note that the first sentence of Article XIII:2(d) refers to allocation of a quota 'among supplying countries'. This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1.⁶⁴⁶ As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met.

...

In so far as this in practice results in the use of an 'others' category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to 'others', the import market will evolve with the minimum amount of distortion. Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the 'others' category and possibly achieve 'substantial supplying interest' status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain 'substantial supplying interest' status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market

shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII."⁶⁴⁷

440. The Panel on *EC – Bananas III (Article 21.5 – Ecuador)* examined the consistency with Article XIII of the European Communities' regime for imports of bananas, as revised by the European Communities in response to the DSB's recommendation. In this revised regime, bananas could be imported under the MFN tariff-rate quota on the basis of past trade performance by exporting countries during the past representative period from 1994 to 1996, while bananas from traditional ACP supplier countries could be imported up to a collective amount which was originally set to reflect the overall amount of the pre-1991 best-ever export by individual traditional ACP suppliers. The Panel found the revised regime to be inconsistent with Article XIII:2(d):

"[F]or traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions."⁶⁴⁸

⁶⁴⁶ (*footnote original*) In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

"[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples – Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report on "Japan – Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226–227, para. 5.1.3.7.

⁶⁴⁷ Panel Report on *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 7.73 and 7.76.

⁶⁴⁸ Panel Report on *EC – Bananas III*, para. 6.28.

(ii) *Allocation of tariff/import quotas to non-Members*

441. In *EC – Poultry*, the Appellate Body upheld the Panel’s finding that the European Communities acted consistently with Article XIII in calculating a tariff-rate quota share for a Member based upon the total quantity of imports including those from non-Members.⁶⁴⁹ See also paragraph 437 above. Brazil claimed upon appeal that the Panel had also made a finding with respect to the *allocation* of tariff-rate quota shares to a non-Member, and the *participation of non-Members in the “others” category* of a tariff-rate quota. Brazil claimed that the Panel erred because it had failed to recognize that the allocation of quota shares is always intended exclusively for Members. The Appellate Body found that the Panel statements which Brazil claimed to constitute the findings it was appealing did not amount to findings or developed legal interpretations on these two issues. As a result, the Appellate Body concluded that a consideration of these questions would be outside its mandate under Article 17.6 of the DSU. In regard to the two aforementioned issues, the Panel had stated:

“We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): ‘The consequence of the foregoing analysis is that Members may be effectively required to use a general ‘others’ category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned’. See panel reports on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, *op. cit.*, para. 7.75. The quoted passage, particularly the use of the phrase ‘*all suppliers other than Members with a substantial interest in supplying the product*’ (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.”⁶⁵⁰

442. The Panel on *EC – Bananas III*, in a finding not addressed by the Appellate Body, examined how the accession to the WTO of a supplying country impacted upon the consistency of a pre-existing quantitative restriction with Article XIII:2.

“The general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the

share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.

[A]lthough the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.⁶⁵¹ The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC’s agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.”⁶⁵²

443. With respect to GATT practice concerning the allocation of quota, see GATT Analytical Index, pages 401–402.⁶⁵³

⁶⁴⁹ Appellate Body Report on *EC – Poultry*, para. 108.

⁶⁵⁰ Panel Report on *EC – Poultry*, para. 230, footnote 140.

⁶⁵¹ (*footnote original*) While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the “others” category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

⁶⁵² Panel Report on *EC – Bananas III*, paras. 7.91–7.92.

⁶⁵³ In this regard, in *EC – Poultry*, Brazil argued that the EC allocation of licences to imports of poultry products from East European countries was inconsistent with Article XIII, citing GATT Panel Report on *EEC – Newsprint*. The Panel rejected this argument, stating as follows:

“There is some similarity between the *Newsprint* case and the present case regarding this specific issue. As in the *Newsprint* case, the purpose of the poultry TRQ is to allow specified quantities (15,500 tonnes) of imports into the EC duty-free which would otherwise be dutiable. However, there are three important factual differences. First, in the *Newsprint* case, EFTA suppliers were accorded duty-free access to the EEC market without restriction. In the present case, imports from Hungary and Poland under the Interim Agreements are still dutiable. Second, in the *Newsprint* case, the level of the MFN duty-free quota was reduced in order to make room for preferential access while in the present case no such reduction has occurred. Third, in the *Newsprint* case, the EFTA agreement was concluded after the opening of the MFN quota whereas in this case the Interim Agreements preceded the opening of the poultry TRQ.

Thus, the present case lacks the basis that led to the conclusion by the *Newsprint* panel. We also note that before making the

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

444. In *EC – Bananas III*, the European Communities argued that even though the Lomé waiver mentioned explicitly only *GATT* Article I:1 in respect of the allocation of country-specific tariff quotas for bananas to certain countries, a violation of Article XIII in respect of its tariff regime for bananas was also covered by the Lomé waiver, due to the inherent substantive link between Articles I and XIII. While the Panel agreed with the European Communities' argument, the Appellate Body rejected it.⁶⁵⁴ See the Chapter on the *WTO Agreement*, Section X.B.3(i).

2. Article II

445. The Panel on *EC – Bananas III* discussed the relationship between *GATT* Articles II and XIII. See paragraphs 110–111 above.

3. Article XI

446. The Panel on *US – Shrimp* found that the United States violated Article XI by imposing an import ban on shrimps and shrimp products harvested by vessels of foreign nations, where such exporting country had not been certified by United States' authorities as using methods not leading to the incidental killing of sea turtles above a certain level. The Panel, in a finding not reviewed by the Appellate Body, then exercised judicial economy with respect to the claim concerning Article XIII.⁶⁵⁵

447. The Panel on *India – Quantitative Restrictions*, in a finding not reviewed by the Appellate Body, stated that “[w]ith regard to the claim of violation of Article XIII of *GATT 1994*, since the resolution of the claims under Articles XI and XVIII:B may make it unnecessary to resolve that claim, we will defer consideration of this issue.”⁶⁵⁶ The Panel ultimately did not address Article XIII.

4. Article XXVIII

448. In *EC – Poultry*, the Appellate Body addressed a complaint against the allocation of tariff quotas for certain poultry products by the European Communities, and rejected Brazil's appeal that Articles I and XIII of *GATT* were not applicable to the allocation of tariff quota resulting from the negotiation under *GATT* Article XXVIII. The Appellate Body, after having confirmed its finding in *EC – Bananas III*⁶⁵⁷, stated that “the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the *GATT 1994*.”⁶⁵⁸ The Appellate Body opined that Article XXVIII does not dis-

pense with the non-discrimination principle inscribed in Articles I and XIII of *GATT 1994*, and considered the negotiating history of Article XXVIII:

“We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the *GATT 1994*. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

‘It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed ‘Modification of Schedules’. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.’⁶⁵⁹

Although this statement refers specifically to the MFN clause in Article I of the *GATT*, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the *GATT 1994*.⁶⁶⁰

5. Reference to *GATT* practice

449. With respect to *GATT* practice concerning the relationship of Article XIII with other Articles, see *GATT Analytical Index*, pages 410–411.

E. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

450. In *EC – Bananas III*, the European Communities argued that, in light of the meaning and intent of

statement cited in paragraph 237 above, the *Newsprint* panel stated that ‘the Panel could find no *GATT* specific provision forbidding such action’. If Brazil had intended to claim a violation of Article XIII:2 on this specific issue, at a minimum, it should have elaborated on the nature of preferences accorded to poultry products imported from East Europe and should have tied it to *inter alia* ‘any special factors which may have or may be affecting the trade in the product’ referred to in Article XIII:2(d). It has not done so.”

Panel Report on *EC – Poultry*, paras. 238–239.

⁶⁵⁴ Appellate Body Report on *EC – Bananas III*, paras. 183–187.

⁶⁵⁵ Panel Report on *US – Shrimp*, para. 7.22. With respect to judicial economy in general, see Chapter on the *DSU*, Section XXXVI.F.

⁶⁵⁶ Panel Report on *India – Quantitative Restrictions*, para. 5.17.

⁶⁵⁷ Appellate Body Report on *EC – Poultry*, para. 98, citing Appellate Body Report on *EC – Bananas III*, para. 154, which is referenced in para. 84 of this Chapter.

⁶⁵⁸ Appellate Body Report on *EC – Poultry*, para. 99.

⁶⁵⁹ (footnote original) EPCT/TAC/PV/18, p. 46.

⁶⁶⁰ Appellate Body Report on *EC – Poultry*, para. 100.

Articles 4.1 and 21.1 of the *Agreement on Agriculture*, it was permitted, with respect to market access concessions, to act inconsistently with the requirements of Article XIII of the GATT 1994. The Panel concluded that the *Agreement on Agriculture* did not permit the European Communities to act inconsistently with Article XIII. The Appellate Body confirmed the Panel's finding:

"[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document⁶⁶¹ or to any 'common understanding' among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994."⁶⁶²

2. Agreement on Safeguards

451. The Panel on *US – Line Pipe* held, in a statement not reviewed by the Appellate Body, that Article XIII does apply to tariff quota safeguard measures. In the Panel's view, if this were not the case, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner inconsis-

tently with the objectives set out in the preamble of the Safeguards Agreement:

"[I]t is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement⁶⁶³ that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.⁶⁶⁴ In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the "need to clarify and reinforce the disciplines of GATT 1994" in the context of safeguards. We consider that the "disciplines of GATT 1994" surely include those providing for non-discrimination. In any event "the elimination of discriminatory treatment in international trade relations" is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to "establish multilateral control over safeguards and eliminate measures that escape such control". We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement."⁶⁶⁵

452. The Panel on *US – Line Pipe*, in a statement not reviewed by the Appellate Body, highlighted the importance of respecting traditional trade patterns when imposing safeguards measures:

"In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for project-

⁶⁶¹ *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

⁶⁶² Appellate Body Report on *EC – Bananas III*, para. 157.

⁶⁶³ (*footnote original*) See section below.

⁶⁶⁴ (*footnote original*) The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.

⁶⁶⁵ Panel Report on *US – Line Pipe*, para. 7.49

ing what might have occurred in the absence of that measure.”⁶⁶⁶

XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

*Article XIV**

Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

- (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or
- (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

B. TEXT OF AD ARTICLE XIV

Ad Article XIV *Paragraph 1*

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2

One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

C. INTERPRETATION AND APPLICATION OF ARTICLE XIV

No jurisprudence or decision of a competent WTO body.

D. RELATIONSHIP WITH OTHER ARTICLES

1. Article XVII

453. The interpretation and application of *Ad* Articles XI, XII, XIII, XIV and XVIII, which clarifies that the terms “import restrictions” or “export restrictions” used in these Articles include “restrictions made effective through state-trading operations”, was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Reference to GATT practice

454. With respect to GATT practice on Article XIV, see GATT Analytical Index, pages 418–424.

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

Article XV *Exchange Arrangements*

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign

⁶⁶⁶ Panel Report on *US – Line Pipe*, para. 7.54.

exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (a) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.

(b) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by

the Articles of Agreement of the International Monetary Fund on members of the Fund.

8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.

9. Nothing in this Agreement shall preclude:

- (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or
- (b) the use by a contracting party of restrictions or controls in imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

B. TEXT OF AD ARTICLE XV

Ad Article XV Paragraph 4

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

C. INTERPRETATION AND APPLICATION OF ARTICLE XV

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

455. With respect to GATT practice concerning Article XV, see GATT Analytical Index, pages 429–441.

XVII. ARTICLE XVI**A. TEXT OF ARTICLE XVI****Article XVI***
*Subsidies***Section A – Subsidies in General**

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B – Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond

that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

B. TEXT OF AD ARTICLE XVI**Ad Article XVI**

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

- (a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and
- (b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

Paragraph 4

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

C. INTERPRETATION AND APPLICATION OF ARTICLE XVI

1. Article XVI:4

456. In *US – FSC*, the Appellate Body discussed the relationship between Article XVI:4 of *GATT 1994* and the *SCM Agreement* in interpreting Article 3.1(a) of the *SCM Agreement*. See Chapter on the *SCM Agreement*, Section II.B.9(a).

2. SCM Agreement

457. With respect to WTO jurisprudence and materials produced by competent WTO bodies concerning subsidies, see Chapter on the *SCM Agreement*.

3. Reference to GATT practice

458. With respect to GATT practice on Article XVI, see *GATT Analytical Index*, pages 445–463.

XVIII. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII

State Trading Enterprises

1* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports and exports by private traders.

(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation

and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that their enterprises of the kind described in paragraph 1 (a) of this article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this article.

(b) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or when it is not possible to do so, of the price charged on the resale of the product.

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

B. TEXT OF AD ARTICLE XVII

*Ad Article XVII
Paragraph 1*

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1(b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4 (b)

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

C. UNDERSTANDING ON THE
INTERPRETATION OF ARTICLE XVII OF
THE GENERAL AGREEMENT ON TARIFFS
AND TRADE 1994*Members,*

Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

Recognizing that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby agree as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184-185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

4. Any Member which has reason to believe that another Member has not adequately met its notification

obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.

5. A working party shall be set up, on behalf of the Council for Trade in Goods, to review notifications and counter-notifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the Secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.

(footnote original) ¹ The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

D. INTERPRETATION AND APPLICATION OF ARTICLE XVII

1. General

(a) Relationship between paragraphs 1(a) and 1(b) of Article XVII

459. In *Canada – Wheat Exports and Grain Imports*, the Panel found that the disputed export regime was inconsistent with the principles in subparagraph (b) of Article XVII:1. Canada (the respondent) alleged that the Panel had established that a violation of subparagraph (b) was sufficient to establish a breach of Article XVII:1 and also that the Panel had failed to consider the proper relationship between subparagraphs (a) and (b) of Article XVII:1. The Appellate Body held that a failure to identify discriminatory conduct prior to determining the consistency of a state trading enterprise's (STE) conduct with subparagraph (b) of Article XVII:1 would constitute an error of law. The Appellate Body held:

"[I]n this case, we have already determined that the two subparagraphs of Article XVII:1 are closely interrelated.

As we have said, a panel faced with a claim of inconsistency with Article XVII:1(a) and (b) will, in most if not all cases, need to analyze and apply *both* provisions in order to assess the consistency of the measure at issue. Subparagraph (b) sets forth two specific conditions with which an STE must comply if allegedly discriminatory conduct falling, *prima facie*, within the scope of subparagraph (a) is to be found consistent with Article XVII:1. Yet, in order to know whether the conditions in (b) are satisfied, a panel must know *what* constitutes the conduct alleged to be inconsistent with the principles of non-discriminatory treatment in the GATT 1994. A panel will need to identify at least the differential treatment at issue. The outcome of an assessment under subparagraph (b) of whether the differential treatment is consistent with commercial considerations may depend, in part, upon whether the alleged discrimination relates to pricing, quality, or conditions of sale, and whether it is discrimination between export markets or some other form of discrimination.

It follows that, logically, a panel cannot assess whether particular practices of an allegedly discriminatory nature accord with commercial considerations without first identifying the key elements of the alleged discrimination. We emphasize that we are *not* suggesting that panels are always obliged to make specific factual and legal findings with respect to each element of a claim of discrimination under subparagraph (a) before undertaking *any* analysis under subparagraph (b). Rather, because a panel's analysis and application of subparagraph (b) to the facts of the case is, like subparagraph (b) itself, dependent on the obligation set forth in subparagraph (a), panels must identify the differential treatment alleged to be discriminatory under subparagraph (a) in order to ensure that they are undertaking a proper inquiry under subparagraph (b).

For these reasons, we are of the view that a failure to identify *any* conduct alleged to constitute discrimination contrary to the general principles of the GATT 1994 for governmental measures affecting imports or exports by private traders *before* undertaking an analysis of the consistency of an STE's conduct with subparagraph (b) of Article XVII:1 would constitute an error of law. Had the Panel in this case simply *ignored* the issue of possible discrimination within the meaning of Article XVII:1(a) and passed immediately to its analysis under subparagraph (b), we would have no difficulty – based on our analysis above of the relationship between the two provisions – concluding that the Panel erred in its interpretative approach. Yet this does not appear to us to be what the Panel did. We set out in the next sub-section our understanding of how the Panel conducted its analysis in this case."⁶⁶⁷

⁶⁶⁷ Appellate Body Report on *Canada – Wheat Exports and Grain Imports*, paras. 110–112. In this case, the Appellate Body found that the Panel had not ignored subparagraph (a) of Article XVII and therefore had not erred.

460. The Panel on *Korea – Various Measures on Beef* found that despite domestic demand for imported beef, the Korean state trading agency for beef imports had suspended its tenders for beef of foreign origin, and had refused to sell imported beef from its stock, during a certain period of time. In examining the consistency of this practice of the Korean state trading agency with Articles III, XI and XVII, the Panel addressed the relationship between paragraphs 1(a) and 1(b) of Article XVII. Referring to the Panel Report on *Canada – FIRA*⁶⁶⁸, the Panel, in a finding not reviewed by the Appellate Body, held that the violation of one of these two paragraphs would suffice to show a violation of the other paragraph:

“In other words the terms ‘general principle of non-discrimination treatment prescribed in this Agreement’ (Art. XVII:1(a)) should be equated with ‘make any such purchases or sales solely in accordance with commercial considerations’ (Art. XVII:1(b)). The list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability etc. . .) are to be used to facilitate the assessment whether the state-trading enterprise has acted in respect of the general principles of non-discrimination. A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on ‘commercial considerations’, would also suffice to show a violation of Article XVII.”⁶⁶⁹

461. Further, noting that the Korean state trading agency had exclusive rights of import for its 30 per cent share of Korea’s beef import quotas, the Panel on *Korea – Various Measures on Beef*, in a statement not reviewed by the Appellate Body, stated:

“Based on the panel findings in the *Canada – Marketing Agencies (1988)* case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the *importation* of products (i.e. border measures) and restrictions affecting *imported* products (i.e. internal measures) loses much of its significance.”⁶⁷⁰

(b) *Ad Note* Articles XI, XII, XIII, XIV and XVIII

462. The Note *Ad* Articles XI, XII, XIII, XIV and XVIII, which clarifies that the terms “import restrictions” or “export restrictions” used in these Articles include “restrictions made effective through state-trading operations”, was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. **Article XVII:1(a)**

463. The Panel on *Korea – Various Measures on Beef*, in a finding not reviewed by the Appellate Body, described the legal status of Article XVII:1(a) in the GATT framework in the following terms:

“Article XVII.1(a) establishes the general obligation on state trading enterprises to undertake their activities in accordance with the GATT principles of non-discrimination. The Panel considers that this general principle of non-discrimination includes at least the provisions of Articles I and III of GATT.”⁶⁷¹

(a) Reference to GATT practice

464. With respect to GATT practice under Article XVII:1, see the GATT Analytical Index, pages 473–479.

3. **Article XVII:1(b)**

465. In *Korea – Various Measures on Beef*, the Panel discussed the general character of Article XVII:1(b). See paragraph 459 above.

(a) Reference to GATT practice

466. With respect to GATT practice under Article XVII:1, see the GATT Analytical Index, pages 473–479.

4. **Article XVII:4**

(a) Notification requirements

467. At its meeting of 20 February 1995, the Council for Trade in Goods decided that “all new and full notifications dealt with under Article XVII of *GATT 1994* and Paragraph 1 of the Understanding on the Interpretation of Article XVII of *GATT 1994*, should be submitted not later than 30 June in every third year after 1995 and that the updating notifications due in each of the two intervening years should be submitted not later than 30 June of the respective year.”⁶⁷² The Council for Trade in Goods, however, clarified that the deadlines for future notifications would be established by the Working Party itself.⁶⁷³

468. With respect to the questionnaire used for as a basis for notifications, see paragraph 471 below.

⁶⁶⁸ Panel Report on *Canada – FIRA*, para. 5.16.

⁶⁶⁹ Panel Report on *Korea – Various Measures on Beef*, para. 757.

⁶⁷⁰ Panel Report on *Korea – Various Measures on Beef*, para. 766.

⁶⁷¹ Panel Report on *Korea – Various Measures on Beef*, para. 753. In support of its proposition, the Panel went on to refer to the following two GATT Panel Reports: (i) Panel Report on *Canada – Provincial Liquor Board (EC)*, para. 4.26; and Panel Report on *Canada – Provincial Liquor Board (US)*, para. 5.15.

⁶⁷² G/C/M/1, paras. 5.6–5.7.

⁶⁷³ G/C/M/1, para.5.5. The Working Party accordingly set forth the following deadlines: (i) 30 June 1995 for the 1995 notifications (G/STR/N/1); (ii) 30 September 1998 for the 1998 new and full notifications (G/STR/N/4); and (iii) 29 June 2001 for the 2001 new and full notifications (G/STR/N/7).

(b) Reference to GATT practice

469. With respect to GATT practice regarding notifications of state trading, see GATT Analytical Index, pages 481–482.

5. Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994

(a) Paragraph 1

470. With respect to the notification requirements set forth in paragraph 1 of the Understanding, see paragraph 467 above.

(b) Paragraph 3

471. At its meeting of 21 April 1998, the Council for Trade in Goods approved a revised questionnaire proposed by the Working Party, which is to be used as a basis for notifications on state trading.⁶⁷⁴

(c) Paragraph 5

(i) *Working Party on State Trading Enterprises*

472. Pursuant to paragraph 5 of the Understanding, the Council for Trade in Goods established a Working Party on State Trading Enterprises at its meeting of 20 February 1995, “to carry out the tasks described in paragraph 5 of the Understanding on the Interpretation of Article XVII of GATT 1994”.⁶⁷⁵

473. With respect to the establishment of the Working Party, see also the Chapter on the *WTO Agreement*, Section V.B.6(a).

(ii) “*an illustrative list*”

474. At its meeting of 15 October 1999, upon a proposal of the Working Party, the Council for Trade in Goods adopted “an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII”.⁶⁷⁶ The illustrative list states that “[t]his list in no way affects the rights and obligations of Members under the Understanding and under Article XVII of GATT 1994 and its Interpretive Notes.”⁶⁷⁷

(iii) “*general background paper*”

475. At its meeting of 6 April 1995, the Working Party established guidelines on the contents and the sources to be used in the preparation of the general background paper to be prepared by the Secretariat on the operation of the state trading enterprises as required under Paragraph 5 of the Understanding.⁶⁷⁸ On 26 October 1995, the Secretariat accordingly prepared and issued a background paper entitled “Operations of

State Trading Enterprises as they Relate to International Trade.”⁶⁷⁹

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

476. The Panel on *Korea – Various Measures on Beef* touched on the relationship between Articles I and XVII. See paragraph 463 above.

2. Article II

477. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of according different treatment to grass-fed beef and grain-fed beef was inconsistent with GATT Articles II:1(a) and XI, the Panel exercised judicial economy with respect to claims concerning the consistency of that practice with Articles III:4 and XVII.⁶⁸⁰

(a) Reference to GATT practice

478. With respect to GATT practice on this issue, see the GATT Analytical Index, page 483.

3. Article III

479. The Panel on *Korea – Various Measures on Beef* discussed the relationship between Articles III and XVII. See paragraph 463 above.

(a) Reference to GATT practice

480. With respect to GATT practice on this issue, see the GATT Analytical Index, pages 483–484.

4. Article XI

481. Exercising judicial economy, the Panel on *Korea – Various Measures on Beef* did not examine claims regarding certain practices of the Korean state trading agency for beef under Articles III:4 and XVII, after it had found a violation of Articles XI and II:1(a) with respect to that practice. See also paragraph 477 above.

482. In *Korea – Various Measures on Beef*, the Panel addressed the practice of the Korean state trading agency which controlled a 30 per cent share of Korea’s import quotas for certain products. See paragraph 461 above.

483. With respect to the Note *Ad* Articles XI, XII, XIII, XIV and XVIII, see paragraph 462 above.

⁶⁷⁴ G/C/M/33, section 3. The text of the approved questionnaire can be found in G/STR/3.

⁶⁷⁵ G/C/M/1, subsection 5(A).

⁶⁷⁶ G/C/M/41, section 3. The text of the adopted illustrative list can be found in G/STR/4.

⁶⁷⁷ G/STR/4, para. 4.

⁶⁷⁸ G/STR/M/1, paras. 25–46.

⁶⁷⁹ G/STR/2.

⁶⁸⁰ Panel Report on *Korea – Various Measures on Beef*, para. 7.80. With respect to judicial economy in general, see the Chapter on the *DSU*, Section XXXVI.F.

(a) Reference to GATT practice

484. With respect to GATT practice on this issue, see the GATT Analytical Index, pages 484–485.

5. Articles XII, XIII, XIV and XVIII

485. With respect to the Note *Ad* Articles XI, XII, XIII, XIV and XVIII, see paragraph 462 above.

(a) Reference to GATT practice

486. With respect to GATT practice on the Note *Ad* Articles XII and XVIII, see the GATT Analytical Index, page 485.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Agriculture

487. Footnote 1 to Article 4.2 of the *Agreement on Agriculture* sets forth that “any measures of the kind which have been required to be converted into ordinary customary duties” under that Agreement, include “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises . . .”. In *Korea – Various Measures on Beef*, the Panel found, and the Appellate Body agreed, that Korea was in violation of Article 4.2 of the *Agreement on Agriculture* and Article XI of the *GATT* in that despite the demand for imported beef, the Korean state trading agency for beef imports suspended its tenders for beef of foreign origin, and refused to sell imported beef from its stock, during a certain period of time. See Chapter on the *Agreement on Agriculture*, Section V.B.3. In this context, the Appellate Body stated:

“Since the Panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of the *Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises.”⁶⁸¹

XIX. ARTICLE XVIII**A. TEXT OF ARTICLE XVIII****Article XVIII****Governmental Assistance to Economic Development*

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the

economies of which can only support low standards of living* and are in the early stages of development.*

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry* and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries* with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party, the economy of which can only support low standards of living* and is in the early stages of development,* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(b) A contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

⁶⁸¹ Panel Report on *Korea – Various Measures on Beef*, para. 768.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in subparagraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions

of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the

possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in subparagraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this subparagraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under subparagraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the

trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of subparagraph (c) (ii) or (d) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(footnote original) ¹ By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has

already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, *the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur* in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

- (a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
- (b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence* of the CONTRACTING PARTIES.*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove;* *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of subparagraph 4 (b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

B. TEXT AD ARTICLE XVIII

Ad Article XVIII

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

Paragraphs 1 and 4

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

Paragraphs 2, 3, 7, 13 and 22

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

Paragraph 7 (b)

A modification or withdrawal, pursuant to paragraph 7 (b), by a contracting party, other than the applicant contracting party, referred to in paragraph 7 (a), shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12 (b) shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 (b) of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraphs 18 and 22

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would

have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 (a), the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 (a) of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

C. UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205–209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions¹.

(footnote original) ¹ Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

Hereby agree as follows :

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly

announced by a Member, that Member shall provide justification as to the reasons therefor.

2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.

4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48–53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.

6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47–49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultations procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of

restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the

incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusions of Balance-of-Payments Consultations

13. The Committee shall report on its consultations the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII:B, the 1979 Declaration and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required."

D. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

1. Article XVIII:B

(a) General

488. The Panel on *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the function of Article XVIII:B within the GATT framework. The Panel distinguished the conditions for taking balance-of-payments measures under Article XVIII from those applicable under Article XII of GATT and considered paragraphs 2, 9 and 11 of Article XVIII:

"It is clear from these provisions that Article XVIII, which allows developing countries to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes, is premised on the assumption that it 'may be necessary' for them to adopt such measures in order to implement economic development programmes. It allows them to 'deviate temporarily from the provisions of the other Articles' of GATT 1994, as

provided for in, *inter alia*, Section B. These provisions reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes. Article XVIII:B of GATT 1994 thus embodies the special and differential treatment foreseen for developing countries with regard to such measures. In our analysis, we take due account of these provisions. In particular, the conditions for taking balance-of-payments measures under Article XVIII are clearly distinct from the conditions applicable to developed countries under Article XII of GATT 1994.⁶⁸²

We also find that while Article XVIII:2 foresees the possibility that it 'may' be 'necessary' for developing countries to take restrictions for balance-of-payments purposes, such measures might not always be required. These restrictions must be adopted within specific conditions 'as provided in' Section B of Article XVIII. The specific conditions to be respected for the institution and maintenance of such measures include Article XVIII:9, which specifies the circumstances under which such measures may be instituted and maintained, and Article XVIII:11 which sets out the requirements for progressive relaxation and elimination of balance-of-payments measures."

(b) Jurisdiction of panels

489. In *India – Quantitative Restrictions*, the Appellate Body reviewed the Panel's finding that India's import restrictions for balance-of-payments reasons were inconsistent with Article XI:1 and that India was not entitled to maintain these balance-of-payments restrictions under the terms of Note Ad Article XVIII:11. India argued that panels have no authority to examine Members' justifications of balance-of-payments restrictions, because footnote 1 to the *Understanding on the Balance-of-Payments Provision* of the GATT 1994 (the "BOP Understanding") provides that the DSU may be invoked in respect of matters relating to the specific use or purpose of a balance-of-payments measure or to the manner in which a balance-of-payments measure is applied in a particular case, but not with respect to the question of balance-of-payment justification of these measures. Rejecting this argument, the Appellate Body stated as follows:

"Any doubts that may have existed in the past as to whether the dispute settlement procedures under Article XXIII were available for disputes relating to balance-of-payments restrictions have been removed by the second sentence of footnote 1 to the *BOP Understanding*, . . .

⁶⁸² (*footnote original*) In particular, the conditions to be met for the institution of balance-of-payments measures are different in Article XVIII:9 and Article XII, and an Ad Note which applies to the conditions for progressive relaxation and elimination of restrictions under Article XVIII:11 has no analogue in Article XII.

In our opinion, this provision makes it clear that the dispute settlement procedures under Article XXIII, as elaborated and applied by the DSU, are available for disputes relating to any matters concerning balance-of-payments restrictions.

...

We note India's arguments relating to the negotiating history of the *BOP Understanding*. However, in the absence of a record of the negotiations on footnote 1 to the *BOP Understanding*, we find it difficult to give weight to these arguments. . . .

Therefore, in light of footnote 1 to the *BOP Understanding*, a dispute relating to the justification of balance-of-payments restrictions is clearly within the scope of matters to which the dispute settlement provisions of Article XXIII of the GATT 1994, as elaborated and applied by the DSU, are applicable."⁶⁸³

490. With reference to the competence of the BOP Committee and the General Council under GATT Article XVIII and the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*, the Appellate Body considered that this competence would not be rendered redundant if panels were permitted to review the justification of balance-of-payments restrictions:

"Recourse to the dispute settlement procedures does not call into question either the availability or the utility of the procedures under Article XVIII:12 and the BOP Understanding. On the contrary, if panels refrained from reviewing the justification of balance-of-payments restrictions, they would diminish the explicit procedural rights of Members under Article XXIII and footnote 1 to the *BOP Understanding*, as well as their substantive rights under Article XVIII:11.

We are cognisant of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of the GATT 1994 and the *BOP Understanding*. However, we see no conflict between that competence and the competence of panels. Moreover, we are convinced that, in considering the justification of balance-of-payments restrictions, panels should take into account the deliberations and conclusions of the BOP Committee, as did the panel in *Korea – Beef*.

We agree with the Panel that the review by panels of the justification of balance-of-payments restrictions would not render redundant the competence of the BOP Committee and the General Council. The Panel correctly pointed out that the BOP Committee and panels have different functions, and that the BOP Committee procedures and the dispute settlement procedures differ in nature, scope, timing and type of outcome."⁶⁸⁴

491. Further, in response to India's argument that while panels did not lack jurisdiction with respect to

balance-of-payments restrictions, they should nevertheless exercise judicial restraint, the Appellate Body stated:

"India clarified its claim of legal error by stating that although panels, in principle, have competence to review any matters relating to balance-of-payments restrictions, they should exercise *judicial restraint* with respect to these matters. . . .

...

[W]e note that, if the exercise of judicial restraint were to lead *in practice*, as India seems to suggest, to panels refraining from considering disputes regarding the justification of balance-of-payments restrictions, such exercise of judicial restraint would, as discussed above, be inconsistent with Article XXIII of the GATT 1994, as elaborated and applied by the DSU, and footnote 1 to the *BOP Understanding*."⁶⁸⁵

(c) Right to maintain balance-of-payments measures

492. In *India – Quantitative Restrictions*, India argued before the Panel that it had the right to maintain balance-of-payment measures until the BOP Committee or the General Council advised it to modify these measures under Article XVIII:12 or established a time-period for their removal under paragraph 13 of the BOP Understanding. The Panel, in a finding not specifically addressed by the Appellate Body, disagreed:

"We note at the outset that there is no explicit statement in Article XVIII:B or the 1994 Understanding that authorizes a Member to maintain its balance-of-payments measures in effect until the General Council or BOP Committee acts under one of the aforementioned provisions. Article XVIII:B, however, addresses the issue of the extent to which balance-of-payments measures may be maintained. Article XVIII:11, which is analyzed in more detail in Part G below, specifies that a Member:

'shall progressively relax any restrictions applied under this Section [i.e., Article XVIII:B] as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article [XVIII] and shall eliminate them when conditions no longer justify their maintenance.'

⁶⁸³ Appellate Body Report on *India – Quantitative Restrictions*, paras. 87–88 and 94–95. Following these paragraphs, in support of this finding, the Appellate Body referred to Panel Report on *Korea – Beef (US)*, paras. 117–118. Also, the Appellate Body rejected the argument that India presented referring to Panel Reports on *EC – Citrus*; *EC – Bananas I*; and *Korea – Beef (US)*. Appellate Body Report on *India – Quantitative Restrictions*, para. 100.

⁶⁸⁴ Appellate Body Report on *India – Quantitative Restrictions*, paras. 102–104. In this regard, see also the Panel's finding referenced in para. 492 of this Chapter.

⁶⁸⁵ Appellate Body Report on *India – Quantitative Restrictions*, paras. 106 and 108.

The obligation of Article XVIII:11 is not conditioned on any BOP Committee or General Council decision. If we were to interpret Article XVIII:11 to be so conditioned, we would be adding terms to Article XVIII:11 that it does not contain.

Moreover, the obligation in Article XVIII:11 requires action by the individual Member. It is qualified only by a proviso and Ad Note (which we discuss in Part G and which are not relevant here) and it is not made subject to the accomplishment of other procedures. In light of the unqualified nature of the Article XVIII:11 obligation, it would be inconsistent with the principle *pacta sunt servanda* to conclude that a WTO Member has a right to maintain balance-of-payments measures, even if unjustified under Article XVIII:B, in the absence of a Committee or General Council decision in respect thereof. Thus, we find that India does not have a right to maintain its balance-of-payments measures until the General Council advises it to modify them under Article XVIII:12 or establishes a time-period for their removal under paragraph 13 of the 1994 Understanding.⁶⁸⁶

493. In *India – Quantitative Restrictions*, India argued that a Member invoking a balance-of-payments justification is entitled to maintain the measures until the General Council, following a recommendation from the BOP Committee, requires it to modify or remove them under Article XVIII:12(c)(i) or (ii). As referenced in paragraph 492 above, the Panel rejected this argument. However, India further argued that Article XVIII:12(c)(i) or (ii) confirms the existence of a “right to a phase-out” for measures which no longer meet the criteria set out in Article XVIII:9, by providing for a “specified period of time” to be granted to secure compliance with the relevant provisions when an inconsistency has been identified. In this context, India also claimed that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a “right” to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The Panel rejected India’s arguments:

“The text of paragraph 13 of the Understanding itself does not specify whether the balance-of-payments difficulties which justified the imposition of the measures should still be in existence when a time schedule is presented for their elimination. However, the notion of presentation of a time-schedule, starting when the balance-of-payments difficulties still exist, is consistent with the temporary nature of balance-of-payments measures and with the requirement for their gradual elimination. Also, the time-schedules referred to in paragraphs 1 and 13 of the 1994 Understanding are the same and paragraph 1 specifies that ‘such time-schedules may be mod-

ified as appropriate to take into account changes in the balance-of-payments situation.’ This suggests that a time-schedule would have to be presented before the balance-of-payments difficulties disappear, otherwise, the reference to ‘take into account changes in the balance-of-payments situation’ would become redundant.

This does not mean that the General Council has no margin of discretion in deciding whether or not to accept or not a time-schedule that would provide protection to the Member concerned. We have seen that the Ad Note suggests also that measures could, under certain circumstances, be maintained for a time when balance-of-payments difficulties which initially justified their institution are no longer in existence. In addition, paragraph 13 of the 1994 Understanding provides that ‘the General Council may recommend that, in adhering to such a time-schedule, a Member *may be deemed* to be in compliance with its GATT 1994 obligations’ (emphasis added). There is no clear evidence that this phrase has to be interpreted as covering only situations under which a phase-out period would exactly coincide with the gradual disappearance of balance-of-payments difficulties.

In light of the above, we conclude that the procedure for submission and approval of a time-schedule incorporated in the 1994 Understanding, which is specific to the Committee consultations, does not give WTO Members a ‘right’ to a phase-out period which a panel would have to protect in the absence of balance-of-payments difficulties in the sense of Article XVIII:B.⁶⁸⁷ Even assuming that such a ‘right’ could be recognised under paragraph 13 of the 1994 Understanding, such a recognition would in any case require a prior decision of the General Council.⁶⁸⁸

(d) Reference to GATT practice

494. With respect to GATT practice concerning Article XVIII:B, see the GATT Analytical Index, pages 501–508.

2. Article XVIII:9

(a) General

495. In *India – Quantitative Restrictions*, the Panel decided that in its evaluation of the situation of India’s monetary reserves under Article XVIII:9, it would need to examine the facts existing on the date of its establishment. The Panel gave both legal and practical reasons for not focusing on the situation existing at a later point in time:

⁶⁸⁶ Panel Report on *India – Quantitative Restrictions*, paras. 5.78–5.80.

⁶⁸⁷ (*footnote original*) As we note in our suggestions for implementation, a phase-out period typically has been negotiated (see text accompanying footnotes 366–368).

⁶⁸⁸ Panel Report on *India – Quantitative Restrictions*, paras. 5.233–5.235.

“With respect to the date at which India’s balance-of-payments and reserve situation is to be assessed, we note that practice, both prior to the WTO and since its entry into force, limits the claims which panels address to those raised in the request for establishment of the panel, which is typically the basis of the panel’s terms of reference (as is the case here).⁶⁸⁹ In our opinion, this has consequences for the determination of the facts that can be taken into account by the Panel, since the complainant obviously bases the claims contained in its request for establishment of the panel on a given set of facts existing when it presents its request to the DSB.

In the present situation, the United States primarily seeks a finding that, at the latest on the date of establishment of the Panel (18 November 1997), the measures at issue were not compatible with the WTO Agreement and were not justified under Article XVIII:11 of GATT 1994. Therefore, it would seem consistent with such a request and logical in the light of the constraints imposed by the Panel’s terms of reference to limit our examination of the facts to those existing on the date the Panel was established.

This result is also dictated by practical considerations. The determination of whether balance-of-payments measures are justified is tied to a Member’s reserve situation as of a certain date. In fixing that date, it is important to consider that the relevant economic and reserve data will be available only with some time-lag, which may vary by type of data. This is unlikely to be a problem if the date of assessment is the date the panel is established, since the first written submission is typically filed at least two (and often more) months after establishment of a panel. However, using the first or second panel meetings as the assessment date is more problematic since data might not be available and, if the date of the second panel meeting were chosen, it could significantly reduce the utility of the first meeting.

We note that, in the case on *Korea – Beef*, the panel relied on the conclusions of the BOP Committee reached before its establishment, but also considered ‘all available information’, including information related to periods after the establishment of the panel.⁶⁹⁰ In this case, the parties and the IMF have supplied information concerning the evolution of India’s balance-of-payments and reserve situation until June 1998. To the extent that such information is relevant to our determination of the consistency of India’s balance-of-payments measures with GATT rules as of the date of establishment of the Panel, we take it into account.⁶⁹¹ ⁶⁹²

(b) Article XVIII:9(a)

496. In *India – Quantitative Restrictions*, the Panel examined whether the Indian balance-of-payments measure met with the conditions set out in subparagraph (a) of Article XVIII:9. The Panel first made a general statement about its analytical approach and then

held that it would consider the “adequacy” of India’s reserves for the purposes of both Article XVIII:9(a) and XVIII:9(b):

“The issue to be decided under Article XVIII:9 (a) is whether India’s balance-of-payments measures exceeded those ‘necessary . . . to forestall the threat of, or to stop, a serious decline in monetary reserves’. In deciding this issue, we must weigh the evidence favouring India against that favouring the United States and determine whether on the basis of all evidence before the Panel, the United States has established its claim under Article XVIII:11 that India does not meet the conditions specified in Article XVIII:9(a).

...

The question before us is whether India was facing a serious decline or threat thereof in its reserves (Article XVIII:9(a)) or had inadequate reserves (Article XVIII:9(b)). In analyzing India’s situation in terms of Article XVIII:9(a), it is important to bear in mind that the issue is whether India was facing or threatened with a *serious* decline in its monetary reserves. Whether or not a decline of a given size is serious or not must be related to the initial state and adequacy of the reserves. A large decline need not necessarily be a serious one if the reserves are more than adequate. Accordingly, it is appropriate to consider the adequacy of India’s reserves for purposes of Article XVIII:9(a), as well as for Article XVIII:9(b).⁶⁹³

497. The Panel on *India – Quantitative Restrictions* then considered information supplied by the International Monetary Fund (IMF), which indicated the level of reserves which could be considered “adequate” for India:

“In this connection, we recall that the IMF reported that India’s reserves as of 21 November 1997 were US\$ 25.1 billion and that an adequate level of reserves at that date would have been US\$ 16 billion. While the Reserve Bank of India did not specify a precise level of what would constitute adequacy, it concluded only three months earlier in August 1997 that India’s reserves were ‘well above the thumb rule of reserve adequacy’ and although the Bank did not accept that thumb rule as the only measure of adequacy, it also found that ‘[b]y any criteria, the level of foreign exchange reserves appears comfortable’. It

⁶⁸⁹ (footnote original) Appellate Body Report on *EC – Bananas III*, para. 143 and Appellate Body Report on *India – Patent (US)*, paras. 87–89.

⁶⁹⁰ (footnote original) Panel Report on *Korea – Beef (US)*, paras. 122–123.

⁶⁹¹ (footnote original) We note for instance that such information might be relevant to an examination of the existence of a threat of serious decline in monetary reserves under Article XVIII:9 or to an examination of the conditions contemplated in the Note Ad Article XVIII:11.

⁶⁹² Panel Report on *India – Quantitative Restrictions*, paras. 5.160–5.163.

⁶⁹³ Panel Report on *India – Quantitative Restrictions*, paras. 5.169 and 5.173.

also stated that ‘the reserves would be adequate to withstand both cyclical and unanticipated shocks’.

...

Turning now to the question of whether India was facing a serious decline or threat thereof in its reserves, it is appropriate to consider the evolution of its reserves in the period prior to November 1997. As noted above, as of 31 March 1996, India’s reserves were US\$17 billion; as of 31 March 1997, India’s reserves were US\$22.4 billion. We note that at the time of the BOP Committee’s consultations with India in January and June 1997, the IMF reported that India did not face a serious decline in its reserves or a threat thereof. As of 21 November 1997, India’s reserves had risen to US\$25.1 billion and the IMF continued to be of the view that India did not face a serious decline in its reserves or a threat thereof. In our view, in light of the foregoing evidence, and taking into account the provisions of Article XV:2, as of the date of establishment of the Panel, India was not facing a serious decline or a threat of a serious decline in monetary reserves as those terms are used in Article XVIII:9(a). In the event that it might be deemed relevant to add support to our findings concerning India’s reserves as of November 1997, we have also examined the evolution of India’s reserves after November 1997. We note that India’s reserves fluctuated around the November level in subsequent months, falling to a low of US\$23.9 billion in December 1997 and rising to a high of US\$26.2 billion in April 1998. They were US\$24.1 billion as of the end of June 1998.”⁶⁹⁴

3. Article XVIII:11

(a) Burden of proof

498. In *India – Quantitative Restrictions*, citing its statement in *US – Wool Shirts and Blouses*⁶⁹⁵, the Appellate Body agreed with the Panel that it is for the responding party to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy:

“The proviso precludes a Member, which is challenging the consistency of balance-of-payments restrictions, from arguing that such restrictions would be unnecessary if the developing country Member maintaining them were to change its development policy. In effect, the proviso places an obligation on Members not to require a developing country Member imposing balance-of-payments restrictions to change its development policy.

...

We consider that the invocation of the proviso to Article XVIII:11 does not give rise to a burden of proof issue insofar as it relates to the interpretation of what policies may constitute a ‘development policy’ within the meaning of the proviso. However, we do not exclude the pos-

sibility that a situation might arise in which an assertion regarding development policy does involve a burden of proof issue. Assuming that the complaining party has successfully established a *prima facie* case of inconsistency with Article XVIII:11 and the Ad Note, the responding party may, in its defence, either rebut the evidence adduced in support of the inconsistency or invoke the proviso. In the latter case, it would have to demonstrate that the complaining party violated its obligation not to require the responding party to change its development policy. This is an assertion with respect to which the responding party must bear the burden of proof. We, therefore, agree with the Panel that the burden of proof with respect to the proviso is on India.”⁶⁹⁶

499. On the issue of the allocation of the burden of proof with respect to the *Ad Note* to the United States, India argued that the Panel had not applied the rules in accordance with the principles laid down by the Appellate Body in *EC – Hormones*.⁶⁹⁷ Specifically, India objected to the fact that the Panel had taken into account the responses of India in its assessment regarding whether the United States had made a *prima facie* case. The Appellate Body did not share India’s view:

“We do not interpret the . . . statement as requiring a panel to conclude that a *prima facie* case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a *prima facie* case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States. This way of proceeding does not imply, in our view, that the Panel shifted the burden of proof to India.”⁶⁹⁸

⁶⁹⁴ Panel Report on *India – Quantitative Restrictions*, paras. 5.174 and 5.177.

⁶⁹⁵ Appellate Body Report on *US – Wool Shirts and Blouses* p.14. With respect to burden of proof in general, see Chapter on *DSU*, Section XXXVI.D.

⁶⁹⁶ Appellate Body Report on *India – Quantitative Restrictions*, paras. 134 and 136.

⁶⁹⁷ India cited the following finding:

“In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal instruments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each article of the *SPS Agreement* addressed by the Panel. . . . Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party’s claim.”

Appellate Body Report on *EC – Hormones*, para. 109.

⁶⁹⁸ Appellate Body Report on *India – Quantitative Restrictions*, para. 142. With respect to the burden of proof in general, see also the Chapter on *DSU*, Section XXXVI.D.

(b) Note *Ad* Article XVIII:11(i) *General*

500. The Panel on *India – Quantitative Restrictions*, in a finding not reviewed by the Appellate Body, addressed the question whether Note *Ad* Article XVIII:11 permitted India to maintain balance-of-payments restrictions which did not meet the requirements of Article XVIII:9. India argued that it should not be required to remove its quantitative restrictions immediately, even if it were found that it currently did not experience balance-of-payments difficulties within the meaning of Article XVIII:9, because immediate removal would create the conditions for their reinstatement within the meaning of Note *Ad* Article XVIII:11. The Panel held that three questions had to be addressed in this context: namely (a) whether the *Ad* Note covered situations where the conditions of Article XVIII:9 were no longer met; (b) what conditions must be met in order to allow for the maintenance of measures under the *Ad* Note; and (c) whether these conditions were met in the present case. With respect to the first question – namely, whether the *Ad* Note covered situations where the conditions of Article XVIII:9 were no longer met – the Panel considered the wording of the *Ad* Note:

“It seems clear to us that the use of the word ‘respectively’ in this provision allows the sentence to be read to refer to two situations, so that the second sentence of paragraph 11 should not be interpreted to mean (i) that a Member is required to relax restrictions if such relaxation would thereupon produce conditions justifying the intensification of restrictions under paragraph 9 of Article XVIII or (ii) that a Member is required to remove restrictions if such removal would thereupon produce conditions justifying the institution of restrictions under paragraph 9 of Article XVIII.

The ordinary meaning of the words therefore suggests that the *Ad* Note could cover situations where the conditions of Article XVIII:9 are no longer met but are threatened. This would make it possible for a developing country having validly instituted measures for balance-of-payments purposes and whose situation has sufficiently improved so that the conditions of Article XVIII:9 are no longer fulfilled, not to eliminate the remaining measures if this would result in the reoccurrence of the conditions which had justified their institution in the first place.”⁶⁹⁹

501. Having found that the ordinary meaning of the words of Note *Ad* Article XVIII:11 could extend to situations where the conditions of Article XVIII:9 no longer exist, but are threatened, the Panel considered also the context of the *Ad* Note and the notion of “gradual relaxation”:

“This appears consistent with the context of the provision, in particular with the general requirement of grad-

ual relaxation of measures as balance-of-payments conditions improve, under Article XVIII:11. The notion of ‘gradual relaxation’ contained in Article XVIII:11 should itself be read in context, together with Article XVIII:9. Article XVIII:9 requires that the measures taken shall not ‘exceed those necessary’ to address the balance-of-payments situation justifying them. The institution and maintenance of balance-of-payments measures is only justified at the level necessary to address the concern, and cannot be more encompassing. Paragraph 11, in this context, confirms this requirement that the measures be limited to what is necessary and addresses more specifically the conditions of evolution of the measures as balance-of-payments conditions improve: at any given time, the restrictions should not exceed those necessary. This implies that as conditions improve, measures must be relaxed in proportion to the improvements. The logical conclusion of the process is that the measures will be eliminated when conditions no longer justify them.

The *Ad* Note clarifies that the relaxation or removal should not result in a worsening of the balance-of-payments situation such as to justify strengthened or new measures. It thus seeks to avoid a situation where a developing country would be required to remove the measures, foreseeing that in doing so, it will create the conditions for their reinstatement. In light also of the need to restore equilibrium of the balance-of-payments on a sound and lasting basis, acknowledged in the first sentence of Article XVIII:11, it appears that removal should be made when the conditions actually allow for it. In this sense, we can agree with India that the developing country Member applying the measures is not required to follow a ‘stop-and-go’ policy. It is worth noting, however, that in circumstances where the balance-of-payments situation has gradually improved, if measures have been gradually relaxed as conditions improved under the terms of Article XVIII:11 and maintained only to the extent necessary under the terms of Article XVIII:9, it could be anticipated that only a minor portion of the measures initially instituted would remain to be removed by the time the balance-of-payments conditions have improved to the extent that the country faces neither a serious decline in monetary reserves or a threat thereof, or inadequate reserves. The elimination of these measures would thus constitute the final stage of a gradual relaxation and elimination.

We therefore conclude that the Note *Ad* Article XVIII:11 could apply to both situations where balance-of-payments difficulties still exist and when they have ceased to exist but are threatened to return. It is therefore possible for India to invoke the existence of such risk in order to justify the maintenance of the measures. However, this possibility is available only to the extent that the conditions foreseen in the *Ad* Note are fulfilled. We must therefore determine what these conditions are

⁶⁹⁹ Panel Report on *India – Quantitative Restrictions*, paras. 5.188–5.189.

before examining whether they are fulfilled in this instance.”⁷⁰⁰

502. Having answered the first of the three questions listed in paragraph 500 above, the Panel then turned to the second question, namely which conditions had to be satisfied for a measure to be justified in the light of Note Ad Article XVIII:11, although the conditions under Article XVIII:9 were no longer met. The Panel gave the following overview:

“Three elements thus appear to be contemplated in this text:

(i) that conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII would occur

(ii) that the relaxation or removal of the measures *would produce* occurrence of these conditions

(iii) the relaxation or removal would *thereupon* produce these conditions.”⁷⁰¹

(ii) “*would produce*”

503. In its analysis of the conditions which a balance-of-payment measure, imposed by a developing country, had to comply with in the light of Note Ad Article XVIII:11, the Panel on *India – Quantitative Restrictions* first addressed the term “would . . . produce”:

“We agree with the Panel that the Ad Note, and, in particular, the words ‘would thereupon produce’, require a *causal link of a certain directness* between the removal of the balance-of-payments restrictions and the recurrence of one of the three conditions referred to in Article XVIII:9. As pointed out by the Panel, the Ad Note demands more than a mere possibility of recurrence of one of these three conditions and allows for the maintenance of balance-of-payments restrictions on the basis only of clearly identified circumstances. In order to meet the requirements of the Ad Note, the probability of occurrence of one of the conditions would have to be clear.”⁷⁰²

(iii) “*thereupon*”

504. With respect to the term “thereupon” in the phrase “would thereupon produce”, the Appellate Body in *India – Quantitative Restrictions* rejected India’s argument that the Panel had erred in interpreting the term “thereupon” contained in Note Ad Article XVIII:11 to signify “immediately”:

“We also agree with the Panel that the Ad Note and, in particular, the word ‘thereupon’, expresses a *notion of temporal sequence* between the removal of the balance-of-payments restrictions and the recurrence of one of the conditions of Article XVIII:9. We share the Panel’s view that the purpose of the word ‘thereupon’ is to ensure that measures are not maintained because of

some distant possibility that a balance-of-payments difficulty may occur.

. . .

We recall that balance-of-payments restrictions may be maintained under the Ad Note if their removal or relaxation would thereupon produce: (i) a threat of a serious decline in monetary reserves; (ii) a serious decline in monetary reserves; or (iii) inadequate monetary reserves. With regard to the first of these conditions, we agree with the Panel that the word ‘thereupon’ means ‘immediately’.

. . .

We agree with the Panel that it would be unrealistic to require that [the two other conditions, i.e.] a serious decline or inadequacy in monetary reserves should actually occur within days or weeks following the relaxation or removal of the balance-of-payments restrictions. The Panel was, therefore, correct to qualify its understanding of the word ‘thereupon’ with regard to these two conditions. While not explicitly stating so, the Panel in fact interpreted the word ‘thereupon’ for these two conditions as meaning ‘soon after’. This is also one of the possible dictionary meanings of the word ‘thereupon’. We are of the view that instead of using the word ‘immediately’, the Panel should have used the words ‘soon after’ to express the temporal sequence required by the word ‘thereupon’.”⁷⁰³

(c) Proviso to Article XVIII:11

505. In *India – Quantitative Restrictions*, the Appellate Body rejected India’s argument that, contrary to the proviso to Article VIII:11, the Panel required India to change its development policy by holding that India could manage its balance-of-payments situation using macroeconomic policy instruments alone, without maintaining quantitative restrictions:

“[W]e are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue. The IMF statement that India can manage its balance-of-payments situation using macroeconomic policy instruments alone does not, therefore, imply a change in India’s development policy.

. . .

We believe structural measures are different from macroeconomic instruments with respect to their rela-

⁷⁰⁰ Panel Report on *India – Quantitative Restrictions*, paras. 5.190–5.192.

⁷⁰¹ Panel Report on *India – Quantitative Restrictions*, para. 5.194.

⁷⁰² Appellate Body Report on *India – Quantitative Restrictions*, para. 114.

⁷⁰³ Appellate Body Report on *India – Quantitative Restrictions*, paras. 115, 117 and 119.

tionship to development policy. If India were asked to implement agricultural reform or to scale back reservations on certain products for small-scale units as indispensable policy changes in order to overcome its balance-of-payments difficulties, such a requirement would probably have involved a change in India's development policy."⁷⁰⁴

4. Article XVIII:12

(a) Article XVIII:12(c)

506. The Panel on *India – Quantitative Restrictions* discussed Article XVIII:12(c)(i) and (ii) in rejecting India's argument that panels have no authority to evaluate Members' balance-of-payments justifications. See the excerpt referenced in paragraph 492 above.⁷⁰⁵

507. Further, the Panel rejected India's argument that Article XVIII:12(c)(ii) confirms the existence of a right to a phase-out for measures no longer justified by current balance-of-payments difficulties, stating as follows:

"We note that Article XVIII.12(c)(ii), provides a specific mechanism in order for the BOP Committee to address possible violations of the provisions of, *inter alia*, Article XVIII:B and provides for a period of time to be granted to the Member in order to implement the requirement to remove or modify the inconsistent measures. In the situation envisaged by Article XVIII:12(c)(ii), a period of time is granted when an inconsistency with the provisions of either Article XVIII:B or Article XIII has been identified. The period of time which is allocated to the Member in order to bring its measures into conformity is thus comparable, but not identical, to an implementation period of the sort provided for in Article 21.3 of the DSU. However, this specific mode of determination of the 'implementation' period applies to procedures initiated under Article XVIII:12(c), which is not the procedure under which this Panel is acting. We consider the issue of whether a phase-out would be appropriate in this case in our suggestions in respect of implementation, where we note this provision of Article XVIII:12(c)(ii)."⁷⁰⁶

5. Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994

(a) General

508. The Panel on *India – Quantitative Restrictions*, in a finding not addressed by the Appellate Body, explained the legal status of the BOP Understanding in relation to Articles XII and XVIII of *GATT 1994*:

"[The text of Article XVIII:B] should now be read in light of the 1994 Understanding, which clarifies the provisions of Articles XII and XVIII:B and of the 1979 Decision. The 1994 Understanding, which refers to the procedures for balance-of-payments consultations adopted in 1970 ('full consultation procedures') and 1972 ('simplified

consultation procedures') as well as the 1979 Decision, contains provisions on the application of balance-of-payments measures, as well as provisions relating to the procedures for balance-of-payments consultations and their conclusion, but it does not explicitly refer to Articles XVIII:12(c) and (d)."⁷⁰⁷

(b) Footnote 1

509. The Appellate Body, in *India – Quantitative Restrictions*, referred to footnote 1 of the BOP Understanding in considering a panel's authority to examine the conformity with the *WTO Agreement* of Members' measures taken for balance-of-payments purposes. See the excerpts referenced in paragraphs 489–491 above.

(c) Paragraph 1

510. In *India – Quantitative Restrictions*, India argued that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The Panel rejected this argument. See the excerpt referenced in paragraph 493 above.

(d) Paragraph 5

(i) *Committee on Balance-of-Payments Restrictions*

Establishment of Committee

511. At its meeting of 31 January 1995, the General Council established the WTO Committee on Balance-of-Payments Restrictions.⁷⁰⁸

Terms of reference

512. At its meeting of 31 January 1995, the General Council adopted the following terms of reference for the Committee on the Balance-of-Payments Restrictions:

"(a) to conduct consultations, pursuant to Article XII:4, Article XVIII:12 and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, on all restrictive import measures taken or maintained for balance-of-payments purposes and, pursuant to Article XII:5 of the General Agreement

⁷⁰⁴ Appellate Body Report on *India – Quantitative Restrictions*, paras. 126 and 128.

⁷⁰⁵ With respect to the relevant finding of the Appellate Body in *India – Quantitative Restrictions*, see the excerpts referenced in para. 489 of this Chapter.

⁷⁰⁶ Panel Report on *India – Quantitative Restrictions*, para. 5.227.

⁷⁰⁷ Panel Report on *India – Quantitative Restrictions*, para. 5.48.

⁷⁰⁸ WT/GC/M/1, section 7.A.(1).

on Trade in Services, on all restrictions adopted or maintained for balance-of-payments purposes on trade in services on which specific commitments have been undertaken; and

(b) to carry out any additional functions assigned to it by the General Council.”⁷⁰⁹

Rules of procedure

513. At its meeting of 13 and 15 December 1995, the General Council approved the rules of procedure adopted by the Committee on the Balance-of-Payments Restrictions.⁷¹⁰

Observer status

514. At its meeting of 13 and 15 December 1995, the General Council took a decision with respect to participation in the meetings of the Committee on the Balance-of-Payments Restrictions.⁷¹¹

(e) Paragraph 9

515. At its meeting of 21 October 1996, the Committee on the Balance-of-Payments Restrictions adopted the format for the annual notification mandated under Paragraph 9 of the Understanding.⁷¹² In order for the Committee on the Balance-of-Payments Restrictions to have a basis for the following year’s schedule of consultations, it was proposed that notifications be completed and submitted to the Secretariat annually by 15 November.⁷¹³

(f) Paragraph 13

(i) *Interpretation*

516. In *India – Quantitative Restrictions*, India argued that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a “right” to a phase-out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The Panel rejected this argument. See the excerpt referenced in paragraph 493 above.

(ii) *Reporting procedures*

517. At its meeting of 15 November 1995, the General Council adopted, *inter alia*, the following procedure for reporting for the Committee on Balance-of-Payment Restrictions to the General Council:

“The Committees on Budget, Finance and Administration and on Balance-of-Payments Restrictions will also submit, in addition to reports submitted during the course of the year on specific issues, a short factual report at the end of the year.”⁷¹⁴

E. RELATIONSHIP WITH OTHER ARTICLES

1. Articles XI, XIII, XIV and XVII

518. The interpretation and application of Note *Ad* Article XI, XII, XIII, XIV and XVIII, which clarifies that the terms “import restrictions” or “export restrictions” as used in these Articles include “restrictions made effective through state-trading operations”, was discussed by the Panels on *India – Quantitative Restrictions* and *Korea – Various Measures on Beef*. See paragraphs 407–408 above.

2. Article XII

519. In *India – Quantitative Restrictions*, the Panel explained the relationship between Articles XII and XVIII:B in clarifying the function of Article XVIII:B. See paragraph 488 above.

3. Reference to GATT practice

520. With respect to GATT practice on this subject-matter, see the GATT Analytical Index, page 511.

XX. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be

⁷⁰⁹ WT/GC/M/1, section 7.A.(1). The adopted terms of reference can be found in WT/L/45.

⁷¹⁰ WT/GC/M/1, section 4. I. (a). The approved rules of procedure can be found in WT/BOP/10.

⁷¹¹ WT/GC/M/1, section 2.

⁷¹² WT/BOP/14.

⁷¹³ WT/BOP/14.

⁷¹⁴ WT/L/105, section 2.

free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. General

(a) Application of Article XIX

521. In *Argentina – Footwear (EC)* and *Korea – Dairy*⁷¹⁵, the Appellate Body held that “any safeguard

measure⁷¹⁶ imposed after the entry into force of the *WTO Agreement* must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the *GATT 1994*.”⁷¹⁷ As regards the relationship between Article XIX and the *Agreement on Safeguards*, see paragraphs 566–572 below

522. In *Korea – Dairy*, the Appellate Body concluded that safeguard measures were “intended by the drafters of the *GATT* to be matters out of the ordinary, and to be matters of urgency, to be, in short, ‘emergency actions’”⁷¹⁸.

523. The Appellate Body on *Argentina – Footwear (EC)* noted that the remedy provided by Article XIX is of an emergency character and is to be “invoked only in situations when, as a result of obligations incurred under the *GATT 1994*, a Member finds itself confronted with developments it had not “foreseen” or “expected” when it incurred that obligation”:

“As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: ‘*Emergency Action on Imports of Particular Products*’. The words ‘emergency action’ also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported ‘*in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers*’. (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the *GATT 1994*, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the *GATT* to be matters out of the ordinary, to be matters of urgency, to be, in short, ‘emergency actions.’ And, such ‘emergency actions’ are to be invoked only in situations when, as a result of obligations incurred under the *GATT 1994*, a Member finds itself confronted with developments it had not ‘foreseen’ or ‘expected’ when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to ‘suspend the obligation in whole or in part or to withdraw or modify the concession’. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.”⁷¹⁹

524. After finding support for its approach in the context of the relevant provisions, the Appellate Body in *Argentina – Footwear (EC)* held that the object and purpose of Article XIX also confirmed its interpretation:

⁷¹⁵ Both Reports were adopted on the same date, 12 July 2000

⁷¹⁶ (footnote original) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

⁷¹⁷ Appellate Body Report on *Argentina – Footwear (EC)*, para. 84 and Appellate Body Report on *Korea – Dairy*, paras. 76–77. See also Chapter on *Agreement on Safeguards*, paras. 4–7.

⁷¹⁸ Appellate Body Report on *Korea – Dairy*, para. 86.

⁷¹⁹ Appellate Body Report on *Argentina – Footwear (EC)*, para. 93. See also Appellate Body Report on *Korea – Dairy*, para. 86.

"This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."⁷²⁰

525. In *US – Line Pipe*, the Appellate Body emphasized that the balance struck by WTO Members in reconciling the natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*. The Appellate Body further articulated on this tension:

"[P]art of the *raison d'être* of Article XIX of the GATT 1994 and the *Agreement on Safeguards* is, unquestionably, that of *giving a WTO Member the possibility*, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation *that, in the judgment of that Member, makes it necessary to protect a domestic industry temporarily*.⁷²¹ (emphasis added)

There is, therefore, a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief. A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. *The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the Agreement on Safeguards.*" (emphasis added)⁷²²

(b) Standard of review

526. In *US – Steel Safeguards*, the Panel, in a finding upheld by the Appellate Body⁷²³, recalled the standard

of review for claims of violation of the unforeseen developments requirement of Article XIX of the *GATT 1994* was that provided for in Article 11 of the *DSU*. The Panel articulated the standard in the following terms:

"[T]he role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers."⁷²⁴

527. The Appellate Body on *US – Steel Safeguards* rejected the United States argument that Article 11 of the *DSU* was not applicable to claims of violation of Article XIX of the *GATT 1994* and added:

"We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'.⁷²⁵ More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a '*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports'.⁷²⁶ Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994."⁷²⁷

528. The Appellate Body on *US – Steel Safeguards* emphasized that "to the extent that the Panel looked for a 'reasoned and adequate explanation' that was 'explicit' in the sense that it was 'clear and unambiguous' and 'did not merely imply or suggest an explanation', the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance

⁷²⁰ Appellate Body Report in *Argentina – Footwear (EC)*, para. 94. See also Appellate Body Report on *Korea – Dairy*, para. 87.

⁷²¹ Appellate Body Report, *US – Line Pipe*, para. 82.

⁷²² Appellate Body Report, *US – Line Pipe*, para. 83.

⁷²³ Appellate Body Report, *US – Steel Safeguards*, para. 280.

⁷²⁴ Panel Report on *US – Steel Safeguards*, para. 10.38.

⁷²⁵ (footnote original) Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

⁷²⁶ (footnote original) Appellate Body Report, *US – Line Pipe*, para. 217. (emphasis added)

⁷²⁷ Appellate Body Report on *US – Steel Safeguards*, para. 276.

with Article XIX of the GATT 1994 and the *Agreement on Safeguards*.⁷²⁸

2. Article XIX:1

(a) Article XIX:1(a): as a result of unforeseen developments

(i) Concept of unforeseen developments

529. In *Argentina – Footwear (EC)*, the Appellate Body pronounced on the meaning of the phrase “as a result of unforeseen developments” which, although not contained in the *Agreement on Safeguards*, is set forth in Article XIX:1(a). The Appellate Body held that “the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been ‘unexpected’”:

“To determine the meaning of the clause – ‘as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .’ – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX.⁷²⁹ We look first to the ordinary meaning of these words. As to the meaning of ‘unforeseen developments’, we note that the dictionary definition of ‘unforeseen’, particularly as it relates to the word ‘developments’, is synonymous with ‘unexpected’.⁷³⁰ ‘Unforeseeable’, on the other hand, is defined in the dictionaries as meaning ‘unpredictable’ or ‘incapable of being foreseen, foretold or anticipated’.⁷³¹ Thus, it seems to us that the ordinary meaning of the phrase ‘as a result of unforeseen developments’ requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been ‘unexpected’.”⁷³²

530. The Panel on *Argentina – Preserved Peaches* emphasized that increased quantities of imports should not be equated with unforeseen developments.⁷³³ The Panel considered that the competent authority had indicated that “the entry of the imports, or the way in which they were being imported, was unforeseen, but there is no mention that the alleged developments themselves were unforeseen.” Therefore the Panel concluded that “a statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen developments.”⁷³⁴

(ii) Requirement to demonstrate “unforeseen developments”

531. In *Argentina – Footwear (EC)* and *Korea – Dairy*, one of the issues considered by the Panel was the omission of the criterion of “unforeseen developments”, contained in Article XIX:1(a) of GATT 1994, from the *Agreement on Safeguards*, most notably from Article 2.1. The Panel on *Argentina – Footwear (EC)* found that “the express omission of the criterion of unforeseen developments in the [*Agreement on Safeguards*], (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT), must . . . have meaning.”⁷³⁵ The Panel, in a finding rejected by the Appellate Body, concluded that “safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT.”⁷³⁶ The Panel on *Korea – Dairy* reached the same conclusion.⁷³⁷ The Appellate Body held that the Panel’s view was inconsistent with the principles of effective treaty interpretation⁷³⁸ and with the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards*. See paragraph 569 below.

⁷²⁸ Appellate Body Report on *US – Steel Safeguards*, para. 297.

⁷²⁹ (footnote original) As we have said in Appellate Body Report, *United States – Gasoline*, supra, footnote 72, p.17; Appellate Body Report, *Japan – Alcoholic Beverages*, supra, footnote 72, p. 11; Appellate Body Report, *India – Patents*, supra, footnote 25, para. 46; Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 47; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para. 84; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

⁷³⁰ (footnote original) See Webster’s *Third New International Dictionary*, (Encyclopaedia Britannica Inc., 1966) Vol. 3, p. 2496; and *Black’s Law Dictionary*, 6th ed., (West Publishing Company, 1990) p. 1530.

⁷³¹ (footnote original) *Ibid*.

⁷³² Appellate Body Report on *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report on *Korea – Dairy*, para. 84.

⁷³³ Panel Report on *Argentina – Preserved Peaches*, para. 7.18.

⁷³⁴ Panel Report on *Argentina – Preserved Peaches*, para. 7.24. In

addition the Panel did not agree with “the statement by the Appellate Body in *Argentina – Footwear (EC)* that ‘the increased quantities of imports should have been ‘unforeseen’ or ‘unexpected’” (See original footnote 484). The Panel was of view that “the text of Article XIX:1(a), together with the Appellate Body’s own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a) – including unforeseen developments – and the conditions in the second clause – including an increase in imports – show that this is not a requirement for the imposition of a safeguard measure.” See Panel Report on *Argentina – Preserved Peaches*, para. 7.24. However, it should be noted here that in *US – Steel Safeguards*, the Appellate Body reaffirmed its statement and concluded that “because the ‘increased imports’ must be ‘as a result’ of an event that was ‘unforeseen’ or ‘unexpected’, it follows that the increased imports must also be ‘unforeseen’ or ‘unexpected’.” See Appellate Body Report on *US – Steel Safeguards*, para. 350.

⁷³⁵ Panel Report on *Argentina – Footwear (EC)*, para. 8.58.

⁷³⁶ Panel Report on *Argentina – Footwear (EC)*, para. 8.69.

⁷³⁷ Panel Report on *Korea – Dairy*, para. 7.48.

⁷³⁸ With respect to treaty interpretation in general, see Chapter on the DSU, Section III.B.1.

532. In *US – Lamb*, the Appellate Body ruled that the existence of “unforeseen developments” is a “pertinent issue of fact and law” under Article 3.1 of the *Agreement on Safeguards*, and “it follows that the published report of the competent authorities, under that Article, must contain a ‘finding’ or ‘reasoned conclusion’ on unforeseen developments”⁷³⁹:

“[W]e observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on ‘all pertinent issues of fact and law’ in their published report. As Article XIX:1(a) of the GATT 1994 requires that ‘unforeseen developments’ must be demonstrated ‘as a matter of fact’ for a safeguard measure to be applied’ the existence of ‘unforeseen developments’ is, in our view, a ‘pertinent issue[] of fact and law’, under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a ‘finding’ or ‘reasoned conclusion’ on ‘unforeseen developments.’”⁷⁴⁰

533. In *Chile – Price Band System*, the Panel referred to the Appellate Body’s conclusions in *US – Lamb* that “unforeseen developments” is a circumstance whose existence must be demonstrated as a matter of fact and must feature in the published report of the investigating authorities.⁷⁴¹ The Panel also ruled that an *ex post facto* explanation cannot cure the importing Member’s failure to meet the requirement of demonstrating “unforeseen development”⁷⁴².

534. In *Argentina – Preserved Peaches*, the Panel concluded that in order to satisfy the requirement to demonstrate “unforeseen developments”, “as a minimum, some discussion should be done by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred ‘as a result’ of circumstances in the first clause.”⁷⁴³

535. In *Argentina – Preserved Peaches*, the competent investigating authority had referred to unforeseen developments only in its final conclusion, the Panel held that this was insufficient:

“A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase.”⁷⁴⁴

536. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, reiterated that unforeseen developments must be demonstrated in a report before the measure is actually applied:

“Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure⁷⁴⁵, it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb*, that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and ‘it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed.’⁷⁴⁶ Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.”⁷⁴⁷

“[S]uch a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the ‘report of the competent authority’, completed and published prior to the application of the safeguard measures.”⁷⁴⁸

537. The Appellate Body on *US – Steel Safeguards* pointed out that the competent authority must provide a “reasoned and adequate explanation” of how the facts support its determination for those prerequisites, including ‘unforeseen developments’ under Article XIX:1(a) of the *GATT 1994*:

“We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on ‘unforeseen developments’. Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a ‘reasoned and adequate explanation’ of how the facts support its determination for those prerequisites, including ‘unforeseen developments’ under Article XIX:1(a) of the GATT 1994.”⁷⁴⁹

⁷³⁹ Appellate Body Report on *US – Lamb*, para. 76.

⁷⁴⁰ Appellate Body Report on *US – Lamb*, para. 76.

⁷⁴¹ Panel Report on *Chile – Price Band System*, para. 7.134.

⁷⁴² Panel Report on *Chile – Price Band System*, para. 7.139.

⁷⁴³ Panel Report on *Argentina – Preserved Peaches*, para. 7.23.

⁷⁴⁴ Panel Report on *Argentina – Preserved Peaches*, para. 7.33.

⁷⁴⁵ (footnote original) Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

⁷⁴⁶ (footnote original) Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296.

⁷⁴⁷ Panel Report on *US – Steel Safeguards*, para. 10.52

⁷⁴⁸ Panel Report on *US – Steel Safeguards*, para. 10.53

⁷⁴⁹ Appellate Body Report on *US – Steel Safeguards*, para. 279.

538. The Appellate Body on *US – Steel Safeguards*, upheld the Panel’s finding that each challenged measure must have been the object of a specific unforeseen development demonstration and also that the factual demonstration of unforeseen developments must also relate to the specific product(s) covered by the specific measure(s) at issue:

“To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* (‘such product’) that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged ‘unforeseen developments’ *result* in increased imports of that *specific product* (‘such product’). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the ‘unforeseen developments identified . . . have resulted in increased imports [of the specific products subject to] . . . each safeguard measure at issue.”⁷⁵⁰ 751

“For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that ‘unforeseen developments’ resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the ‘unforeseen developments’ at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of ‘unforeseen developments’ must be performed for *each* product subject to a safeguard measure.”⁷⁵² 753

539. In *US – Steel Safeguards*, the Appellate Body agreed with the Panel that “with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the ‘unforeseen developments identified . . . have resulted in increased imports [of the specific products subject to] . . . each safeguard measure at issue.”⁷⁵⁴ 755 The Appellate Body further concluded:

“[W]hen an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that ‘unforeseen developments’ resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the ‘unforeseen developments’ at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of ‘unforeseen developments’ must be performed for *each* product subject to a safeguard measure. (Emphasis original)”⁷⁵⁶

540. In *US – Steel Safeguards*, the Appellate Body was of view that it was for competent authorities not for panels to provide a “reasoned conclusion” on “unforeseen developments”:

“A ‘reasoned conclusion’ is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, ‘Article 3.1 thus assigns the competent authorities – not the panel – the obligation to ‘publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law.’ A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find

⁷⁵⁰ (footnote original) Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee’s submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify “for each affirmative determination . . . any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury.” (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

⁷⁵¹ Appellate Body Report on *US – Steel Safeguards*, para. 316.

⁷⁵² (footnote original) We note that the United States also alleges that the Panel “mistakenly indicated that a competent authority had to ‘differentiate the impact’ of various unforeseen developments on the individual industries and even economies of other countries.” (United States’ appellant’s submission, para. 85, referring to Panel Reports, paras. 10.127–10.128). Based on our review of the Panel Reports, we do not understand the Panel to have imposed such a requirement. Instead, as we see it, the Panel merely observed, in paragraph 10.127, that the Asian and Russian crises affected some countries more than others, to

support its view that the USITC was required to “explain how the increased imports of the specific steel products subject to the investigation *were linked to and resulted from* the confluence of unforeseen developments.” (emphasis added) Previously, in paragraph 10.123 of the Panel Reports, the Panel had stated that “even if ‘large volumes of foreign steel production were displaced from foreign consumption’, this [did] not, in itself, imply that *imports to the United States* increased as a result of unforeseen developments.” (emphasis added)

⁷⁵³ Appellate Body Report on *US – Steel Safeguards*, para. 319.

⁷⁵⁴ (footnote original) Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee’s submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify “for each affirmative determination . . . any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury.” (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

⁷⁵⁵ Appellate Body Report on *US – Steel Safeguards*, paras. 316.

⁷⁵⁶ Appellate Body Report on *US – Steel Safeguards*, paras. 319.

support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report."⁷⁵⁷

Unforeseen developments as describing a set of circumstances

541. The Appellate Body, in *Argentina – Footwear (EC)*, then held that the requirement of “unforeseen developments” did not establish a separate “condition” for the imposition of safeguard measures, but described a certain set of “circumstances”:

“When we examine this clause – ‘as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .’ – in its immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – ‘If, . . . , any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products . . .’. The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*⁷⁵⁸, are that: (1) a product is being imported ‘in such quantities and under such conditions’; (2) ‘as to cause’; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – ‘as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions . . .’ – is a dependent clause which, in our view, is linked grammatically to the verb phrase ‘is being imported’ in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – ‘as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .’ – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.”⁷⁵⁹

542. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the legal standard used to determine what constitutes an unforeseen development may be both subjective and objective:

“The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the

parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea – Dairy* that safeguard measures “are to be invoked only in situations when . . . an importing Member finds itself confronted with developments *it had not ‘foreseen’ or ‘expected’* when *it* incurred [its] obligation [under GATT 1994]. (emphasis added)⁷⁶⁰

What was ‘unforeseen’ when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Further, what constitutes ‘unforeseen developments’ for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development⁷⁶¹ for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind. This was recognized early in GATT by the *US – Fur Felt Hats* decision, which characterized unforeseen developments as “developments [. . .] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated”.⁷⁶²⁷⁶³

Confluence of developments to form the basis of an unforeseen development

543. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, concluded that the confluence of several events can unite to form the basis of an unforeseen development:

“The United States argues that the robustness of the US dollar was a development which combined with the other developments, namely, the currency crises in Asia and the former USSR and the continued growth in steel

⁷⁵⁷ *Ibid.*

⁷⁵⁸ (footnote original) We note that the title of Article 2 of the *Agreement on Safeguards* is: “*Conditions*”.

⁷⁵⁹ Appellate Body Report on *Argentina – Footwear (EC)*, para. 92. See also Appellate Body Report on *Korea – Dairy*, para. 85.

⁷⁶⁰ (footnote original) Appellate Body Report, *Korea – Dairy*, para. 86 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 93 (emphasis added).

⁷⁶¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91; Appellate Body Report, *Korea – Dairy*, para. 84.

⁷⁶² (footnote original) *US – Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina – Footwear (EC)*, para. 96; Appellate Body Report, *Korea – Dairy*, para. 89.

⁷⁶³ Panel Report on *US – Steel Safeguards*, paras. 10.39 and 10.41–10.43.

demand in the United States' market as other markets declined, lead to increased imports.

The Panel has already accepted that the Russian and the Southeast Asian financial crises, at least conceptually, could be considered unforeseen developments that did not exist at the end of the Uruguay Round. We have also found that the USITC did not consider the strength of the United States' economy and the appreciation of the US dollar as unforeseen developments *per se*; it had referred to these factors in relation to other unforeseen developments, which *together* had resulted in increased imports causing or threatening to cause injury.

Article XIX does not preclude consideration of the confluence of a number of developments as 'unforeseen developments'. Accordingly, the Panel believes that confluence of developments can form the basis of 'unforeseen developments' for the purposes of Article XIX of GATT 1994. The Panel is of the view, therefore, that it is for each Member to demonstrate that a confluence of circumstances that it considers were unforeseen at the time it concluded its tariff negotiations resulted in increased imports causing serious injury.

To the complainants' argument that the changes in steel markets were much more pronounced in 1991 following the dissolution of the former Soviet Union than later on and could not, therefore, be unforeseen after 1994, the Panel notes that the fact that the dissolution of the USSR and its overall effects may have constituted an unforeseen development in 1991 does not mean that a subsequent financial crisis also resulting somehow from the dissolution of the USSR, cannot, with other developments, be considered part of a 'confluence of unforeseen developments' in 1997 for the purpose of Article XIX of GATT 1994.⁷⁶⁴

(iii) *Logical connection between "unforeseen developments" and "the condition for imposition of a safeguard measure"*

544. The Panel on *US – Steel Safeguards*, in a finding upheld by the Appellate Body, held that the phrase "as a result of" implies a "logical connection" between "unforeseen developments and the effects of tariffs concessions and obligations" and "the condition for imposition of a safeguard measure":

"The Appellate Body has interpreted the phrase 'as a result of' in Article XIX:1(a) of GATT 1994 as a logical connection that exists between the first two clauses of that Article. In other words, a logical connection must be demonstrated to have existed between the elements of the first clause of Article XIX:1(a) – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions' – and the conditions set forth in the second clause of that Article – 'increased imports caus-

ing serious injury' – for the imposition of a safeguard measure.⁷⁶⁵

...

The Panel agrees with New Zealand that it would be improper to reduce to a nullity the obligation to explain how 'unforeseen developments' resulted in increased imports causing or threatening to cause serious injury. In some cases, the explanation may be as simple as bringing two sets of facts together. However, in other situations, it may require much more detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury. The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate.⁷⁶⁶

545. The Appellate Body on *US – Steel Safeguards* confirmed that the "unforeseen developments" must result in increased imports of the product that is subject to a safeguard measure:

"Turning to the term 'as a result of' that is also found in Article XIX:1(a), we note that the ordinary meaning of 'result' is, as defined in the dictionary, 'an effect, issue, or outcome *from* some action, process or design'.⁷⁶⁷ The increased imports to which this provision refers must therefore be an 'effect, or outcome' of the 'unforeseen developments'. Put differently, the 'unforeseen developments' must 'result' in increased imports of the product ('such product') that is subject to a safeguard measure.⁷⁶⁸

546. In *US – Steel Safeguards*, the Appellate Body clarified the relationship between unforeseen developments and increased imports and concluded that in situations of unforeseen developments, the increased imports must also be unforeseen:

"In a similar vein, we said in *Argentina – Footwear (EC)* that 'the increased quantities of imports should have been 'unforeseen' or 'unexpected'.⁷⁶⁹ In doing so, we were referring to the fact that the increased imports must, under Article XIX:1(a), result from 'unforeseen

⁷⁶⁴ Panel Report on *US – Steel Safeguards*, para. 10.97 – 10.100.

⁷⁶⁵ (footnote original) Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85.

⁷⁶⁶ Panel Report on *US – Steel Safeguards*, para.10.97–10.104 and 10.110.

⁷⁶⁷ (footnote original) *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.

⁷⁶⁸ Appellate Body Report on *US – Steel Safeguards*, paras 315 and 316.

⁷⁶⁹ (footnote original) Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

developments' in order to justify the application of a safeguard measure. Because the 'increased imports' must be 'as a result' of an event that was 'unforeseen' or 'unexpected', it follows that the increased imports must also be 'unforeseen' or 'unexpected'. Thus, the 'extraordinary nature' of the domestic response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected."⁷⁷⁰

Point in time where the developments were unforeseen

547. The Appellate Body on *Argentina – Footwear (EC)* noted a GATT Panel Report, which confirmed that the development must have been unforeseen at the time of the tariff negotiation:

"In addition, we note that our reading of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved Article XIX, the so-called '*Hatters' Fur*' case.⁷⁷¹ Members of the Working Party in that case, in 1951, stated:

... 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.⁷⁷²"⁷⁷³

548. In *Korea – Dairy*, the Appellate Body held that unforeseen developments are developments not foreseen or expected when Members incurred that obligation:

"[S]uch 'emergency actions' [safeguard measures] are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."⁷⁷⁴

549. In *Argentina – Preserved Peaches*, the Panel agreed with the approach advanced by both parties that the developments should have been unforeseen by the negotiators at the time they granted the relevant concession:

"There is the issue of the point in time at which Article XIX:1(a) requires that developments should have been unforeseen. Chile stated that the developments should have been unforeseen by a Member at the time it incurred the relevant obligation.⁷⁷⁵ In response to questions posed by the Panel, both parties submitted basically that developments should have been unforeseen by

the negotiators at the time at which they granted the relevant concession."⁷⁷⁶

...

We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure."⁷⁷⁷

Judicial economy

550. In *Argentina – Footwear (EC)*, the European Communities appealed the Panel's finding on judicial economy as regards the absence of findings by the Panel on the European Communities claim on unforeseen developments. The Appellate Body upheld the Panel's findings that the safeguards investigation at issue was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards* and concluded that, since such an inconsistency deprived the measure of legal basis, "there was no need to go further and examine whether, in addition, the measure was also inconsistent with Article XIX:1(a) of GATT 1994".⁷⁷⁸ As regards the obligation to apply Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of GATT 1994 cumulatively, including the requirement to demonstrate "unforeseen developments", see paragraph 531 above.

551. In *US – Wheat Gluten*, the Appellate Body reiterated the above conclusion, stating that, given the lack of legal basis of the safeguard measure at issue, the Panel was entitled to decline to examine the claim regarding unforeseen developments.⁷⁷⁹

⁷⁷⁰ Appellate Body Report on *US – Steel Safeguards*, para. 350. Note that a previous panel report on *Argentina – Preserved Peaches*, para. 7.24 had reached the opposite conclusion.

⁷⁷¹ (footnote original) Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

⁷⁷² (footnote original) *Supra*, footnote 84, para. 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by the majority of the Working Party with the exception of the United States.

⁷⁷³ Appellate Body Report in *Argentina – Footwear (EC)*, para. 96. See also Appellate Body Report on *Korea – Dairy*, para. 89.

⁷⁷⁴ Appellate Body Report in *Korea – Dairy*, para. 86.

⁷⁷⁵ (footnote original) See Chile's first written submission, paragraph 4.11.

⁷⁷⁶ (footnote original) See Chile's and Argentina's respective responses to question No. 7 of the Panel.

⁷⁷⁷ Panel Report on *Argentina – Preserved Peaches*, paras 7.25 – 7.28.

⁷⁷⁸ Appellate Body Report on *US – Wheat Gluten*, paras. 182, referring to Appellate Body Report on *Argentina – Footwear (EC)*, para. 98.

⁷⁷⁹ Appellate Body Report on *US – Wheat Gluten*, paras. 181–184.

(iv) “as a result . . . of the effect of the obligations incurred by a Member”

552. With respect to the clause “of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .” the Appellate Body held in *Argentina – Footwear (EC)*:

“[W]e believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member’s Schedule is subject to the obligations contained in Article II of the GATT 1994.”⁷⁸⁰

553. [In *Argentina – Footwear (EC)*, the Appellate Body described the requirement “as a result . . . of the effect of the obligations incurred by a Member” as setting forth “certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994”. See paragraph 541 above.

554. The Panel on *US – Steel Safeguards*, in a finding not reviewed by the Appellate Body, held that “the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.”⁷⁸¹

555. With respect to the significance of the context and object and purpose of Article XIX for the interpretation of the term “as a result . . . of the effect of the obligations incurred by a Member”, see paragraph 541. With respect to a GATT Panel Report on this issue, see paragraph 547 above.

556. As regards the interpretation of the element “unforeseen developments” under Article XIX and the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section II.B.1(b).

(v) “being imported in such increased quantities . . .”

557. Concerning the interpretation of the phrase “in such increased quantities” under Article 2.1 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section III.B.2(c).

(vi) “under such conditions”

558. As to the interpretation of the phrase “under such conditions” under Article 2.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section III.B.2(d).

(vii) “as to cause or threaten serious injury to domestic producers”

559. As regards the interpretation of the phrase “serious injury” under Article 2.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section III.B.2(h).

560. With respect to the interpretation of the element of “serious injury” under Article 4.1 of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Sections V.B.1–V.B.2.

561. Concerning the interpretation of the element “serious injury” under Article 4.2(a) of the *Agreement on Safeguards*, see Chapter on the *Agreement on Safeguards*, Section V.B.4.

562. As to the causation test to be applied in relating “increased imports” to “serious injury”, see Chapter on the *Agreement on Safeguards*, Section V.B.5(a).

3. Article XIX:2

(a) “shall give notice in writing to the Contracting Parties as far as in advance as may be practicable”

563. With regard to the notification requirements and particularly to the interpretation of the phrase “shall immediately notify” under Article 12.1 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, Section XIII.B.1–2.

(b) “an opportunity to consult”

564. With respect to the interpretation of “opportunity for prior consultations” under Article 12.3 of the *Agreement on Safeguards*, see the Chapter on the *Agreement on Safeguards*, XIII.B.4(a)

4. Reference to GATT practice

565. Regarding GATT practice on Article XIX, see GATT Analytical Index, pages 516–529.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Safeguards

566. In *Korea – Dairy*, the Appellate Body examined the relationship between Article XIX of *GATT 1994* and the *Agreement on Safeguards* in light of, on the one hand, Article II of the WTO Agreement⁷⁸², and, on the other hand, Articles 1 and 11.1(a) of the *Agreement on*

⁷⁸⁰ Appellate Body Report on *Argentina – Footwear (EC)*, para. 91. See also Appellate Body Report on *Korea – Dairy*, para. 84.

⁷⁸¹ Panel Report on *US – Steel Safeguards*, paras. 10.140.

⁷⁸² For the Appellate Body’s analysis under Article II of the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section III.B.1.

Safeguards.⁷⁸³ The Appellate Body concluded that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX and the *Agreement on Safeguards*:

“The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the WTO Agreement is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

...

Article 1 states that the purpose of the *Agreement on Safeguards* is to establish ‘rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.’ ... The ordinary meaning of the language in Article 11.1(a) – ‘unless such action conforms with the provisions of that Article applied in accordance with this Agreement’ – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure⁷⁸⁴ imposed after the entry into force of the WTO Agreement must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994.”⁷⁸⁵

567. In *US – Line Pipe*, the Panel, in a finding not reviewed by the Appellate Body, did not examine whether Korea’s claim under Article XIX:1(a) was justified on the basis that it had already rejected Korea’s claims under the *Agreement on Safeguards*:

“In the context of its claims under Articles 5.1 (first sentence) and 7.1 concerning the extent and duration of the line pipe measure, Korea also alleged an infringement of Article XIX:1(a). This provision authorizes the imposition of safeguard measures “to the extent and for such time as may be necessary to prevent or remedy” injury caused by increased imports. Korea’s Article XIX:1(a) claim is based on the same arguments advanced in support of its Article 5.1 (first sentence) and 7.1 claims. Since we have already rejected those claims, we also reject Korea’s Article XIX:1(a) claim regarding the duration and extent of the line pipe measure.”⁷⁸⁶

568. In *Argentina – Footwear (EC)*, the Appellate Body reversed a conclusion by the Panel that “safeguard investigations and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Safeguards Agreement* satisfy the requirements of Article XIX of GATT.”⁷⁸⁷ The Appellate Body noted that Articles 1 and 11.1(a) of the *Agreement on Safeguards* described the precise nature of the relationship between Article XIX of *GATT 1994* and the *Agreement on Safeguards* within the *WTO Agreement*⁷⁸⁸, and then observed:

“We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests

an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the *GATT 1994* within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish ‘rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of *GATT 1994*.’ ... This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language ‘unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*’ ... clearly is that any safeguard action must *conform with* the provisions of Article XIX of the *GATT 1994* as well as with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.⁷⁸⁹”⁷⁹⁰

569. The Appellate Body on *Argentina – Footwear (EC)* further rejected the conclusion of the Panel that because the clause “[i]f, as a result of unforeseen developments ... concessions”⁷⁹¹ in Article XIX:1(a) had been expressly omitted from Article 2.1 of the *Agreement on Safeguards*, safeguard measures that meet the requirements of the *Agreement on Safeguards* will automatically also satisfy the requirements of Article XIX. The Appellate Body considered this conclusion of the Panel as inconsistent with the principles of effective treaty interpretation⁷⁹² and with the ordinary meaning

⁷⁸³ The issue of the relationship between Article XIX of the *GATT 1994* and the *Agreement on Safeguards* arose in these disputes in connection with claims raised regarding a failure to examine whether the import trends of the products under investigation were the result of “unforeseen developments” within the meaning of Article XIX:1(a) of the *GATT 1994*. For the interpretation of the phrase “If, as a result of unforeseen developments ... concessions” in Article XIX:1(a) of the *GATT 1994*, see Section XX.B.2 of this Chapter.

⁷⁸⁴ (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

⁷⁸⁵ Appellate Body Report on *Korea – Dairy*, paras. 76–77. See also Appellate Body Report on *Argentina – Footwear (EC)*, para. 84. Panel Report on *US – Line Pipe*, para. 7.115.

⁷⁸⁶ Panel Report on *Argentina – Footwear (EC)*, para. 8.69.

⁷⁸⁷ Appellate Body Report on *Argentina – Footwear (EC)*, para. 82.

⁷⁸⁸ (*footnote original*) We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

“Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of *GATT 1994* which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).” (emphasis added)

⁷⁹⁰ Appellate Body Report on *Argentina – Footwear (EC)*, para. 83.

⁷⁹¹ The discussion on “unforeseen developments” can be found in Section XX.B.2(a) of this Chapter.

⁷⁹² With respect to treaty interpretation in general, see Chapter on the *DSU*, Section III.B.1.

of Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

"[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions . . . We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."⁷⁹³

570. The Panel on *US – Lamb*, referring to the statements by the Appellate Body in *Argentina – Footwear (EC)* and *Korea – Dairy*, on the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, observed:

"Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the *Safeguards Agreement* could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the *Safeguards Agreement* and GATT Article XIX must be given meaning and effect."⁷⁹⁴

571. The Appellate Body Report in *US – Lamb* reiterated the conclusions drawn by the Appellate Body in *Argentina – Footwear (EC)* and in *Korea – Dairy* on the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994 and observed:

"[A]rticles 1 and 11.1(a) of the *Agreement on Safeguards* express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the *Agreement on Safeguards*."⁷⁹⁵

572. Concerning the possibility of resorting to judicial economy as regards claims of unforeseen developments in cases where it has found that the requirements of Article 2 and 4 of the *Agreement on Safeguards* have not been met, see paragraphs 550 above-551 above.

XXI. ARTICLE XX

A. TEXT OF ARTICLE XX

Article XX *General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and

⁷⁹³ Appellate Body Report on *Argentina – Footwear (EC)*, para. 89.

⁷⁹⁴ Panel Report on *US – Lamb*, para. 7.11.

⁷⁹⁵ Appellate Body Report on *US – Lamb*, para. 70.

shall not depart from the provisions of this Agreement relating to non-discrimination;

- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

B. TEXT OF AD ARTICLE XX

Ad Article XX Subparagraph (h)

The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

C. INTERPRETATION AND APPLICATION OF ARTICLE XX

1. General

(a) Nature and purpose of Article XX

573. In *US – Gasoline*, in discussing the preambular language (the “chapeau”) of Article XX, the Appellate Body stated:

“[T]he chapeau says that ‘*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .*’ The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well.”⁷⁹⁶

574. In *US – Shrimp*, the Appellate Body examined the GATT-consistency of the import ban on shrimp and shrimp products from exporting nations not certified by United States authorities. Such certification could be obtained, *inter alia*, where the foreign country could demonstrate that shrimp or shrimp products were being caught using methods which did not lead to incidental killing of turtles beyond a certain level. The Panel had found that the measure at issue could not be justified under Article XX, because Article XX could not serve to justify “measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies”. The Appellate Body disagreed with this interpretation of the scope of Article XX and stated:

“[C]onditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.”⁷⁹⁷

575. In *US – Shrimp*, interpreting the chapeau of Article XX, the Appellate Body described the nature and purpose of Article XX as a balance of rights and duties:

“[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.”⁷⁹⁸

576. In *US – Gasoline*, the Appellate Body concluded its analysis by emphasizing the function of Article XX with respect to national measures taken for environmental protection:

“It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests – including the protection of human health, as well as the

⁷⁹⁶ Appellate Body Report on *US – Gasoline*, p. 24.

⁷⁹⁷ Appellate Body Report on *US – Shrimp*, para. 121.

⁷⁹⁸ Appellate Body Report on *US – Shrimp*, paras. 156 and 159.

conservation of exhaustible natural resources – to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*,⁷⁹⁹ there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.”⁸⁰⁰

(b) Structure of Article XX

(i) Two-tier test

577. In *US – Gasoline*, the Appellate Body examined the Panel’s findings that the United States regulation concerning the quality of gasoline was inconsistent with GATT Article III:4 and not justified under either paragraph (b), (d) or (g) of Article XX. The Appellate Body presented a two-tiered test under Article XX:

“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.”⁸⁰¹

578. In *US – Shrimp*, the Appellate Body reviewed the Panel’s finding concerning an import ban on shrimp and shrimp products harvested by foreign vessels. The ban applied to shrimp and shrimp products where the exporting country had not been certified by United States authorities as using methods not leading to incidental killing of sea turtles above a certain level. The Panel found a violation of Article III and held that the United States measure was not within the scope of measures permitted under the chapeau of Article XX. As a result of its finding that the United States measure could not be justified under the terms of the chapeau, the Panel did not examine the import ban in the light of Articles XX (b) and XX(g). The Appellate Body referred to its finding in *US – Gasoline*, cited in paragraph 577 above, and emphasized the need to follow the sequence of steps as set out in that Report:

“The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the funda-

mental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States – Gasoline* ‘seems equally appropriate.’⁸⁰² We do not agree.

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure ‘in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail’ or ‘a *disguised restriction* on international trade.’ (emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies.”⁸⁰³

(ii) Language of paragraphs (a) to (i)

579. In *US – Gasoline*, the Appellate Body compared the terms used in paragraphs (a) to (i) of Article XX, emphasizing that different terms are used in respect of the different categories of measures described in paragraphs (a) to (i):

“Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

‘necessary’ – in paragraphs (a), (b) and (d); ‘essential’ – in paragraph (j); ‘relating to’ – in paragraphs (c), (e) and (g); ‘for the protection of’ – in paragraph (f); ‘in pursuance of’ – in paragraph (h); and ‘involving’ – in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal

⁷⁹⁹ (footnote original) Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.

⁸⁰⁰ Appellate Body Report on *US – Gasoline*, pp. 30–31.

⁸⁰¹ Appellate Body Report on *US – Gasoline*, p. 22.

⁸⁰² (footnote original) Panel Report on *US – Shrimp*, para 7.28.

⁸⁰³ Appellate Body Report on *US – Shrimp*, paras. 119–120.

and the state interest or policy sought to be promoted or realized.”⁸⁰⁴

(c) Burden of proof

580. In *US – Gasoline*, the Appellate Body differentiated between the burden of proof under the individual paragraphs of Article XX on the one hand, and under the chapeau of Article XX on the other:

“The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.”⁸⁰⁵

581. The Panel on *EC – Asbestos*, in a statement not reviewed by the Appellate Body, elaborated on the burden of proof under Article XX in the context of a defence based on Article XX(b):

“We consider that the reasoning of the Appellate Body in *United States – Shirts and Blouses from India*⁸⁰⁶ is applicable to Article XX, inasmuch as the invocation of that Article constitutes a ‘defence’ in the sense in which that word is used in the above-mentioned report. It is therefore for the European Communities to submit in respect of this defence a prima facie case showing that the measure is justified. Of course, as the Appellate Body pointed out in *United States – Gasoline*, the burden on the European Communities could vary according to what has to be proved. It will then be for Canada to rebut that prima facie case, if established.

If we mention this working rule at this stage, it is because it could play a part in our assessment of the evidence submitted by the parties. Thus, the fact that a party invokes Article XX does not mean that it does not need to supply the evidence necessary to support its allegation. Similarly, it does not release the complaining party from having to supply sufficient arguments and evidence in response to the claims of the defending party. Moreover, we are of the opinion that it is not for the party invoking Article XX to prove that the arguments put forward in rebuttal by the complaining party are incorrect until the latter has backed them up with sufficient evidence.⁸⁰⁷”⁸⁰⁸

582. The Panel on *EC – Asbestos*, in a finding not addressed by the Appellate Body, further discussed the burden of proof specifically regarding the scientific aspect of the measure at issue. The Panel chose to confine itself to the provisions of the GATT 1994 and to the criteria defined by the practice relating to the application of GATT Article XX rather than to extend the principles of the *SPS Agreement* to examination under Article XX:⁸⁰⁹

“[I]n relation to the scientific information submitted by the parties and the experts, the Panel feels bound to point out that it is not its function to settle a scientific debate, not being composed of experts in the field of the possible human health risks posed by asbestos. Consequently, the Panel does not intend to set itself up as an arbiter of the opinions expressed by the scientific community.

Its role, taking into account the burden of proof, is to determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures taken by France are necessary in relation to the objectives pursued. The Panel therefore considers that it should base its conclusions with respect to the existence of a public health risk on the scientific evidence put forward by the parties and the comments of the experts consulted within the context of the present case. The opinions expressed by the experts we have consulted will help us to understand and evaluate the evidence submitted and the arguments advanced by the parties.⁸¹⁰ The same approach will be adopted with respect to the necessity of the measure concerned.”⁸¹¹

2. Preamble of Article XX (the “chapeau”)

(a) Scope

583. In *US – Gasoline*, the Appellate Body held that the chapeau has been worded so to prevent the abuse of the exceptions under Article XX:

“The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.”⁸¹²

⁸⁰⁴ Appellate Body Report on *US – Gasoline*, pp. 17.

⁸⁰⁵ Appellate Body Report on *US – Gasoline*, p. 22.

⁸⁰⁶ (*footnote original*) Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 15–16:

“We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.”

⁸⁰⁷ (*footnote original*) See Report of the Appellate Body in *EC – Hormones*, para. 104.

⁸⁰⁸ Panel Report on *EC – Asbestos*, paras. 8.177–8.178.

⁸⁰⁹ Panel Report on *EC – Asbestos*, para. 8.180.

⁸¹⁰ (*footnote original*) Report of the Appellate Body in *Japan – Agricultural Products*, para. 129. At this point, we recall that the experts were selected in consultation with the parties and that the latter did not challenge the appointment of any of them, although they reserved the right to comment on their statements. . . .

⁸¹¹ Panel Report on *EC – Asbestos*, paras. 8.181–8.182. See also para. 611 of this Chapter. With respect to burden of proof in general, see the Chapter on *DSU*, Section XXXVI.D.

⁸¹² The footnote to this sentence refers to Panel Report on *US – Spring Assemblies*, BISD 30S/107, para. 56.

It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].'⁸¹³ This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."⁸¹⁴

584. In *US – Shrimp*, the Appellate Body elaborated on the notion of preventing abuse or misuse of the exceptions under Article XX. The Appellate Body found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members"⁸¹⁵, as referenced in paragraph 575 above, and went on to state:

"In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau."⁸¹⁶ This interpretation of the chapeau is confirmed

by its negotiating history.⁸¹⁷ The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.⁸¹⁸ Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.⁸¹⁹ In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified.⁸²⁰ This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947."⁸²¹

585. The Appellate Body then linked the balance of rights and obligations under the chapeau of Article XX to the general principle of good faith:

"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised

⁸¹³ The footnote to this sentence refers to EPCT/C.11/50, p. 7.

⁸¹⁴ Appellate Body Report on *US – Gasoline*, p. 22

⁸¹⁵ Appellate Body Report on *US – Shrimp*, para. 156.

⁸¹⁶ (*footnote original*) This view is consistent with the approach taken by the panel in *US – Section 337*, which stated:

"Article XX is entitled 'General Exceptions' and . . . the central phrase in the introductory clause reads: 'nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . .' Article XX(d) thus provides a *limited and conditional exception from obligations under other provisions*." (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.

⁸¹⁷ (*footnote original*) Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

⁸¹⁸ (*footnote original*) The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

"Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: . . ."

⁸¹⁹ (*footnote original*) For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way:

"Indirect protection is an undesirable and dangerous phenomenon. . . . Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconcilable [*sic*] with the aim of chapters IV, V and VI." E/PC/T/C.II/32, 30 October 1946

⁸²⁰ (*footnote original*) The United Kingdom's proposed text for the chapeau read:

"The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 36.

⁸²¹ Appellate Body Report on *US – Shrimp*, para. 157.

bona fide, that is to say, reasonably.”⁸²² An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.”⁸²³

586. In *US – Shrimp*, before elaborating on the general significance of the chapeau of Article XX, as quoted in paragraphs 584–585 above, the Appellate Body discussed the significance of the Preamble of the *WTO Agreement* for its interpretative approach to the chapeau:

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

We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of *WTO* Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the ‘*CTE*’).

...

[W]e must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture

and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the *GATT 1994*, in particular.”⁸²⁴

(b) “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”

(i) *Constitutive elements*

587. The Appellate Body on *US – Shrimp* provided an overview regarding the three constitutive elements of the concept of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”:

“In order for a measure to be applied in a manner which would constitute “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the *GATT 1994*, such as Articles I, III or XI.⁸²⁵ Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting

⁸²² (footnote original) B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

... A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. ... (emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim’s International Law*, 9th ed, Vol. I (Longman’s, 1992), pp. 407–410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

⁸²³ Appellate Body Report on *US – Shrimp*, paras. 158–159.

⁸²⁴ Appellate Body Report on *US – Shrimp*, paras. 153–155. In this context, the Appellate Body pointed out that the Decision refers to the Rio Declaration on Environment and Development, and Agenda 21.

⁸²⁵ (footnote original) In *US – Gasoline*, p. 23, we stated: “The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.”

Members, but also between exporting Members and the importing Member concerned.⁸²⁶⁸²⁷

(ii) *Type of discrimination covered by the chapeau*

588. With respect to the phrase “between countries where the same conditions prevail”, the question arose whether the notion of discrimination under the chapeau of Article XX referred to conditions in importing or exporting countries (i.e. discrimination between a foreign country or foreign countries on the one hand and the home country on the other) or only to conditions in various exporting countries. The Appellate Body on *US – Gasoline* indicated that it considered both types of discrimination covered by the chapeau:

“[The United States] was asked whether the words incorporated into the first two standards ‘between countries where the same conditions prevail’ refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. . . . At no point in the appeal was that assumption challenged by Venezuela or Brazil. . . .”

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .’. The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words ‘nothing in this Agreement’, and Article XX as a whole including its chapeau more easily integrated into the remainder of the *General Agreement*, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.

[W]e see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants.⁸²⁸⁸²⁹

589. In *US – Shrimp*, the Appellate Body confirmed its finding in *US – Gasoline* on the type of discrimination covered by the chapeau Article XX:

“In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.”⁸³⁰

(iii) *Standard of discrimination*

590. The Appellate Body on *US – Gasoline* considered the appropriate discrimination standard relevant under the chapeau Article XX and held that this standard must be different from the standard applied under Article III:4:

“The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

The chapeau, it will be seen, prohibits such application

⁸²⁶ (footnote original) Appellate Body Report on *US – Gasoline*, pp. 23–24.

⁸²⁷ Appellate Body Report on *US – Shrimp*, para. 150.

⁸²⁸ (footnote original) We note in this connection that two previous panels had occasion to apply the chapeau. In *US – Spring Assemblies*, the panel had before it a ban on imports, and an exclusion order of the United States International Trade Commission, of certain automotive spring assemblies which the Commission had found, under Section 337 of the Tariff Act of 1930, to have infringed valid United States patents. The panel there held that the exclusion order had *not* been applied in a manner which would constitute a means of “arbitrary or unjustifiable discrimination against countries where the same conditions prevail,” because that order was directed against imports of infringing assemblies “from all foreign sources, and not just from Canada.” At the same time, the same order was also examined and found *not* to be “a disguised restriction on international trade.” *Id.*, paras. 54–56. See also *US – Tuna (EEC)*, para. 4.8.

It may be observed that the term “countries” in the chapeau is textually unqualified; it does not say “foreign countries”, as did Article 4 of the 1927 League of Nations *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, 97 L.N.T.S. 393. Neither does the chapeau say “third countries” as did, e.g., bilateral trade agreements negotiated by the United States under the 1934 *Reciprocal Trade Agreements Act*, e.g. the *Trade Agreement between the United States of America and Canada*, 15 November 1935, 168 L.N.T.S. 356 (1936). These earlier treaties are here noted, not as pertaining to the *travaux préparatoires* of the *General Agreement*, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer’s ink in the *General Agreement*.

⁸²⁹ Appellate Body Report on *US – Gasoline*, pp. 23–24.

⁸³⁰ Appellate Body Report on *US – Shrimp*, para. 150.

of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

- (a) 'arbitrary discrimination' (between countries where the same conditions prevail);
- (b) 'unjustifiable discrimination' (with the same qualifier); or
- (c) 'disguised restriction' on international trade.

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards it contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application."⁸³¹

591. After noting that "[t]he enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4" as referenced in paragraph 590 above, the Appellate Body on *US – Gasoline* examined the United States conduct with respect to other Members' governments and its failure to consider the costs imposed by its measures upon foreign refiners. The Appellate Body then held that these "two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place":

"We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade.' We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole."⁸³²

592. In *US – Shrimp*, the Appellate Body listed three elements of "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX. See also paragraph 587 above. In respect of the first element, it reiterated its findings from *US – Gasoline* concerning

the difference in discrimination under the chapeau of Article XX and other GATT provisions:

"As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI."⁸³³⁸³⁴

(iv) *Examples of arbitrary and unjustifiable discrimination*

593. In *US – Shrimp*, in analysing the United States measure at issue in the light of the chapeau of Article XX, the Appellate Body noted the "intended and actual coercive effect on other governments" to "adopt *essentially the same policy*" as the United States:

"Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same policy* (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers."⁸³⁵

594. The Appellate Body on *US – Shrimp* acknowledged that "the United States . . . applie[d] a uniform standard throughout its territories regardless of the particular conditions existing in certain parts of the country"⁸³⁶, but held that such a uniform standard cannot be permissible in international trade relations. The Appellate Body held that "discrimination exists", *inter alia*, "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries":

"It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

⁸³¹ Appellate Body Report on *US – Gasoline*, p. 23.

⁸³² Appellate Body Report on *US – Gasoline*, pp. 28–29.

⁸³³ (*footnote original*) In *US – Gasoline*, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

⁸³⁴ Appellate Body Report on *US – Shrimp*, para. 150.

⁸³⁵ Appellate Body Report on *US – Shrimp*, para. 161.

⁸³⁶ Appellate Body Report on *US – Shrimp*, para. 164.

Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.⁸³⁷

595. The Appellate Body on *US – Shrimp* further criticised the “single, rigid and unbending requirement” that countries applying for certification – required under the United States measure at issue in order to import shrimps into the United States – were faced with. The Appellate Body also noted a lack of flexibility in how officials were making the determination for certification:

“Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute ‘arbitrary discrimination’ within the meaning of the chapeau.”⁸³⁸

596. Another aspect which the Appellate Body on *US – Shrimp* considered in determining whether the United States measure at issue constituted “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” was the concept of “due process”. The Appellate Body found that the procedures under which United States authorities were granting the certification which foreign countries were required to obtain in order for their nationals to import shrimps into the United States were “informal” and “casual” and not “transparent” and “predictable:

“[W]ith respect to neither type of certification under [the measure at issue requiring certification] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.

The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification.”⁸³⁹

597. The Panel on *EC – Tariff Preferences* analysed whether the European Communities’ Drug Arrangements were justified under Article XX(b). As one of the steps in assessing this, the Panel examined whether the measure was applied in a manner consistent with the chapeau of Article XX. Specifically, the Panel looked at the inclusion of Pakistan, as of 2002, as a beneficiary of the Drug Arrangements preference scheme and the exclusion of Iran, and found that no objective criteria could be discerned in the selection process. Consequently, the Panel was not satisfied that conditions in the 12 beneficiary countries were the same or similar and that they were not the same with those prevailing in other countries:

⁸³⁷ Appellate Body Report on *US – Shrimp*, paras. 164–165.

⁸³⁸ Appellate Body Report on *US – Shrimp*, para. 177.

⁸³⁹ Appellate Body Report on *US – Shrimp*, paras. 180–181.

"First, the Panel notes the European Communities' argument that the assessment of the gravity of the drug issue is based on available statistics on the production and/or trafficking of drugs in each country. The Panel notes, however, from the statistics provided by the European Communities itself in support of its argument that the 12 beneficiaries are the most seriously drug-affected countries, that the seizures of opium and of heroin in Iran are substantially higher than, for example, the seizures of these drugs in Pakistan throughout the period 1994–2000.⁸⁴⁰ Iran is not covered as a beneficiary under the Drug Arrangements. Such treatment of Iran, and possibly of other countries, in the view of the Panel, is discriminatory. Bearing in mind the well-established rule that it is for the party invoking Article XX to demonstrate the consistency of its measure with the chapeau, the Panel notes that the European Communities has not provided any justification for such discriminatory treatment *vis-à-vis* Iran. Moreover, the European Communities has not shown that such discrimination is not arbitrary and not unjustifiable as between countries where the same conditions prevail.

Second, the Panel also notes, based upon statistics provided by the European Communities, that seizures of opium in Pakistan were 14,663 kilograms in 1994, as compared to 8,867 kilograms in 2000. Seizures of heroin in Pakistan were 6,444 kilograms in 1994 and 9,492 kilograms in 2000. The overall drug problem in Pakistan in 1994 and thereafter was no less serious than in 2000. The Panel considers that the conditions in terms of the seriousness of the drug problem prevailing in Pakistan in 1994 and thereafter were very similar to those prevailing in Pakistan in the year 2000. Accordingly, the Panel fails to see how the application of the same claimed objective criteria justified the exclusion of Pakistan prior to 2002 and, at the same time, its inclusion as of that year. And, given that the Panel cannot discern any change in the criteria used for the selection of beneficiaries under the Drug Arrangements since 1990, the Panel cannot conclude that the criteria applied for the inclusion of Pakistan are objective or non-discriminatory. Moreover, the European Communities has provided no evidence on the existence of any such criteria.

...

Given the European Communities' unconvincing explanations as to why it included Pakistan in the Drug Arrangements in 2002 and the fact that Iran was not included as a beneficiary, the Panel is unable to identify the specific criteria and the objectivity of such criteria the European Communities has applied in its selection of beneficiaries under the Drug Arrangements.

...

The Panel finds no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing

countries not covered by any other preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries."⁸⁴¹

(c) "disguised restriction on international trade"

598. In *US – Gasoline*, the Appellate Body held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which "imparted meaning to one another":

"'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."⁸⁴²

599. See also the excerpt from the report of the Appellate Body in *US – Gasoline* referenced in paragraph 591 above.

(d) Reference to GATT practice

600. With respect to GATT practice on the Preamble of Article XX, see GATT Analytical Index, pages 563–565.

3. Paragraph (b)

(a) Three-tier test

(i) *General*

601. The Panel on *US – Gasoline*, in a finding not reviewed by the Appellate Body, presented the following three-tier test in respect of Article XX(b):

⁸⁴⁰ First written submission of the European Communities, para. 123. In this regard, the Panel recalls that, according to the European Communities, its inclusion of Pakistan in the Drug Arrangements is due to the seriousness of drug trafficking, based on statistics of drug seizures, not of drug production. First written submission of the European Communities, para. 136.

⁸⁴¹ Panel Report on *EC – Tariff Preferences*, paras. 7.228–7.229, 7.232 and 7.234.

⁸⁴² Appellate Body Report on *US – Gasoline*, p. 25.

"[A]s the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied."⁸⁴³

602. In *EC – Asbestos*, the Panel followed the approach used by the Panel on *US – Gasoline* and indicated that it "must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health".⁸⁴⁴

603. The Panel on *EC – Tariff Preferences* also followed the same approach as the Panels on *US – Gasoline* and *EC – Asbestos*:

"In *EC – Asbestos*, the panel followed the same approach as used in *US – Gasoline*: 'We must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health'.⁸⁴⁵

Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, or whether the policy objective is for the purpose of, "protect[ing] human . . . life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is "necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX."⁸⁴⁶

(ii) *Policy objective of the measure at issue*

604. In determining whether the policy objective of the European Communities' Drug Arrangements was the protection of human life or health, the Panel on *EC – Tariff Preferences* analysed the design and the structure of the GSP Regulation. However, it found no references to the alleged policy objective of protection of human life and health:

"Examining the design and structure of Council Regulation 2501/2001 and the Explanatory Memorandum of the Commission, the Panel finds nothing in either of these documents relating to a policy objective of protecting the health of European Communities citizens. The only objectives set out in the Council Regulation (in the second preambular paragraph) are 'the objectives of development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries'. The Explanatory Memorandum states that '[t]hese objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combatting drug production and trafficking'.⁸⁴⁷

Examining the structure of the Regulation, the Panel notes that Title I provides definitions of 'beneficiary countries' and the scope of product coverage for various categories of beneficiaries. Title II then specifies the methods and levels of tariff cuts for the various preference schemes set out in the Regulation, including for the General Arrangements, Special Incentive Arrangements, Special Arrangements for Least Developed Countries and Special Arrangements to Combat Drug Production and Trafficking. Title II also provides Common Provisions on graduation. Title III deals with conditions for eligibility for special arrangements on labour rights and the environment. Title IV provides only that the European Communities should monitor and evaluate the effects of the Drug Arrangements on drug production and trafficking in the beneficiary countries. There are other titles dealing with temporary withdrawal and safeguard provisions, as well as procedural requirements. From an examination of the whole design and structure of this Regulation, the Panel finds nothing linking the preferences to the protection of human life or health in the European Communities."⁸⁴⁸

605. In addressing European Communities' argument that providing market access is a necessary component of the United Nations' comprehensive international strategy to fight drug problem by promoting alternative development, the Panel on *EC – Tariff Preferences* stated that while alternative development is one component of that strategy, providing market access is not itself a significant component of the comprehensive strategy. The Panel went on to state that even if it were assumed that market access was an important component of the international strategy, the European Communities had not established a link between the market access improvement and the protection of human health in the European Communities:

⁸⁴³ Panel Report on *US – Gasoline*, para. 6.20.

⁸⁴⁴ Panel Report on *EC – Asbestos*, para. 8.184.

⁸⁴⁵ Panel Report, *EC – Asbestos*, para. 8.184. (*footnote original*)

⁸⁴⁶ Panel Report on EC tariff preferences, paras. 7.198–7.199.

⁸⁴⁷ (*footnote original*) Explanatory Memorandum, para. 35, Exhibit India-7.

⁸⁴⁸ Panel Report on *EC – Tariff Preferences*, paras. 7.201–202.

"From its examination of these international instruments, including the 1988 Convention and the 1998 Action Plan, the Panel understands that alternative development is one component of the comprehensive strategy of the UN to combat drugs. The Panel has no doubt that market access plays a supportive role in relation to alternative development, but considers that market access is not itself a significant component of this comprehensive strategy. As the Panel understands it, the alternative development set out in the Action Plan depends more on the long-term political and financial commitment of both the governments of the affected countries and the international community to supporting integrated rural development, than on improvements in market access.

Even assuming that market access is an important component of the international strategy to combat the drug problem, there was no evidence presented before the Panel to suggest that providing improved market access is aimed at protecting human life or health in drug importing countries. Rather, all the relevant international conventions and resolutions suggest that alternative development, including improved market access, is aimed at helping the countries seriously affected by drug production and trafficking to move to sustainable development alternatives."⁸⁴⁹

(iii) "necessary"

Aspect of measure to be justified as "necessary"

606. In *US – Gasoline*, the Panel addressed the question of which specific aspect of a measure under scrutiny should be justified as "necessary" within the meaning of paragraph (b) of Article XX. The Panel held that "it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefiting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product". The Appellate Body did not address the Panel's findings on paragraph (b). However, in addressing the Panel's findings on paragraph (g), more specifically the Panel's statements concerning the terms "relating to" and "primarily aimed at", the Appellate Body was critical that "the Panel [had] asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air." The Appellate Body found that "the Panel . . . was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."⁸⁵⁰

607. In *EC – Tariff Preferences*, the Panel, in considering the extent to which the European Communities'

Drug Arrangements were necessary in achieving the European Communities' stated health objective, referred to the approach used by the Appellate Body on *Korea – Various Measures on Beef*. The Panel found that the GSP benefits decreased during the period 1 July 1999 to 31 December 2001 and that the continuing contribution of the Drug Arrangements to the EC's health objective was therefore doubtful:

"The Panel recalls the Appellate Body ruling in *Korea – Various Measures on Beef* that 'the term 'necessary' refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.⁸⁵¹ In order to determine where the Drug Arrangements are situated along this continuum between 'contribution to' and 'indispensable', the Panel is of the view that it should determine the extent to which the Drug Arrangements contribute to the European Communities' health objective. This requires the Panel to assess the benefits of the Drug Arrangements in achieving the objective of protecting life or health in the European Communities.

The Panel notes the Report of the Commission pursuant to Article 31 of Council Regulation No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001. The assessment of the effects of the Drug Arrangements in this report reveals that the product coverage under the Drug Arrangements decreased by 31 per cent from 1999 through 2001. It also shows that the volume of imports from the beneficiary countries under the Drug Arrangements decreased during the same period. As the Panel understands it, this decrease in product coverage and in imports from the beneficiaries is due to the reduction to zero – or close to zero – of the MFN bound duty rates on certain products, including coffee products.

The Panel considers that the above-referenced decreases in product coverage and depth of tariff cuts reflect a long-term trend of GSP benefits decreasing as Members reduce their import tariffs towards zero in the multilateral negotiations. Given this decreasing trend of GSP benefits, the contribution of the Drug Arrangements to the realization of the European Communities' claimed health objective is insecure for the future. To the Panel, it is difficult to deem such measure as 'necessary' in the sense of Article XX(b). Moreover, given that the benefits under the Drug Arrangements themselves are decreasing, the Panel cannot come out to the conclusion that

⁸⁴⁹ Panel Report on *EC – Tariff Preferences*, paras. 7.206–7.207.

⁸⁵⁰ Appellate Body Report on *US – Gasoline*, p. 16.

⁸⁵¹ (footnote original) Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

the 'necessity' of the Drug Arrangements is closer to the pole of 'indispensable' than to that of "contributing to" in achieving the objective of protecting human life or health in the European Communities."⁸⁵²

608. The Panel on *EC – Tariff Preferences* also considered the temporary suspension mechanism in the EC's GSP Regulation as well as its application to Myanmar and found that with one or more drug-producing or trafficking countries outside of the scheme, the Drug Arrangements are not contributing sufficiently to the reduction of drug supply to the EC's market:

"Assuming a beneficiary country under the Drug Arrangements was not ensuring sufficient customs controls on export of drugs, or was infringing the objectives of an international fisheries conservation convention, the European Communities could then suspend the tariff preferences under the Drug Arrangements to this country, for reasons unrelated to protecting human life or health. Given that this beneficiary would be a seriously drug-affected country, the suspension of the tariff preferences would arrest the European Communities' support to alternative development in that beneficiary and therefore also stop efforts to reduce the supply of illicit drugs into the European Communities. The whole design of the EC Regulation does not support the European Communities' contention that it is 'necessary' to the protection of human life and health in the European Communities, because such design of the measure does not contribute sufficiently to the achievement of the health objective.

The European Communities confirms that while Myanmar is one of the world's leading producers of opium, it is not necessary to separately include this country under the Drug Arrangements since it is already accorded preferential tariff treatment as a least-developed country. The Panel notes that the European Communities has suspended tariff preferences for Myanmar. . . .

Recalling that the European Communities confirms that it is required to continue its suspension of tariff preferences for Myanmar through the expiration of the EC Regulation on 31 December 2004, the Panel notes that any of the 12 beneficiaries is also potentially subject to similar suspension under the same Regulation, regardless of the seriousness of the drug problems in that country. With one or more of the main drug-producing or trafficking countries outside the scheme, it is difficult to see how the Drug Arrangements are in fact contributing sufficiently to the reduction of drug supply into the European Communities' market to qualify as a measure necessary to achieving the European Communities' health objective."⁸⁵³

Treatment of scientific data and risk assessment

609. In *EC – Asbestos*, the Panel found that the measure at issue, a French ban on the manufacture, importation

and exportation, and domestic sale and transfer of certain asbestos products including products containing chrysotile fibres, was inconsistent with *GATT* Article III:4, but justified under Article XX(b) in light of the underlying policy of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument under Article XX(b) that the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health. The Appellate Body referred to Article 11 of the DSU and its reports on *US – Wheat Gluten*⁸⁵⁴ and *Korea – Alcoholic Beverages*⁸⁵⁵, and stated:

"The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence."⁸⁵⁶

610. Further, in *EC – Asbestos*, Canada argued that Article 11 of the DSU requires that the scientific data must be assessed in accordance with the principle of the balance of probabilities, and that in particular where the evidence is divergent or contradictory, a Panel must take a position as to the respective weight of the evidence by virtue of the principle of the preponderance of the evidence. The Appellate Body rejected this argument, pointing out:

"As we have already noted, '[w]e cannot second-guess the Panel in appreciating either the evidentiary value of . . . studies or the consequences, if any, of alleged defects in [the evidence]'.⁸⁵⁷ And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources.'⁸⁵⁸ (emphasis added) In justifying a measure under Article XX(b) of the *GATT* 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent,

⁸⁵² Panel Report on *EC – Tariff Preferences*, paras. 7.211–7.213.

⁸⁵³ Panel Report on *EC – Tariff Preferences*, paras. 7.216–7.218.

⁸⁵⁴ The Appellate Body cited Appellate Body Report on *US – Wheat Gluten*, para. 151.

⁸⁵⁵ The Appellate Body cited Appellate Body Report on *Korea – Alcoholic Beverages*, para. 161.

⁸⁵⁶ Appellate Body Report on *EC – Asbestos*, para. 161. With respect to the standard of review in general, see Article 11 of the Chapter on the DSU.

⁸⁵⁷ (footnote original) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 161.

⁸⁵⁸ (footnote original) Appellate Body Report on *EC – Hormones*, para. 194.

but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the 'preponderant' weight of the evidence."⁸⁵⁹

611. In *EC – Asbestos*, the Appellate Body also rejected Canada's argument that in examining whether the French ban on manufacture, sale and imports of certain asbestos products including chrysotile-cement products was justified under GATT Article XX(b), the Panel should have quantified the risk associated with chrysotile-cement products:

"As for Canada's second argument, relating to 'quantification' of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health.⁸⁶⁰ A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that 'no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis.' The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer. Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' 'hypotheses' of the risk."⁸⁶¹

612. The Appellate Body also rejected Canada's argument that the Panel erroneously postulated that the level of health protection inherent in the measure was a halt to the spread of asbestos-related health risks, because it did not take into consideration the risk associated with the use of substitute products without a framework for controlled use. The Appellate Body stated:

"[W]e note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a 'halt' to the spread of asbestos-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres, although that evidence did *not* indicate that the risk

posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place."⁸⁶²

"Reasonably available" alternatives

613. In *EC – Asbestos*, the Appellate Body confirmed that a measure is "necessary" within the meaning of GATT Article XX(b) "if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to it." The Appellate Body on *EC – Asbestos* then considered Canada's claim that the Panel had erroneously found that "controlled use" was not a reasonably available alternative to the measure at issue. In this connection, Canada argued that the Appellate Body itself had held in *US – Gasoline* that an alternative measure can only be ruled out if it is shown to be impossible to implement. The Appellate Body rejected Canada's argument, but began its analysis by acknowledging that "administrative difficulties" did not render a measure not "reasonably available":

"We certainly agree with Canada that an alternative measure which is impossible to implement is not 'reasonably available'. But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not cease to be 'reasonably' available simply because the alternative measure involved *administrative difficulties* for a Member.⁸⁶³ The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case."

614. The Appellate Body then found that "several factors must be taken into account" in ascertaining whether a suggested alternative measure is "reasonably available". In this context, the Appellate Body mentioned, *inter alia*, the importance of the value pursued by the measure at issue:

"Looking at this issue now, we believe that, in determining whether a suggested alternative measure is 'reasonably available', several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is 'necessary' under Article XX(b):

⁸⁵⁹ Appellate Body Report on *EC – Asbestos*, paras. 177–178.

⁸⁶⁰ (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 186.

⁸⁶¹ Appellate Body Report on *EC – Asbestos*, para. 167.

⁸⁶² Appellate Body Report on *EC – Asbestos*, para. 168.

⁸⁶³ (*footnote original*) See Panel Report on *US – Gasoline*, paras. 6.26 and 6.28.

'The import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.⁸⁶⁴ (emphasis added)

In our Report in *Korea – Beef*, we addressed the issue of 'necessity' under Article XX(d) of the GATT 1994.⁸⁶⁵ In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States – Section 337 of the Tariff Act of 1930*:

'It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.'⁸⁶⁶

We indicated in *Korea – Beef* that one aspect of the 'weighing and balancing process . . . comprehended in the determination of whether a WTO-consistent alternative measure' is reasonably available is the extent to which the alternative measure 'contributes to the realization of the end pursued'.⁸⁶⁷ In addition, we observed, in that case, that '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends.⁸⁶⁸ In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.⁸⁶⁹

615. The Appellate Body then examined the remaining question of "whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition,"⁸⁷⁰ i.e. "whether France could reasonably be expected to employ 'controlled use' practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks".⁸⁷¹

"In our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of 'controlled use' remains to be demonstrated. Moreover, even in cases where 'controlled use' practices are

applied 'with greater certainty', the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a 'significant residual risk of developing asbestos-related diseases.' The Panel found too that the efficacy of 'controlled use' is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.⁸⁷² Given these factual findings by the Panel, we believe that 'controlled use' would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. 'Controlled use' would, thus, not be an alternative measure that would achieve the end sought by France."⁸⁷³

(b) Reference to GATT practice

616. With respect to GATT practice under Article XX(b), see GATT Analytical Index, pages 565–573.

4. Paragraph (d)

(a) General

617. In *Korea – Various Measures on Beef*, the Appellate Body examined Korea's argument that the prohibition of retail sales of both domestic and imported beef products (the dual retail system) was designed to secure compliance with a consumer protection law, and thus, although in violation of Article III:4, nevertheless justified by Article XX(d). Referring to its Report on *US – Gasoline*, the Appellate Body set forth the following two elements for paragraph (d):

"For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."⁸⁷⁴

⁸⁶⁴ (footnote original) Panel Report on *Thailand – Cigarettes*, para. 75.

⁸⁶⁵ (footnote original) Appellate Body Report on *Korea – Various Measures on Beef*, paras. 159 ff.

⁸⁶⁶ (footnote original) Panel Report on *US – Section 337*, para. 5.26; we expressly affirmed this standard in our Report in *Korea – Various Measures on Beef*, para. 166.

⁸⁶⁷ (footnote original) Appellate Body Report on *Korea – Various Measures on Beef*, paras. 166 and 163.

⁸⁶⁸ (footnote original) Appellate Body Report on *Korea – Various Measures on Beef*, para. 162.

⁸⁶⁹ Appellate Body Report on *EC – Asbestos*, paras. 170–172. The cited paragraphs in Appellate Body Report on *Korea – Various Measures on Beef* are also referenced in para. 618 of this Chapter.

⁸⁷⁰ Appellate Body Report on *EC – Asbestos*, para. 172.

⁸⁷¹ Appellate Body Report on *EC – Asbestos*, para. 173.

⁸⁷² Appellate Body Report on *Korea – Various Measures on Beef*, paras. 8.213–8.214.

⁸⁷³ Appellate Body Report on *EC – Asbestos*, para. 174.

⁸⁷⁴ Appellate Body Report on *Korea – Various Measures on Beef*, para. 157.

(b) “necessary”

618. In *Argentina – Hides and Leather*, the disputed measures were certain collection and withholding mechanisms that Argentina had adopted to secure compliance with certain tax laws and to combat tax evasion. The disputing parties, Argentina and the European Communities had different views with regard to how the provision “necessary” in Article XX(d) should be interpreted. The European Communities claimed that a measure can only be “necessary” if there is no alternative, whereas Argentina argued that the Member claiming the “necessity” of a measure should be entitled a certain degree of discretion in that determination. The Panel refused to resolve this interpretative dispute⁸⁷⁵, but taking into account *inter alia* the “general design and structure” of the measures, the Panel found that the arguments advanced by Argentina raised a presumption, not rebutted by the European Communities and accordingly held that the measures were “necessary”:

“[W]e are satisfied that Argentina has adduced argument and evidence sufficient to raise a presumption that the contested measures, in their general design and structure, are “necessary” even on the European Communities’ reading of that term. Argentina stresses the fact that tax evasion is common in its territory and that, against this background of low levels of tax compliance, tax authorities cannot expect to improve tax collection primarily through the pursuit of repressive enforcement strategies (e.g. aggressive criminal prosecution of tax offenders). In those circumstances, Argentina maintains, tax authorities must direct their efforts towards preventing tax evasion from occurring in the first place. According to Argentina, this is precisely what RG 3431 and RG 3543 are designed to accomplish.”⁸⁷⁶

The European Communities does not dispute that, in the circumstances of the present case, collection and withholding mechanisms are necessary to combat tax evasion.⁸⁷⁷ Nor has the European Communities submitted other arguments or evidence which would rebut the presumption raised by Argentina in respect of the “necessity” of RG 3431 and RG 3543.⁸⁷⁸

In light of the foregoing, we conclude that, in view of their general design and structure, RG 3431 and RG 3543 are “necessary” measures within the meaning of Article XX(d).

Since it has thus been established that RG 3431 and RG 3543 satisfy all of the requirements set forth in Article XX(d), we further conclude that they enjoy provisional justification under the terms of Article XX(d).⁸⁷⁹

619. In *Korea – Various Measures on Beef*, the Appellate Body attempted to situate the meaning of the term “necessary” within the context of Article XX(d) on a “continuum” stretching from “indispensable/of abso-

lute necessity” to “making a contribution to”. Furthermore, the Appellate Body emphasized the context in which the term “necessary” is found in Article XX(d) and held that in “assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation [a treaty interpreter] may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect”:

“We believe that, as used in the context of Article XX(d), the reach of the word ‘necessary’ is not limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable’. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term ‘necessary’ refers, in our view, to a range of degrees of necessity. At one end of this continuum lies ‘necessary’ understood as ‘indispensable’; at the other end, is ‘necessary’ taken to mean as ‘making a contribution to’. We consider that a ‘necessary’ measure is, in this continuum, located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”⁸⁸⁰

In appraising the ‘necessity’ of a measure in these terms, it is useful to bear in mind the context in which “necessary” is found in Article XX(d). The measure at stake has

⁸⁷⁵ Panel Report on *Argentina – Hides and Leather*, para. 11.304.

⁸⁷⁶ (*footnote original*) In our view, the presumption raised by Argentina of the existence of a relationship of necessity between Argentina’s declared objective of securing compliance with the IVA Law and IG Law and the general design of RG 3431 and RG 3543 is not affected by the inconsistency of these measures with Article III:2, first sentence.

⁸⁷⁷ (*footnote original*) See para. 8.258 of this report.

⁸⁷⁸ (*footnote original*) It is true that the European Communities disputes that the higher rates applied to imported products pursuant to RG 3431 and RG 3543 are “necessary” in order to secure compliance with the IVA Law and IG Law. See e.g. EC First Oral Statement, at paras. 79, 82 and 84. We consider that this contention goes to the question of whether Argentina makes improper use of the exception set out in Article XX(d) and not to the question of whether RG 3431 and RG 3543, in light of their general design and structure, fall within the terms of Article XX(d). We therefore address the justifiability of applying higher rates to imported products when we appraise RG 3431 and RG 3543 under the chapeau of Article XX. This approach is in accordance with that followed by the Appellate Body in *United States – Gasoline*. See the Appellate Body Report on *United States – Gasoline*, *supra*, at pp. 19 and 25–29.

⁸⁷⁹ Panel Report on *Argentina – Hides and Leather*, paras. 11.306 – 11.308.

⁸⁸⁰ (*footnote original*) We recall that we have twice interpreted Article XX(g), which requires a measure “relating to the conservation of exhaustible natural resources”. (emphasis added). This requirement is more flexible textually than the “necessity” requirement found in Article XX(d). We note that, under the more flexible “relating to” standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a “substantial relationship”, (emphasis added) i.e., a close and genuine relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was “reasonably related” to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

to be 'necessary to ensure compliance with laws and regulations . . . , including those relating to customs enforcement, the enforcement of [lawful] monopolies . . . , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'. (emphasis added) Clearly, Article XX(d) is susceptible of application in respect of a wide variety of "laws and regulations" to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

...

In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."⁸⁸¹

620. In *Korea – Various Measures on Beef*, the Panel, in a finding upheld by the Appellate Body, did not accept Korea's argument for invoking an exception under Article XX(d) to justify a violation of Article III:4. Korea argued that it was "necessary to have domestic and imported beef sold through separate stores in order to counteract fraudulent practices prohibited by the *Unfair Competition Act*", the dual retail system.⁸⁸² Korea argued that due to the fact that imported beef was cheaper than domestic beef, "traders have a strong incentive to sell imported beef as domestic beef since by doing so they can profit from the higher sales price."⁸⁸³ Korea adopted and implemented the dual retail system in 1990 and decided to abrogate the previous simultaneous sales system which had been in place since 1988 when imports of beef first resumed. Korea claimed further that, in view of the substantial costs to the government, it was not sustainable from an economic aspect to maintain continuous policing of the shops. When evaluating whether the adoption of the *Unfair Competition Act* fulfilled the "necessity" criterion in Article XX(d) the Panel stated the following:

"To demonstrate that the dual retail system is 'necessary', Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agree-

ment is reasonably available at present in order to deal with misrepresentation in the retail beef market as to the origin of beef. The Panel considers that Korea has not discharged this burden for two inter-related reasons. First, Korea has not found it 'necessary' to establish 'dual retail systems' in order to prevent similar cases of misrepresentation of origin from occurring in other sectors of its domestic economy. Second, Korea has not shown to the satisfaction of the Panel that measures, other than a dual retail system, compatible with the WTO Agreement, are not sufficient to deal with cases of misrepresentation of origin involving imported beef."⁸⁸⁴

621. The Appellate Body on *Korea – Various Measures on Beef* further stated that a determination of whether a measure is necessary under Article XX(d), when that measure is not actually indispensable in achieving compliance with the law or regulation at issue, involves weighing and balancing different factors:

"In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."⁸⁸⁵

622. In keeping with this interpretation, the Panel on *Canada – Wheat Exports and Grain Imports* undertook the weighing and balancing of various factors in the following manner:

"In applying the 'weighing and balancing' test, the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC Asbestos* considered the importance of the value or interest pursued by the laws with which the challenged measure sought to secure compliance, whether the objective pursued by the challenged measure contributed to the end that was sought to be realized and whether a reasonably available alternative measure existed. We apply the same approach here in determining whether Section 57(c) of the *Canada Grain Act* is 'necessary' for the purposes of Article XX(d) of the GATT 1994.

With respect to the importance of the interests or values that the statutory and other provisions with which, according to Canada, Section 57(c) secures compliance

⁸⁸¹ Appellate Body Report on *Korea – Various Measures on Beef*, paras. 161–162 and 164. Following these paragraphs, the Appellate Body cited Panel Report on *US – Section 337*, para. 5.26.

⁸⁸² Panel Report on *Korea – Various Measures on Beef*, para. 645.

⁸⁸³ Panel Report on *Korea – Various Measures on Beef*, para. 645.

⁸⁸⁴ Panel Report on *Korea – Various Measures on Beef*, para. 659.

⁸⁸⁵ Appellate Body Report on *Korea – Various Measures on Beef*, para. 164.

are intended to protect, Canada has indicated that those objectives are to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation and preserve and enforce the CWB monopoly. In other words, the relevant provisions are said to essentially help maintain the integrity of Canada's grading and quality assurance system and of the CWB's exclusive right to sell Western Canadian grain for domestic sale or export and, thereby, to preserve the reputation of Canadian grain notably in export markets. It is clear that these interests, which appear to be essentially commercial in nature, are important. It seems equally clear, however, that these interests are not as important as, for instance, the protection of human life and health against a lifethreatening health risk, an interest which the Appellate Body in *EC – Asbestos* characterized as 'vital and important in the highest degree'.⁸⁸⁶

(c) Aspect of measure to be justified as "necessary"

623. The Panel on *US – Gasoline* held that "maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not 'secure compliance' with the baseline system. These methods were not an enforcement mechanism." While the Appellate Body did not address the Panel's findings on Article XX(d), it criticised that, in the context of Article XX(g), "the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air." The Appellate Body found that "the Panel . . . was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."⁸⁸⁷ See also paragraphs 606 above and 629 below.

(d) "Reasonably available" alternatives

624. In *Canada – Wheat Exports and Grain Imports*, the Panel made reference to the Appellate Body report on *EC – Asbestos* regarding "reasonably available" alternatives in the context of Article XX(b) (see paragraph 613 above) and to the Appellate Body report on *Korea – Various Measures on Beef* (see paragraph 618 above) in addressing "reasonably available" alternatives in the context of Article XX(d):

"Therefore, the question remains as to whether there is an alternative measure to Section 57(c) that is reasonably available. The Appellate Body has indicated that relevant factors for determining whether an alternative measure is 'reasonably available' are: (i) the extent to which the alternative measure 'contributes to the realization of the end pursued'; (ii) the difficulty of implementation³¹¹;

and (iii) the trade impact of the alternative measure compared to that of the measure for which justification is claimed under Article XX. The Appellate Body has also stated that, in addition to being 'reasonably available', the alternative measure must also achieve the level of compliance sought. In this regard, the Appellate Body has recognized that 'Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations'.⁸⁸⁸

(e) Reference to GATT practice

625. With respect to GATT practice under Article XX(d), see GATT Analytical Index, pages 573–583.

5. Paragraph (g): "relating to the conservation of exhaustible natural resources"

(a) "the conservation of exhaustible natural resources"

(i) *Jurisdictional limitations*

626. In *US – Shrimp*, the Appellate Body reviewed the Panel's finding concerning a United States measure which banned imports of shrimps and shrimp products harvested by vessels of foreign nations, where such exporting country had not been certified by United States authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel had found that the United States could not justify its measure under Article XX(g). Noting that sea turtles migrate to, or traverse waters subject to the jurisdiction of the United States, the Appellate Body indicated as follows:

"We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."⁸⁸⁹

(ii) *meaning of "exhaustible natural resources"*

627. In *US – Shrimp*, the Appellate Body addressed the meaning of the term "exhaustible natural resources" contained in Article XX(g). The Appellate Body emphasized the need for a dynamic rather than a static interpretation of the term "exhaustible", noting the need to interpret this term "in the light of contemporary concerns of the community of nations about the protection

⁸⁸⁶ Panel Report on *Canada – Wheat Exports and Grain Imports*, paras. 6.223–6.224.

⁸⁸⁷ Appellate Body Report on *US – Gasoline*, p. 16.

⁸⁸⁸ Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 6.226.

⁸⁸⁹ Appellate Body Report on *US – Shrimp*, para. 133.

and conservation of the environment". In its interpretative approach, the Appellate Body also took into consideration non-WTO law:

"Textually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources.⁸⁹⁰

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

...

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.⁸⁹¹ It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.⁸⁹² . . .

...

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.⁸⁹³ Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g).⁸⁹⁴ We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible

natural resources, whether *living* or *non-living*, may fall within Article XX(g)."⁸⁹⁵

(iii) *Reference to GATT practice*

628. With respect to GATT practice on the term "exhaustible natural resources" under Article XX(g), see GATT Analytical Index, pages 585–586.

(b) "relating to"

(i) *Aspect of the measure to be justified as "relating to"*

629. The Panel on *US – Gasoline* held that the United States measure at issue could not be justified in the light of Article XX(g) as a measure "relating to the conservation of exhaustible natural resources". More specifically, the Panel held that it "saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving air quality in the United States" and that "the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources".⁸⁹⁶ The Appellate Body reversed the Panel's finding and held that the United States measure was justified under Article XX(g), although it ultimately found that the measure was inconsistent with the chapeau of

⁸⁹⁰ (*footnote original*) We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet . . ." World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

⁸⁹¹ (*footnote original*) See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978–I) 159 *Recueil des Cours* 1, p. 49.

⁸⁹² Following this sentence, the Appellate Body refers to 1982 United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261, Arts. 56, 61 and 62; Agenda 21, adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26/Rev.1. See, for example, para. 17.70, ff; and Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15.

⁸⁹³ (*footnote original*) Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude "living" natural resources from the scope of application of Article XX(g).

⁸⁹⁴ (*footnote original*) Panel Reports on *US – Canadian Tuna*, para. 4.9; and *Canada – Herring and Salmon*, para. 4.4.

⁸⁹⁵ Appellate Body Report on *US – Shrimp*, paras. 128–131.

⁸⁹⁶ Panel Report on *US – Gasoline*, para. 6.40.

Article XX. See also paragraph 591 above. The Appellate Body held that the Panel was in error in searching for a link between the *discriminatory aspect* of the United States measure (rather than the *measure itself*) and the policy goal embodied in Article XX(g):

"[The] problem with the reasoning in that paragraph is that the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided 'less favourable treatment' under Article III:4 before the Panel examined the 'General Exceptions' contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment.'"⁸⁹⁷

(ii) *Meaning of "relating to" and "primarily aimed at"*

630. In interpreting the term "relating to" under Article XX(g), the Appellate Body noted that all the parties and participants to the appeal agreed that the term "relating to" was equivalent to "primarily aimed at":

"All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).⁸⁹⁸ Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."⁸⁹⁹

631. The Panel on *US – Gasoline* found that "being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources." The Appellate Body criticised the Panel analysis which had focused on whether the discriminatory aspect of the United States measure was related to the stated policy goal. See paragraph 629 above. The Appellate Body then opined that the Panel had transposed the concept of "necessary" from Article XX(b) into its analysis under Article XX(g):

"[T]he Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not "necessary" for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be "necessary" under Article XX(b) since alternative measures either consistent or less inconsistent with the *General Agreement* were reasonably available to the United States for achieving its aim of protecting human, animal or plant life.⁹⁰⁰ In other words, the Panel Report appears to have applied the "necessary" test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g)."⁹⁰¹

632. In reversing the Panel's findings on Article XX(g), the Appellate Body began by recalling the principles of treaty interpretation and comparing the terms used in each paragraph of Article XX. See the quote referenced in paragraph 579 above. The Appellate Body subsequently considered the relationship between Article III:4 and Article XX:

"Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."⁹⁰²

633. The Appellate Body on *US – Gasoline* finally examined whether the United States baseline establish-

⁸⁹⁷ Appellate Body Report on *US – Gasoline*, p. 16. See also paragraphs 606 and 623 of this Chapter.

⁸⁹⁸ (*footnote original*) We note that the same interpretation has been applied in two recent unadopted panel reports: *US – Tuna (EEC)*; *US – Taxes on Automobiles*.

⁸⁹⁹ Appellate Body Report on *US – Gasoline*, p. 18.

⁹⁰⁰ (*footnote original*), Panel Report, paras. 6.25–6.28.

⁹⁰¹ Appellate Body Report on *US – Gasoline*, p. 16.

⁹⁰² Appellate Body Report on *US – Gasoline*, p. 18.

ment rules were appropriately regarded as “primarily aimed at” the conservation of natural resources within the meaning of Article XX(g). The Appellate Body answered this question in the affirmative:

“The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the ‘non-degradation’ requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the ‘non-degradation’ requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule’s objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the ‘non-degradation’ requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).”⁹⁰³

634. In *US – Shrimp*, in holding that the United States measure was “primarily aimed at” the conservation of natural resources, the Appellate Body opined that the measure was not a “simple, blanket prohibition” and that a reasonable “means and ends relationship” existed between the measure and the policy of natural resource conservation:

“In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one.

In our view, therefore, Section 609 is a measure ‘relating to’ the conservation of an exhaustible natural resource

within the meaning of Article XX(g) of the GATT 1994.”⁹⁰⁴

635. With respect to GATT practice on the term “relating to” under Article XX(g), see GATT Analytical Index, pages 583–585.

(c) “measures made effective in conjunction with”

636. In *US – Gasoline*, the Appellate Body described the term “measures made effective in conjunction with” as a “requirement of *even-handedness* in the imposition of restrictions”:

“Viewed in this light, the ordinary or natural meaning of ‘made effective’ when used in connection with a measure – a governmental act or regulation – may be seen to refer to such measure being ‘operative’, as ‘in force’, or as having ‘come into effect.’ Similarly, the phrase ‘in conjunction with’ may be read quite plainly as ‘together with’ or ‘jointly with.’ Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause ‘if such measures are made effective in conjunction with restrictions on domestic product or consumption’ is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”⁹⁰⁵

637. The Appellate Body made clear that the “requirement of *even-handedness*” embodied in Article XX(g) did not amount to a requirement of “identity of treatment”:

“There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment – constituting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline,

⁹⁰³ Appellate Body Report on *US – Gasoline*, p. 19.

⁹⁰⁴ Appellate Body Report on *US – Shrimp*, paras. 141–142.

⁹⁰⁵ Appellate Body Report on *US – Gasoline*, p. 20.

providing for – generally speaking – individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of ‘dirty’ gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded ‘less favourable treatment’ than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of ‘domestic production or consumption.’”⁹⁰⁶

638. The Appellate Body further rejected the argument that the term “made effective” was designed to require an “empirical effects test” and that the measure at issue had to produce some measurable “positive effects”:

“We do not believe . . . that the clause ‘if made effective in conjunction with restrictions on domestic production or consumption’ was intended to establish an empirical ‘effects test’ for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been ‘primarily aimed at’ conservation of natural resources at all.”⁹⁰⁷

639. Citing its own finding in *US – Gasoline* that the phrase “if such measures are made effective in conjunction with restrictions on domestic product or consumption” in Article XX(g) was a “requirement of *even-handedness*” (see paragraph 636 above), the Appellate Body in *US – Shrimp* held that the United States measure at issue was justified under Article XX(g):

“We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls. These

regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs ‘in areas and at times when there is a likelihood of intercepting sea turtles’, with certain limited exceptions. Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions. The United States government currently relies on monetary sanctions and civil penalties for enforcement. The government has the ability to seize shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations. We believe that, in principle, Section 609 is an even-handed measure.

Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).”⁹⁰⁸

(d) Reference to GATT practice

640. With respect to GATT practice on the term “measures made effective in conjunction with” under Article XX(g), see GATT Analytical Index, pages 586–587.

XXII. ARTICLE XXI

A. TEXT OF ARTICLE XXI

Article XXI *Security Exceptions*

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

⁹⁰⁶ Appellate Body Report on *US – Gasoline*, p. 21.

⁹⁰⁷ Appellate Body Report on *US – Gasoline*, p. 21.

⁹⁰⁸ Appellate Body Report on *US – Shrimp*, paras. 144–145.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

641. With respect to GATT practice on Article XXI, see GATT Analytical Index, pages 600–606.

XXIII. ARTICLE XXII

A. TEXT OF ARTICLE XXII

*Article XXII
Consultation*

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

642. The following table lists the disputes, up to 31 December 2004, in which panel and/or Appellate Body reports have been adopted where Article XXII of the GATT 1994 was invoked:

Case Name	Case Number	Invoked Articles
1 <i>US – Gasoline</i>	WT/DS2	XXII:1
2 <i>Japan – Alcoholic Beverages II</i>	WT/DS8, WT/DS10, WT/DS11	XXII
3 <i>EC – Hormones</i>	WT/DS26, WT/DS48	XXII
4 <i>Indonesia – Autos</i>	WT/DS54, WT/DS55, WT/DS59, WT/DS64	XXII:1 XXII
5 <i>Argentina – Textiles and Apparel</i>	WT/DS56	XXII:1
6 <i>US – Shrimp</i>	WT/DS58	XXII:1
7 <i>EC – Computer Equipment</i>	WT/DS62, WT/DS67, WT/DS68	XXII:1
8 <i>Korea – Alcoholic Beverages</i>	WT/DS75, WT/DS84	XXII
9 <i>Chile – Alcoholic Beverages</i>	WT/DS87, WT/DS110	XXII:1
10 <i>India – Quantitative Restrictions</i>	WT/DS90	XXII:1

Table (*cont.*)

Case Name	Case Number	Invoked Articles
11 <i>Canada – Dairy</i>	WT/DS103, WT/DS113	XXII:1
12 <i>Argentina – Footwear (EC)</i>	WT/DS121	XXII
13 <i>EC – Asbestos</i>	WT/DS135	XXII
14 <i>US – Lead and Bismuth II</i>	WT/DS138	XXII:1
15 <i>India – Autos</i>	WT/DS146, WT/DS175	XXII:1
16 <i>US – Section 301 Trade Act</i>	WT/DS152	XXII:1
17 <i>Argentina – Hides and Leather</i>	WT/DS155	XXII
18 <i>Korea – Various Measures on Beef</i>	WT/DS161, WT/DS169	XXII
19 <i>US – 1916 Act (Japan)</i>	WT/DS162	XXII:1
20 <i>US – Certain EC Products</i>	WT/DS165	XXII:1
21 <i>US – Wheat Gluten</i>	WT/DS166	XXII:1
22 <i>Canada – Patent Term</i>	WT/DS170	XXII
23 <i>US – Lamb</i>	WT/DS177, WT/DS178	XXII:1
24 <i>US – Hot-Rolled Steel</i>	WT/DS184	XXII
25 <i>US – Export Restraints</i>	WT/DS194	XXII
26 <i>US – Line Pipe</i>	WT/DS202	XXII:1
27 <i>US – Steel Plate</i>	WT/DS206	XXII
28 <i>US – Offset Act (Byrd Amendment)</i>	WT/DS217, WT/DS234	XXII
29 <i>US – Section 129(c)(1)URAA</i>	WT/DS221	XXII
30 <i>EC – Sardines</i>	WT/DS231	XXII
31 <i>US – Softwood Lumber III</i>	WT/DS236	XXII
32 <i>US – Corrosion-Resistant Steel Sunset Review</i>	WT/DS244	XXII
33 <i>US – Steel Safeguards</i>	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	XXII
34 <i>US – Softwood Lumber IV</i>	WT/DS257	XXII
35 <i>US – Softwood Lumber V</i>	WT/DS264	XXII
36 <i>Canada – Wheat Exports and Grain Imports</i>	WT/DS276	XXII

643. Concerning how the requirement of consultations has been applied under other WTO agreements, see for example, Article 4 of the Chapter on the DSU, Article 6.11 of the Chapter on the ATC, Article 17 of the Chapter on the *Anti-Dumping Agreement*.

XXIV. ARTICLE XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

(footnote original) ¹ By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

1. General

(a) Relationship between Articles XXIII:1(a) and XXIII:1(b)

644. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In response, the European Communities raised preliminary objections, arguing on two grounds that the measure fell outside the scope of application of Article XXIII:1(b). The Panel rejected both objections. In addressing the European Communities appeal against the Panel's rejection of these preliminary objections, the Appellate Body explained the relationship between Articles XXIII:1(a) and XXIII:1(b):

"Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has 'nullified or impaired' 'benefits' accruing to another Member, 'whether or not that measure conflicts with the provisions' of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as 'non-violation' cases; we note, though, that the word 'non-violation' does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* . . . in the following terms:

'The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.⁹⁰⁹ (emphasis added)'⁹¹⁰

⁹⁰⁹ Panel Report on *EEC – Oilseeds I*, para. 144.

⁹¹⁰ Appellate Body Report on *EC – Asbestos*, para. 185.

2. Article XXIII:1(b)

(a) Overview of the non-violation complaint

645. In *EC – Asbestos*, Canada claimed that the French ban on the sale and import of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Appellate Body stated that “[l]ike the panel in [*Japan – Film*], we consider that the remedy in Article XXIII:1(b) ‘should be approached with caution and should remain an exceptional remedy.’”⁹¹¹ The Appellate Body went on to refer to the Panel’s finding in *Japan – Film* referenced in paragraph 646 below.

646. In *Japan – Film*, the United States argued, under Article XIII:1(b) of GATT 1994, that certain Japanese “measures”, relating to commercial distribution of photographic film and paper, large retail stores and sales promotion techniques nullified or impaired benefits accruing to the United States based on tariff concessions made by Japan in the course of three rounds of multilateral trade negotiations. In addressing the United States’ claims, the Panel made a general statement about the significance of the non-violation remedy within the WTO/GATT legal framework, holding that “the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept”:

“Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been ‘on the books’ for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.⁹¹² This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.⁹¹³ The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.”⁹¹⁴

(b) Purpose

647. The Panel on *Japan – Film* elaborated upon the purpose of Article XXIII:1(b) as follows:

“[The purpose of Article XXIII:1(b) is] to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member’s legitimate expectations of benefits from tariff negotiations.”⁹¹⁵⁹¹⁶

(c) Scope

648. In *EC – Asbestos*, the Appellate Body rejected the European Communities argument that Article XXIII:1(b) only applies to measures which do not otherwise fall under other provisions of the *GATT 1994*. The Appellate Body emphasized the phrase, contained in Article XXIII:1(b), “whether or not [the measure] conflicts with the provisions of this Agreement”:

“The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a ‘benefit’ is being ‘nullified or impaired’ through the ‘application . . . of any measure, whether or not it conflicts with the provisions of this Agreement’. (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), even if the measure ‘conflicts’ with some substantive provisions of the *GATT 1994*. It follows that a measure may, at one and the same time, be inconsistent with, or in breach of, a provision of the *GATT 1994* and, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure ‘conflicts’ with a provision of the *GATT 1994*, that measure must actually fall within the scope of application of that provision of the *GATT 1994*. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the *GATT 1994*.⁹¹⁷ Accordingly, we decline the European Communities’ first ground of appeal under Article XXIII:1(b) of the *GATT 1994*.”⁹¹⁸

649. In *EC – Asbestos*, the Appellate Body further rejected the European Communities argument that it is possible to have “legitimate expectations” only in

⁹¹¹ Appellate Body Report on *EC – Asbestos*, para. 186.

⁹¹² (footnote original) Report of the Working Party on *Australia – Ammonium Sulphate*; Panel Report on *Germany – Sardines*; [Panel Report on] *Uruguay – Recourse to Article XXIII*; [Panel Report on] *EC – Citrus*; [Panel Report on] *EEC – Canned Fruit*; [Panel Report on] *Japan – Semi-Conductors*; *EEC – Oilseeds I*; [Panel Report on] *US – Sugar Waiver*.

⁹¹³ (footnote original) In *EEC – Oilseeds I*, the United States stated that it “concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept”. *EEC – Oilseeds I*, para. 114. The EEC in that case stated that “recourse to the ‘non-violation’ concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty”. *Ibid.*, para. 113.

⁹¹⁴ Panel Report on *Japan – Film*, para. 10.36.

⁹¹⁵ (footnote original) GATT Panel Report on *EEC – Oilseeds I*, para. 144.

⁹¹⁶ Panel Report on *Japan – Film*, para. 1050.

⁹¹⁷ (footnote original) See Panel Report, para. 8.263, which refers to the Panel Report in *Japan – Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and *EEC – Oilseeds*, *supra*, footnote 186, para. 144.

⁹¹⁸ Appellate Body Report on *EC – Asbestos*, para. 187.

connection with a purely “commercial measure” unlike the measure at issue, which had allegedly been taken to protect human life or health. The Appellate Body stated that “the text [of Article XXIII:1(b)] does not distinguish between, or exclude, certain types of measures” and that such distinctions would be “very difficult in practice”

“[W]e look to the text of Article XXIII:1(b), which provides that ‘the application by another Member of *any measure*’ may give rise to a cause of action under that provision. The use of the word ‘any’ suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities’ argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).

In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only ‘commercial’ measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a ‘non-commercial’ measure.”⁹¹⁹

(d) Test under Article XXIII:1(b)

650. In *Japan – Film*, the Panel summarized the elements of a non-violation case:

“The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.”⁹²⁰

651. In *EC – Asbestos*, the Panel followed the three part test of the *Japan – Film* Panel.⁹²¹ The Appellate Body did not deal with the Panel’s ultimate finding on the substance of the claim under Article XXIII:1(b).

(e) Burden of proof

652. The Panel on *Japan – Film* explained that the burden of proof under Article XXIII:1(b) falls upon the complaining party:

“Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the

Appellate Body ruling that ‘precisely how much and precisely what kind of evidence will be required to establish . . . a presumption [that what is claimed is true] will necessarily vary from . . . provision to provision’, we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption.”⁹²²

653. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). The Panel’s finding on the burden of proof, which was not appealed, was that “with respect to its claims of non-violation, Canada bears the primary burden of presenting a detailed justification for its claims.”⁹²³⁹²⁴ In support of its proposition, with reference to Article 26.1 of the DSU, the Panel cited the finding of the panel on *Japan – Film* referenced in paragraph 652 above.⁹²⁵

654. In *EC – Asbestos*, Canada argued, citing the Appellate Body Report on *India – Patent (US)*⁹²⁶ and the Panel Report on *Japan – Film*⁹²⁷, that when a complainant proves that it enjoys a tariff concession and the respondent subsequently adopts a measure that affects the value of this concession, the complainant benefits from the presumption that it could not reasonably anticipate that this concession would be nullified or otherwise impaired by this measure. The Panel, in a finding not reviewed by the Appellate Body, rejected this argument, stating that the introduction of a measure affecting the value of the concession is only one of the elements of a non-violation claim and added that “the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment” and that “situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations”:

“We do not consider that Canada has correctly interpreted the Panel report in *Japan – Film*. First of all, the presumption to which the Panel refers is that, if it is

⁹¹⁹ Appellate Body Report on *EC – Asbestos*, paras. 188–189.

⁹²⁰ Panel Report on *Japan – Film*, para. 10.41. See also Panel Report on *Korea – Procurement*, para. 7.85.

⁹²¹ Panel Report on *EC – Asbestos*, para. 8.283.

⁹²² Panel Report on *Japan – Film*, para. 10.32.

⁹²³ Previous Panels have not defined the precise scope of the concept of detailed justification.

⁹²⁴ Panel Report on *EC – Asbestos*, para. 8.278.

⁹²⁵ Panel Report on *EC – Asbestos*, para. 8.277.

⁹²⁶ Appellate Body Report on *India – Patents (US)*, para. 41.

⁹²⁷ Panel Report on *Japan – Film*, para. 10.79.

shown that a measure has been introduced after the conclusion of the tariff negotiations in question, then the complainant should not be considered as having anticipated that measure, which is only one of the tests applied by the Panel. Moreover, if the interpretation of the burden of proof suggested by Canada were followed, the obligation to present a detailed justification for which Article 26.1(a) provides might in certain cases be evaded. Accordingly, we do not follow the interpretation proposed by Canada but the rule laid down in *Japan – Film*.

Furthermore, in the light of our reasoning in paragraph 8.272 above, we consider that the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment. By creating the right to invoke exceptions in certain circumstances, Members have recognized *a priori* the possibility that the benefits they derive from certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. This situation is different from that in which a Member takes a measure of a commercial or economic nature such as, for example, a subsidy or a decision organizing a sector of its economy, from which it expects a purely economic benefit. In this latter case, the measure remains within the field of international trade. Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b).

Consequently, the Panel concludes that because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations and whether or not the initial Decree could be reasonably anticipated.⁹²⁸

655. Further, the Panel stated that the burden of proof for a claim concerning a concession which had been made a long time previously “must be all the heavier inasmuch as the intervening period has been so long”:

“[W]e consider that in view of the time that elapsed between those concessions and the adoption of the Decree (between 50 and 35 years), Canada could not assume that, over such a long period, there would not be advances in medical knowledge with the risk that one day a product would be banned on health grounds. For this reason, too, we also consider that the presumption applied in *Japan – Film* cannot be applied to the concessions granted in 1947 and 1962. Any other interpretation would extend the scope of the concept of non-violation nullification well beyond that envisaged by

the Panel in *Japan – Film*. On the contrary, it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned. In the present case, the burden of proof must be all the heavier inasmuch as the intervening period has been so long. Indeed, it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier.”⁹²⁹

(f) “measure”

656. In the Panel on *Japan – Film*, Japan argued that a measure, in order to be classified as such, must provide a benefit or impose a legally binding obligation. The Panel stated that even non-binding actions “can potentially have adverse effects on competitive conditions of market access”:

“[A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria.”⁹³⁰

657. The Panel on *Japan – Film* noted that the *WTO Agreement* is an international agreement signed by national governments and customs territories. According to the Panel, the term “measure” in Article XXIII:1(b) and Article 26.1 of the DSU “refers only to policies or actions of governments, not those of private parties.”⁹³¹

658. The Panel on *Japan – Film* held that the non-violation remedy is limited to measures that are currently being applied and found confirmation for this finding in GATT/WTO precedent:

“The text of Article XXIII:1(b) is written in the present tense, viz. ‘If any Member should consider that any benefit *accruing* to it directly or indirectly under this Agreement is being nullified or impaired . . . as the result of . . . (b) the application by another Member of any measure,

⁹²⁸ Panel Report on *EC – Asbestos*, paras. 8.280–282.

⁹²⁹ Panel Report on *EC – Asbestos*, para. 8.292.

⁹³⁰ Panel Report on *Japan – Film*, para. 10.49.

⁹³¹ Panel Report on *Japan – Film*, para. 10.52.

whether or not it *conflicts* with the provisions of this Agreement'. It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, 'whether or not it conflicts' (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.

Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn.⁹³² In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.⁹³³

[W]e do not rule out the possibility that *old* "measures" that were never officially revoked may continue to be applied through continuing administrative guidance. Similarly, even if measures were officially revoked, the underlying policies may continue to be applied through continuing administrative guidance. However, the burden is on the United States to demonstrate clearly that such guidance does in fact exist and that it is currently nullifying or impairing benefits."⁹³⁴

(g) "benefit"

659. In *Japan – Film*, the Panel examined whether the benefits legitimately expected by a Member can be derived from successive rounds of tariff negotiations. The Panel recalled that in all GATT cases dealing with Article XXIII:1(b), except one, the claimed benefit was that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.⁹³⁵ The Panel referred to Article 1(b)(i) of the *GATT 1994* and went on to state that "[t]he conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports":

"GATT 1994 incorporates both 'protocols and certifications relating to tariff concessions' under paragraph 1(b)(i) and 'the Marrakesh Protocol to GATT 1994' under paragraph 1(d). The ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.

Where tariff concessions have been progressively improved, the benefits – expectations of improved market access – accruing directly or indirectly under different tariff concession protocols incorporated in GATT

1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US – Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.

The conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports.⁹³⁶ The panel in *EEC – Canned Fruit* found that the United States had a reasonable expectation arising from the EEC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions (even though the panel separately found that the United States could have anticipated certain subsidies in respect of the Tokyo Round tariff concessions).⁹³⁷ And the *EEC – Oilseeds* panel found that the United States had a reasonable expectation arising from the EEC's 1962 Dillon Round tariff concessions.⁹³⁸ As the United States points out, these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules."⁹³⁹

⁹³² (*footnote original*) See Panel Report on *US – Gasoline*, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina – Footwear, Textiles and Apparel*, pp. 84–86.

⁹³³ (*footnote original*) See, e.g., Panel Report on *US – Wool Shirts and Blouses*, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC – Measure on Animal Feed Proteins*, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States – Prohibitions on Imports of Tuna and Tuna Products from Canada*, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC – Restrictions on Imports of Apples from Chile*, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

⁹³⁴ Panel Report on *Japan – Film*, paras. 10.57–10.59.

⁹³⁵ Panel Report on *Japan – Film*, para. 10.62. The Panel cited GATT Panel Reports on *Australia – Ammonium Sulphate*; *Germany – Sardines*; *Uruguay – Recourse to Article XXIII*; *EC – Citrus*; *EEC – Canned Fruit*; *Japan – Semi-Conductors*; *EEC – Oilseeds I*; *US – Sugar Waiver*. The Panel then stated as follows:

"Only in *EC – Citrus Products* did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 ('most-favoured-nation') treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries."

⁹³⁶ (*footnote original*) See Panel Reports on *EEC – Canned Fruit*; and *EEC – Oilseeds I*.

⁹³⁷ (*footnote original*) Panel Report on *EEC – Canned Fruit*, para. 54.

⁹³⁸ (*footnote original*) Panel Report on *EEC – Oilseeds I*, paras. 144–146.

⁹³⁹ Panel Report on *Japan – Film*, paras. 10.64–10.66.

660. After making the finding referenced in paragraph 659 above, the Panel on *Japan – Film* then quoted with approval the following excerpt from the GATT Panel Report on *EEC – Oilseeds I*:

“In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstatement of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962’.”⁹⁴⁰

661. The Panel on *Japan – Film* ultimately reached the following conclusion:

“We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIIIbis negotiations.”⁹⁴¹

662. The Panel on *EC – Asbestos* held, in a statement not reviewed by the Appellate Body:

“[T]he Panel in *Japan – Film* recalled that, with only one exception, in all the previous cases in which Article XXIII:1(b) was invoked the benefit claimed consisted in the legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions. We first need to know what benefit Canada could legitimately have expected from the Community concessions on chrysotile asbestos. We note, however, that previous panels approached the question differently, insofar as they appear to have assumed the existence of a benefit in the form of improved market access opportunities and then considered whether a party could have had a *legitimate expectation* of a given benefit.”⁹⁴²

(h) Legitimate expectations

663. In *Japan – Film*, the Panel examined whether the United States could not have anticipated that the benefits related to improved market access would be offset by the subsequent application of a measure by Japan. The Panel held that if measures were anticipated, no legitimate expectations of improved market access could exist with respect to the impairment caused by these anticipated measures:

“As suggested by the 1961 report,⁹⁴³ in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.

Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan.”⁹⁴⁴

664. The Panel on *Japan – Film* then considered the standard by which to ascertain the existence of “reasonable anticipation”. Where measures had been introduced after tariff negotiations had taken place, the Panel held that a presumption would exist that the United States, the complaining party, should not be held to have anticipated these measures:

“We consider that the issue of reasonable anticipation should be approached in respect of specific ‘measures’ in light of the following guidelines. First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. As in the

⁹⁴⁰ Panel Report on *EC – Oilseeds I*, para. 146, quoted in Panel Report on *Japan – Film*, para. 10.67.

⁹⁴¹ Panel Report on *Japan – Film*, para. 10.70.

⁹⁴² Panel Report on *EC – Asbestos*, para. 8.285.

⁹⁴³ The “1961 report” referenced to is the GATT Panel Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201.

⁹⁴⁴ Panel Report on *Japan – Film*, paras. 10.76–10.77.

*EEC – Oilseeds case*⁹⁴⁵, we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures, such as ‘measures’ to improve what Japan describes as the inefficient Japanese distribution sector. Indeed, if a Member were held to anticipate all GATT-consistent measures, a non-violation claim would not be possible. Nor do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members’ markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis.”⁹⁴⁶

665. After holding that “the issue of reasonable anticipation needs to be addressed on a case-by-case basis” and that it was “not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy”, the Panel on *Japan – Film* held that with respect to measures introduced prior to the conclusion of the tariff negotiations at issue, a presumption would exist that the complaining party “should be held to have anticipated those measures”:

“[I]n the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. We realize that knowledge of a measure’s existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure’s relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States’ legitimate expectations of benefits from these three Rounds. A simple statement that a Member’s measures were so opaque and informal that their impact could not be assessed is not sufficient. While it is true that in most past non-violation cases, one could easily discern a clear link between a product-specific action and the effect on the tariff concession that it allegedly impaired, one can also discern a link between general measures affecting the internal sale and distribution of products, such as rules on advertising and premiums, and tariff concessions on products in general.”⁹⁴⁷

666. In *EC – Asbestos*, in examining a non-violation claim by Canada, the Panel decided to assess whether the measure in question could reasonably have been anticipated, as referenced in paragraph 654 above. With regard to what factors should *not* be taken into account to answer this question, the Panel considered, in a finding subsequently not reviewed by the Appellate Body:

“[P]revious panels found that a number of elements were not relevant. We consider it necessary to assess their applicability in relation to the circumstances of the present case.

(a) First of all, we note that the reports in *Japan – Film* and *EEC – Oilseeds* concluded that a specific measure could not be considered foreseeable solely because it was consistent with or a continuation of a past general government policy. However, we note that, in contrast to the two cases mentioned above, France had already developed a specific policy in response to the health problems created by asbestos before the adoption of the Decree. This factor must certainly be taken into account in our analysis.”⁹⁴⁸

(b) The Panel in *Japan – Film*, also concluded that it would not be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures. Consequently, we do not consider that Canada reasonably anticipated all GATT-consistent measures, or even possible measures justifiable under Article XX.

(c) Finally, insofar as the Decree postdates the most recent tariff negotiations, we could apply the presumption applied by the Panel in *Japan – Film*, according to which normally Canada should not be considered to have anticipated a measure introduced after the tariff concession had been negotiated. However, we do not consider such a presumption to be consistent with the standard of proof that we found to be applicable in paragraph 8.272 above in the case of an allegation of non-violation nullification concerning measures falling under Article XX of the GATT 1994.”⁹⁴⁹

667. After listing some of the elements which it considered should not be taken into account when deter-

⁹⁴⁵ (footnote original) Panel Report on *EEC – Oilseeds I*, paras. 147 and 148.

⁹⁴⁶ Panel Report on *Japan – Film*, para. 10.79.

⁹⁴⁷ Panel Report on *Japan – Film*, paras. 10.76–10.77 and 10.79–10.80.

⁹⁴⁸ (footnote original) In our opinion, there is a difference between, on the one hand, an import ban following upon a series of national measures gradually reinforcing, since 1977, the measures taken to protect public health against the effects of asbestos and, on the other, the relationship which the EC tried to establish in *EEC – Oilseeds* between the existence in 1962 of oil-seeds subsidies in certain member States of the European Communities and the development of a subsidy programme insulating oil-seed producers from competition from imports (see para. 149 of the panel report).

⁹⁴⁹ Panel Report on *EC – Asbestos*, para. 8.291.

mining the existence of legitimate expectations, the Panel on *EC – Asbestos* distinguished the case before it from that in *Japan – Film*:

“Moreover, the circumstances of the present case seem to us to be different from the situation envisaged in *Japan – Film*. In that case, the measures in question concerned the organization of the Japanese domestic market. They were therefore economic measures of a kind that a third country might find surprising and, accordingly, difficult to anticipate. Here, it is a question of measures to protect public health under Article XX(b), that is to say, measures whose adoption is expressly envisaged by the GATT 1994. We therefore consider that the presumption applied in *Japan – Film* is not applicable to the present case.”⁹⁵⁰

668. Following the finding referenced in paragraphs 666–667 above, in deciding that Canada had no legitimate expectations of maintaining or even developing its exports of certain asbestos products at the conclusion of the Uruguay Round, the Panel on *EC – Asbestos* noted that the increasing evidence showing the hazardous nature of asbestos and the growing number of international and Community decisions concerning the use of asbestos “could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos”:

“As we have found . . . the presumption applied by the Panel in *Japan – Film* cannot be applied to the present case.⁹⁵¹ Unlike Canada, which claims that no recent scientific development could have made the measure foreseeable, we consider that there is evidence to show that regulations restricting the use of asbestos could have been anticipated. First of all, the hazardous nature of chrysotile has long been known. . . .

Moreover, in the light of the information submitted by the parties and the experts, we consider that the study of the diseases associated with the inhalation of asbestos is a field of science in which any possible conclusion would appear to be based on the observation of pathological cases day by day. . . .

On the other hand, the accumulation of international and Community decisions concerning the use of asbestos, even if it did not necessarily make it certain that the use of asbestos would be banned by France, could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos. We also note that the use of chrysotile asbestos was banned by Members of the WTO well before it was banned by France. Admittedly, in *Japan – Film* the Panel considered that the adoption in other

Members’ markets of measures similar to the measures in question could not make the latter foreseeable. However, here again it was a question of commercial measures. We consider that in the present case the situation is different since it concerns public health and the competent international organizations have already taken a position on the question. The adoption, in an already restrictive context, of public health measures by other States, faced with a social and economic situation similar to that in France, creates an environment in which the adoption of similar measures by France, is no longer unforeseeable.

Moreover, as noted above, at the end of the Uruguay Round France already had in place a number of measures regulating the use of asbestos. These included, in particular, measures relating to the exposure of workers taken after asbestos was recognized as a carcinogen by the IARC (Decree 77–949 of 17 August 1977) and the adoption of ILO Convention 162, as well as for the purpose of implementing Community directives applicable. The Panel also notes that Decree 88–466 of 28 April 1988 on products containing asbestos had prohibited the use of chrysotile asbestos in the manufacture of certain products.⁹⁵² ⁹⁵³

669. The Panel on *Korea – Procurement*, referring to the finding of the Appellate Body in *EC – Computer Equipment*, discussed the relevance of negotiation history in addressing issues of reasonable or legitimate expectation in cases relating to non-violation:

“At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities – Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that in a non-violation case the relevant question is what was the reasonable expectation of the complaining party. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.⁹⁵⁴ This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations. It is

⁹⁵⁰ Panel Report on *EC – Asbestos*, para. 8.291.

⁹⁵¹ (*footnote original*) Even if it were applicable, we consider that the EC rebutted this presumption by their references to the systems established at international and Community level concerning the use of asbestos.

⁹⁵² (*footnote original*) See Annex II, reply of the European Communities to the Panel’s question No. 4 at the Second Meeting with the Parties, paras. 254 to 261.

⁹⁵³ Panel Report on *EC – Asbestos*, paras. 8.295–8.298.

⁹⁵⁴ (*footnote original*) Appellate Body Report on *EC – Computer Equipment* at paragraphs 81–84, 93.

also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ.”⁹⁵⁵

670. With respect to the issue of legitimate expectations in the context of violation complaints, see Chapter on the *DSU*, Section XXIII.B.2.

(i) “nullified or impaired”

671. In *Japan – Film*, the Panel examined the third element required for a claim of non-violation, i.e. “nullification and impairment”. The Panel equated “nullification and impairment” with “upsetting the competitive relationship” between domestic and imported products and held that the complaining party “must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships”:

“[I]t must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* (‘nullified or impaired . . . as the result of’) the application of a measure not reasonably anticipated. The equation of ‘nullification or impairment’ with ‘upsetting the competitive relationship’ established between domestic and imported products as a result of tariff concessions has been consistently used by GATT panels examining non-violation complaints. For example, the *EEC – Oilseeds* panel, in describing its findings, stated that it had ‘found . . . that the subsidies concerned had impaired the tariff concession because they *upset the competitive relationship between domestic and imported oilseeds*, not because of any effect on trade flows’.⁹⁵⁶ The same language was used in the *Australian Subsidy* and *Germany – Sardines* cases. Thus, in this case, it is up to the United States to prove that the governmental measures that it cites have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships.

672. The Panel on *Japan – Film* then sub-divided the issue of “causality” into four separate issues: the degree of causation, original-neutrality of the measure at issue, the relevance of intent with respect to causality and “the extent to which measures may be considered collectively in an analysis of causation”:

“As to the first issue . . . Japan should be responsible for what is caused by measures attributable to the Japanese

Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.

In respect of the second issue . . . even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for the United States to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure. And, the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.

We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I⁹⁵⁷ and in regard to that of national treatment under GATT Article II⁹⁵⁸ . . . We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.

The third issue is the relevance of intent to causality. . . . We note . . . that Article XXIII:1(b) does not require a proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e. whether it upsets competitive relationships. Nonetheless, intent may not be irrelevant. In our view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists.

⁹⁵⁵ Panel Report on *Korea – Procurement*, para. 7.75.

⁹⁵⁶ (footnote original) Follow-up on the GATT Panel Report on *EEC – Oilseeds*, BISD 39S/91, para. 77 (emphasis added).

⁹⁵⁷ (footnote original) See, e.g., Panel Report on *European Economic Community – Imports of Beef from Canada*, paras. 4.2, 4.3.

⁹⁵⁸ (footnote original) See Panel Reports on *US – Section 337*, para. 5.11; *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, paras. 5.12–5.14 and 5.30–5.31; *US – Malt Beverages*, para. 5.30; and Panel Reports on *US – Gasoline*, para. 6.10; *Japan – Alcoholic Beverages II*, para. 6.33; and *EC – Bananas III*, paras. 7.179–7.180.

Finally, as for the US position that the Panel should examine the impact of the measures *in combination* as well as individually (a position contested by Japan), we do not reject the possibility of such an impact. It is not without logic that a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of – in combination with – a larger set of measures. Notwithstanding the logic of this theoretical argument, however, we are sensitive to the fact that the technique of engaging in a combined assessment of measures so as to determine causation is subject to potential abuse and therefore must be approached with caution and circumscribed as necessary.”⁹⁵⁹

673. In *EC – Asbestos*, Canada claimed that the French ban on the sale and imports of products containing asbestos nullified or impaired benefits accruing to it under Article XXIII:1(b). In this regard, the Panel stated:

“[T]he Panel finds it appropriate to consider that in view of the type of measure in question the ‘upsetting of the competitive relationship’ can be assumed. By its very nature, an import ban constitutes a denial of any opportunity for competition, whatever the import volume that existed before the introduction of the ban. We will therefore concentrate on the question of whether the measure could reasonably have been anticipated by the Canadian Government at the time that it was negotiating the various tariff concessions covering the products concerned.”⁹⁶⁰

(j) Non-violation complaints in relation to the Agreement on Government Procurement

674. In *Korea – Procurement*, the Panel noted the three requirements enunciated by the Panel on *Japan – Film* as necessary for a claim of non-violation under Article XXIII:1(b). The Panel observed that the key difference between a traditional non-violation case and the case involving the *Agreement on Government Procurement* before it was that the question of “reasonable expectation” in a traditional non-violation case is whether or not it was reasonable to be expected that the benefit under an existing concession would be impaired by the measures, but in the instant case, the question was “whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession.” The Panel continued:

“[T]he non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which

might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU. The principle of *pacta sunt servanda* is expressed in Article 26 of the *Vienna Convention*⁹⁶¹ in the following manner:

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’”⁹⁶²

675. The Panel on *Korea – Procurement* then addressed the issue of “error in treaty negotiation”:

“One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda*. Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith.”⁹⁶³

676. The Panel on *Korea – Procurement* explained its decision to review the claim of nullification or impairment within the framework of principles of international law which are generally applicable not only to the performance of treaties but also to treaty negotiation as follows:

“[W]e will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.⁹⁶⁴ To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then

⁹⁵⁹ Panel Report on *Japan – Film*, paras. 10.83–10.88.

⁹⁶⁰ Panel Report on *EC – Asbestos*, para. 8.289.

⁹⁶¹ (*footnote original*) A reference to the rule of *pacta sunt servanda* also appears in the preamble to the Vienna Convention.

⁹⁶² Panel Report on *Korea – Procurement*, para. 7.93.

⁹⁶³ Panel Report on *Korea – Procurement*, para. 7.100.

⁹⁶⁴ (*footnote original*) We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel’s review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements.⁹⁶⁵

(k) Relationship with other WTO Agreements

(i) *Anti-Dumping Agreement*

677. With respect to the relationship between Article XXIII of the *GATT 1994* and Article 17 of the *Anti-*

Dumping Agreement, see the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *Anti-Dumping Agreement*.

3. Article XXIII:1(c)

No jurisprudence or decision of a competent WTO body.

4. Article XXIII:2

678. The following table lists the disputes, up to 31 December 2004, in which panel and/or Appellate Body reports have been adopted where the provisions of the *GATT 1994* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>US – Gasoline</i>	WT/DS2	Articles I, III and XX
2 <i>Japan – Alcoholic Beverages II</i>	WT/DS8, WT/DS10, WT/DS11	Articles III, III:1 and III:2
3 <i>Australia – Salmon</i>	WT/DS18	Articles XI
4 <i>Brazil – Desiccated Coconut</i>	WT/DS22	Articles I, II, VI:3, VI:6
5 <i>US – Underwear</i>	WT/DS24	Article X:2
6 <i>EC – Hormones</i>	WT/DS26, WT/DS48	Articles III and XX
7 <i>EC – Bananas III</i>	WT/DS27	Articles I, II, III, X, XI, XIII and XVIII
8 <i>Canada – Periodicals</i>	WT/DS31	Articles III and XI
9 <i>US – Wool Shirts and Blouses</i>	WT/DS33	Article XXIII:1(a)
10 <i>Turkey – Textiles</i>	WT/DS34	Articles XI, XIII and XXIV
11 <i>Japan – Film</i>	WT/DS44	Articles III:1, III:4, X:1, X:3 and XXIII:1(b)
12 <i>India – Patents (US)</i>	WT/DS50	Article XXXIII
13 <i>Indonesia – Autos</i>	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles I:1, III:2, III:4, III:7, X:1 and X:3(a)
14 <i>Argentina – Textiles and Apparel</i>	WT/DS56	Articles II, and VIII
15 <i>US – Shrimp</i>	WT/DS58	Articles I, XI, XIII and XX
16 <i>Guatemala – Cement I</i>	WT/DS60	Article VI
17 <i>EC – Computer Equipment</i>	WT/DS62, WT/DS67, WT/DS68	Article II
18 <i>EC – Poultry</i>	WT/DS69	Articles II, X and XIII
19 <i>Korea – Alcoholic Beverages</i>	WT/DS75, WT/DS84	Article III:2 and XX(d)
20 <i>Chile – Alcoholic Beverages</i>	WT/DS87, WT/DS110	Article III:2
21 <i>India – Quantitative Restrictions</i>	WT/DS90	Articles XI:1, XIII and XVIII:11
22 <i>Korea – Dairy</i>	WT/DS98	Article XIX
23 <i>US – DRAMS</i>	WT/DS99	Article X
24 <i>US – FSC</i>	WT/DS108	Article III:4
25 <i>Canada – Dairy</i>	WT/DS103, WT/DS113	Article II
26 <i>Argentina – Footwear (EC)</i>	WT/DS121	Articles XIX and XXIV
27 <i>Thailand – H-Beams</i>	WT/DS122	Article VI
28 <i>EC – Asbestos</i>	WT/DS135	Articles III, XI, XXIII:1(b) and XX(b)
29 <i>US – 1916 Act (EC)</i>	WT/DS136	Article VI
30 <i>Canada – Autos</i>	WT/DS139, WT/DS142	Articles I:1, III:4 and XXIV
31 <i>India – Autos</i>	WT/DS146, WT/DS175	Articles III:4 and XI:1
32 <i>Argentina – Hides and Leather</i>	WT/DS155	Articles III:2, XI:1 and X:3(a)
33 <i>Guatemala – Cement II</i>	WT/DS156	Article VI
34 <i>Korea – Various Measures on Beef</i>	WT/DS161, WT/DS169	Articles II, XI, XVII and XX
35 <i>US – 1916 Act (EC)</i>	WT/DS162	Articles III:4, VI and XI
36 <i>Korea – Procurement</i>	WT/DS163	Article XXIII
37 <i>US – Certain EC Products</i>	WT/DS165	Articles I, II, VIII and XI
38 <i>US – Wheat Gluten</i>	WT/DS166	Article XXIV
39 <i>US – Stainless Steel</i>	WT/DS179	Article X:3
40 <i>US – Lamb</i>	WT/DS177, WT/DS178	Articles I, II and XIX
41 <i>US – Hot-Rolled Steel</i>	WT/DS184	Articles VI and X
42 <i>US – Cotton Yarn</i>	WT/DS192	Article III
43 <i>US – Line Pipe</i>	WT/DS202	Articles XIII:2, XIII:2(a) and XIX
44 <i>US – Steel Plate</i>	WT/DS206	Article VI:1, VI:2

⁹⁶⁵ Panel Report on *Korea – Procurement*, para. 7.101.

Table (cont.)

Case Name	Case Number	Invoked Articles
45 <i>Chile – Price Band System</i>	WT/DS207	Articles II:1(b) and XIX:1(a)
46 <i>Egypt – Steel Rebar</i>	WT/DS211	Article X:3
47 <i>US – Offset Act (Byrd Amendment)</i>	WT/DS217; WT/DS234	Articles VI and X:3(a)
48 <i>EC – Tube or Pipe Fittings</i>	WT/DS219	Articles I and VI
49 <i>US – Section 129(c)(1)URAA</i>	WT/DS221	Articles VI:2, VI:3 and VI:6(a)
50 <i>EC – Sardines</i>	WT/DS231	Articles I, III and XI:1
51 <i>US – Softwood Lumber III</i>	WT/DS236	Article VI:3
52 <i>Argentina – Preserved Peaches</i>	WT/DS238	Article XIX:1
53 <i>US – Corrosion-Resistant Steel Sunset Review</i>	WT/DS244	Articles VI and X
54 <i>Japan – Apples</i>	WT/DS245	Article XI
55 <i>EC – Tariff Preferences</i>	WT/DS246	Article I:1
56 <i>US – Steel Safeguards</i>	WT/DS248; WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	Articles I, II, X:3, XIII and XIX
57 <i>US – Softwood Lumber IV</i>	WT/DS257	Articles VI and X:3(a)
58 <i>US – Softwood Lumber V</i>	WT/DS264	Articles VI:1, VI:2 and X:3
59 <i>Canada – Wheat Exports and Grain Imports</i>	WT/DS276	Articles III:4 and XVII
60 <i>US – Softwood Lumber VI</i>	WT/DS277	Article VI:6(a)

679. With respect to the practice under Article XXIII:2 in general, see Chapter on the *DSU*, Article 4, Article 6.1, Article 11 and Article 22.

5. Reference to GATT practice

680. With respect to GATT practice on Article XXIII, see GATT Analytical Index, pages 612–619.

PART III

XXV. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV

Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of

commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

- (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
- (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

- (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the

whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
- (c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them,

pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

B. TEXT OF AD ARTICLE XXIV

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

C. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26–28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs

union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan

and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

D. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

1. General

(a) Committee on Regional Trade Agreements

681. Pursuant to Article IV:7 of the *WTO Agreement*, on 6 February 1996, the General Council decided to establish the Committee on Regional Trade Agree-

ments.⁹⁶⁶ With respect to the establishment of the Committee, its rules of procedure and activities, including reports to the General Council, see the Chapter on the *WTO Agreement*, Section V.B.7(f).⁹⁶⁷ Also, with respect to the activities of the Committee concerning the examination of agreements notified under Article XXIV of the *GATT 1994*, see Section V.B.7(f)(iv).

(b) Enabling Clause

682. In 1979, the GATT Council adopted the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the “Enabling Clause”) to waive Article I of the GATT for certain arrangements, with respect to, *inter alia*, “[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs”. For the text of the Enabling Clause, see paragraph 29 above.

(c) Reference to GATT practice

683. With respect to GATT practice on this subject, see GATT Analytical Index, pages 53–59.

2. Article XXIV:4

(a) Relationship between paragraph 4 and paragraphs 5 to 9

684. In *Turkey – Textiles*, the Appellate Body reviewed the Panel’s finding that Article XXIV did not justify the imposition by Turkey of quantitative restrictions on imports of certain textile and clothing products from India upon the formation of a customs union with the European Communities. Although the key provision in this dispute was paragraph 5 of Article XXIV, the Appellate Body held that “paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5”⁹⁶⁸:

“According to paragraph 4, the purpose of a customs union is ‘to facilitate trade’ between the constituent members and ‘not to raise barriers to the trade’ with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. We note that [the preamble of] the *Understanding on Article XXIV* explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union, the constituent members should ‘to the greatest possible extent avoid creating adverse affects on the trade of other Members’. Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obliga-

tions that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5.”⁹⁶⁹

(b) “not to raise barriers to the trade of other contracting parties”

685. On the issue of whether parties to a regional trade agreement are required not to increase the barriers overall or rather not to raise any barrier, the Appellate Body identified paragraph 4 as an important element in the context of interpreting the text of the chapeau of paragraph 5, and it stated:

“According to paragraph 4, the purpose of a customs union is ‘to facilitate trade’ between the constituent members and ‘not to raise barriers to the trade’ with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries.”⁹⁷⁰

(c) Reference to GATT practice

686. With respect to GATT practice on this subject, see GATT Analytical Index, page 796.

3. Article XXIV:5

(a) Chapeau

(i) *Interpretation: the necessity test*

687. The Panel on *Turkey – Textiles* had found that Turkey could not justify a violation of Article XI by invoking Article XXIV:5, because Article XXIV:5, in the view of the Panel, does not apply to *specific measures* adopted on the occasion of the formation of a new customs union. Rather, the Panel found that Article XXIV:5 focuses on the *overall effect* of a regional agreement. As a result, the Panel concluded that there is no legal basis in Article XXIV:5(a) for the justification of individual quantitative restrictions which are otherwise incompatible with WTO law. Although the Appellate Body ultimately upheld the Panel’s finding that Turkey’s measures could not be justified under Article XXIV, it modified the Panel’s reasoning on Article XXIV:5. The Appellate Body began by emphasizing that the chapeau of Article XXIV:5 states that the provisions of GATT 1994 “shall not prevent” the formation of a customs union and that this meant “that the provisions of the

⁹⁶⁶ WT/GC/M/10, para.11. The decision can be found in WT/L/127.

⁹⁶⁷ WT/REG/M/2, para. 11. The text of the rules of procedures can be found in WT/REG/1. See also WT/REG/M/2, para. 12.

⁹⁶⁸ Appellate Body Report on *Turkey – Textiles*, para. 56.

⁹⁶⁹ Appellate Body Report on *Turkey – Textiles*, para. 57.

⁹⁷⁰ WT/DS34/AB/R, paras. 55–56.

GATT 1994 *shall not make impossible* the formation of a customs union”:

“[I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 ‘*shall not prevent*’ the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible ‘defence’ to a finding of inconsistency.⁹⁷¹

Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent ‘*the formation of a customs union*’. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.”⁹⁷²

688. The Appellate Body then indicated the two conditions under which a measure, otherwise incompatible with WTO law, could be justified by virtue of Article XXIV:

“[I]n a case involving the formation of a customs union, this ‘defence’ is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.

We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union.”⁹⁷³

689. The Appellate Body reiterated its findings from *Turkey – Textiles*, referenced in paragraphs 687–688 above, in its Report on *Argentina – Footwear (EC)*, when it examined the Panel’s finding that Argentina had violated Article 2 of the *Agreement on Safeguards* by includ-

ing imports from all sources in its investigation of “increased imports” of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures.⁹⁷⁴

(ii) *Reference to GATT practice*

690. With respect to GATT practice on this subject, see GATT Analytical Index, page 798.

(b) Paragraph 5(a)

(i) *Link with the chapeau*

691. In *Turkey – Textiles*, the Appellate Body held that “Article XXIV can . . . only be invoked as a defence . . . to the extent that the measure [at issue] is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a)”:

“[I]n examining the text of the chapeau of Article XXIV:5, we note that the chapeau states that the provisions of the GATT 1994 shall not prevent the formation of a customs union ‘*Provided that*’. The phrase ‘*provided that*’ is an essential element of the text of the chapeau. In this respect, for purposes of a ‘customs union’, the relevant proviso is set out immediately following the chapeau, in Article XXIV:5(a). . . .

Given this proviso, Article XXIV can, in our view, only be invoked as a defence to a finding that a measure is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in sub-

⁹⁷¹ (*footnote original*) We note that legal scholars have long considered Article XXIV to be an “exception” or a possible “defence” to claims of violation of GATT provisions. An early treatise on GATT law stated: “[Article XXIV] establishes an *exception to GATT obligations* for regional arrangements that meet a series of detailed and complex criteria.” (emphasis added) J. Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, 1969), p. 576. See also J. Allen, *The European Common Market and the GATT* (The University Press of Washington, D.C., 1960), p. 2; K. Dam, “Regional Economic Arrangements and the GATT: The Legacy of Misconception”, *University of Chicago Law Review*, 1963, p. 616; and J. Huber, “The Practice of GATT in Examining Regional Arrangements under Article XXIV”, *Journal of Common Market Studies*, 1981, p. 281. We note also the following statement in the unadopted panel report in *EEC – Member States’ Import Regimes for Bananas*, DS32/R, 3 June 1993, para. 358: “The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to *deviate from their obligations under other provisions of the General Agreement* for the purpose of forming a customs union” (emphasis added)

The chapeau of paragraph 5 refers only to the provisions of the GATT 1994. It does not refer to the provisions of the ATC. However, Article 2.4 of the ATC provides that “[n]o new restrictions . . . shall be introduced *except under* the provisions of this Agreement or *relevant GATT 1994 provisions*.” (emphasis added) In this way, Article XXIV of the GATT 1994 is incorporated in the ATC and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the ATC, provided that the conditions set forth in Article XXIV for the availability of this defence are met.

⁹⁷² Appellate Body Report on *Turkey – Textiles*, paras. 45–46.

⁹⁷³ Appellate Body Report on *Turkey – Textiles*, paras. 58–59.

⁹⁷⁴ Appellate Body Report on *Argentina – Footwear (EC)*, para. 109.

paragraph 5(a) of Article XXIV relating to the 'duties and other regulations of commerce' applied by the constituent members of the customs union to trade with third countries."⁹⁷⁵

(ii) "General incidence" of duties

692. With respect to the requirements for a WTO-compatible customs union, the Appellate Body in *Turkey – Textiles* noted that the term "general incidence" of duties referred to the applied rates of duties:

"With respect to 'duties', Article XXIV:5(a) requires that the duties applied by the constituent members of the customs union *after* the formation of the customs union 'shall *not* on the whole be *higher* . . . than the *general incidence*' of the duties that were applied by each of the constituent members before the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* requires that the evaluation under Article XXIV:5(a) of the *general incidence of the duties* applied before and after the formation of a customs union 'shall . . . be based upon an overall assessment of weighted average tariff rates and of customs duties collected.'⁹⁷⁶ Before the agreement on this Understanding, there were different views among the GATT Contracting Parties as to whether one should consider, when applying the test of Article XXIV:5(a), the *bound* rates of duty or the *applied* rates of duty. This issue has been resolved by paragraph 2 of the *Understanding on Article XXIV*, which clearly states that the *applied* rate of duty must be used."⁹⁷⁷

(iii) "Other regulations of commerce"

693. With respect to the term "other regulations of commerce", the Appellate Body held in *Turkey – Textiles*:

"With respect to 'other regulations of commerce', Article XXIV:5(a) requires that those applied by the constituent members *after* the formation of the customs union 'shall *not* on the whole be . . . *more restrictive* than the *general incidence*' of the regulations of commerce that were applied by each of the constituent members *before* the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* explicitly recognizes that the quantification and aggregation of regulations of commerce other than duties may be difficult, and, therefore, states that 'for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.'⁹⁷⁸"⁹⁷⁹

(iv) "Economic test"

694. On the issue of increase of barriers *vis-à-vis* third parties, the Panel in the *Turkey – Textiles* case found that:

"What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of

the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies and that paragraph 5(a) provided for an "'economic" test' for assessing compatibility."⁹⁸⁰

695. The Appellate Body on *Turkey – Textiles* agreed with the Panel that the test for assessing whether a specific customs union is compatible with Article XXIV is an economic one:

"We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the *Understanding on Article XXIV*, provide:

' . . . that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.'

and we also agree that this is:

'an 'economic' test for assessing whether a specific customs union is compatible with Article XXIV.'⁹⁸¹

696. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, which was found inconsistent with GATT Article I. The Panel, in a finding not reviewed by the Appellate Body, rejected this defence, noting that the import duty exemption was not granted to all products imported from the United States and Mexico and that it was also granted to products from countries other than the United States and Mexico:

"We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment

⁹⁷⁵ Appellate Body Report on *Turkey – Textiles*, paras. 51–52.

⁹⁷⁶ Paragraph 2 of the *Understanding on Article XXIV* further states that "this assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin."

⁹⁷⁷ Appellate Body Report on *Turkey – Textiles*, para. 53.

⁹⁷⁸ (*footnote original*) In paragraph 43 of its appellant's submission, Turkey argues that this provision must be interpreted as allowing the constituent members of a customs union to introduce GATT/WTO inconsistent quantitative restrictions upon the formation of the customs union. We see no basis for such an interpretation.

⁹⁷⁹ Appellate Body Report on *Turkey – Textiles*, para. 54.

⁹⁸⁰ WT/DS34/R, para. 9.121.

⁹⁸¹ Appellate Body Report on *Turkey – Textiles*, para. 55.

of imports from the United States and Mexico does not capture this aspect of the measure. In our view, Article XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.

We further note that the import duty exemption does not provide for duty-free importation of all like products originating in the United States or Mexico and that whether such products benefit from the exemption depends upon whether they are imported by certain motor vehicle manufacturers in Canada who are eligible for the exemption. While in view of the particular foreign affiliation of these manufacturers, the exemption will mainly benefit products of the United States and Mexico, products of certain producers in these countries who have no relationship with such manufacturers are unlikely to benefit from the exemption. Thus, in practice the import duty exemption does not apply to some products that would be entitled to duty-free treatment if such treatment were dependant solely on the fact that the products originated in the United States or Mexico. We thus do not believe that the import duty exemption is properly characterized as a measure which provides for duty-free treatment of imports of products of parties to a free-trade area.⁹⁸²

(c) Reference to GATT practice

697. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXIV, pages 798–810.

4. Article XXIV:7

(a) “Any contracting party . . . shall promptly notify the CONTRACTING PARTIES”

698. As of 31 December 2004, 310 regional trade agreements (RTAs) had been notified to the GATT/WTO⁹⁸³. Of these, 253 RTAs were notified under Article XXIV of the *GATT 1947* or *GATT 1994*; 21 under the Enabling Clause⁹⁸⁴ (see paragraph 682 above); and 36 under Article V of the *GATS*. By that same date, 160 agreements were in force (with the following breakdown, respectively: 111/21/28).^{985 986}

(b) Examination of agreements

699. Up to the establishment of the Committee on Regional Trade Agreements in February 1996, the examination of RTAs in accordance with paragraph 7 of Article XXIV of the *GATT 1994* and of the Understanding on the Interpretation of Article XXIV of the *GATT 1994* was carried out by individual working parties. As of the entry into force of the WTO, 14 working parties of the *GATT 1947* were in existence;⁹⁸⁷ from January 1995 up to February 1996, 12 additional working parties were established by either the Council

for Trade in Goods or the Council for Trade in Services.⁹⁸⁸

700. With respect to the *GATT 1947* working parties, the decision adopted by the General Council on 31 January 1995 on the Avoidance of Procedural and Institutional Duplication states:

“2. The coordination procedures set out in paragraphs 3 and 4 below shall apply in the relations between the bodies referred to in sub-paragraphs (a) to (d) below:

. . .

(c) The Working Parties established under the *GATT 1947* to examine a regional agreement or arrangement shall coordinate their activities with Working Parties of the WTO that examine the same regional agreement or arrangement.⁹⁸⁹

. . .

3. The bodies established under the *GATT 1947* or a Tokyo Round Agreement that are referred to in paragraph 2 above shall hold their meetings jointly or consecutively, as appropriate, with the corresponding WTO bodies. In meetings held jointly the rules of procedure to be applied by the WTO body shall be followed. The reports on joint meetings shall be submitted to the competent bodies established under the *GATT 1947*, the Tokyo Round Agreements and the WTO Agreement.

4. The coordination of activities in accordance with paragraph 3 above shall be conducted in a manner

⁹⁸² Panel Report on *Canada – Autos*, paras. 10.55–10.56.

⁹⁸³ This figure corresponds to notifications of new RTAs, as well as accessions to existing RTAs.

⁹⁸⁴ *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of the *GATT 1947* CONTRACTING PARTIES of 28 November 1979.

⁹⁸⁵ The trade-related aspects of a considerable number of RTAs previously in force were abrogated in 2004 as a consequence of the enlargement of the European Union to include ten new Member States on 1 May 2004.

⁹⁸⁶ Updated figures on the basis of WT/REG/14, Report (2004) of the Committee on RTAs.

⁹⁸⁷ Working Parties established to examine the following 14 regional trade agreements: Interim Agreements between the European Communities and the Czech Republic, Slovak Republic, Hungary and Poland (in one single WP); Free-Trade Agreements between the EFTA States and Israel, Romania, Bulgaria, Poland and Hungary; Free-Trade Agreements between Switzerland and Estonia, Latvia and Lithuania; MERCOSUR; the Central European Free-Trade Agreement; the North American Free-Trade Agreement; and the Free-Trade Agreements between Slovenia and the Czech Republic and the Slovak Republic.

⁹⁸⁸ The Council for Trade in Goods established ten Working Parties to examine the following agreements: European Communities and Bulgaria, Estonia, Faroe Islands, Latvia, Lithuania, Romania and Turkey; Enlargement of the European Communities (EC-15); Hungary-Slovenia; and EFTA-Slovenia. The Council for Trade in Services established two Working Parties to examine the North American Free-Trade Agreement and the Enlargement of the European Communities. See WT/GC/W/125 and G/L/134.

⁹⁸⁹ (*footnote original*) The Working Parties of the WTO include Working Parties originating from decisions of the CONTRACTING PARTIES to the *GATT 1947* that were adopted before the entry into force of the WTO Agreement and therefore form part of the *GATT 1994*.

which ensures that the enjoyment of the rights and the performance of the obligations under the GATT 1947, the Tokyo Round Agreements and the WTO Agreement and the exercise of the competence of the CONTRACTING PARTIES to the GATT 1947, the Committees established under the Tokyo Round Agreements and the bodies of the WTO are unaffected.⁹⁹⁰

701. At its meeting on 11 July 1995, the General Council modified the terms of reference for those working parties established under the GATT 1947 so that agreements would be examined in the light of the relevant provisions of the GATT 1994, and that examination reports would be submitted to the Council for Trade in Goods.⁹⁹¹ Similarly, the Committee on Trade and Development modified the terms of reference for the examination of MERCOSUR at its meeting on 14 September 1995, so that the examination be carried out in the light of the relevant provisions of the Enabling Clause and the GATT 1994. The Decision stated that the examination report would be transmitted to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods.⁹⁹²

702. The first terms of reference under the WTO for the examination of a regional trade agreement – Enlargement of the European Communities (accession of Austria, Finland and Sweden) – was adopted by the Council for Trade in Goods on 20 February 1995, along with an understanding read out by the Chairman at that meeting.⁹⁹³ Since then, these terms of reference and Chairman's understanding have been standard for the examination of all regional trade agreements notified under Article XXIV of the GATT 1994.

703. On 6 February 1996, the General Council established the Committee on RTAs.⁹⁹⁴ Under its terms of reference, the Committee is mandated, *inter alia*, to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services and the Committee on Trade and Development, as the case may be.⁹⁹⁵ With respect to the establishment, terms of reference and rules of procedure of the Committee, see the Chapter on the *WTO Agreement*, Section V.B.7(f). With respect to procedures for the examination of regional trade agreements, see the Chapter on the *WTO Agreement*, Section V.B.7(f)(iv).

704. On 31 December 2004, the Committee on RTAs had under examination a total of 112 RTAs, of which 86 were in the area of trade in goods and 26 in trade in services.⁹⁹⁶ By that same date, the Committee had already completed the factual examination for 40 of these RTAs; 38 RTAs were undergoing factual examination; for the

remaining 34 RTAs, the factual examination had not yet started (see, respectively, Annex I-Annex III for the lists of RTAs notified under Article XXIV of the GATT 1994, and the Chapter on the GATS, for the lists of RTAs notified under Article V of the GATS).⁹⁹⁷ At that same date, an additional ten agreements notified under Article XXIV of the GATT 1994, Article V of the GATS and the Enabling Clause were yet to be considered by the relevant Councils or Committee (see Annex IV below for those RTAs notified under Article XXIV of the GATT 1994 or under GATT 1947, and the Chapter on the GATS, for those RTAs notified under Article V of the GATS).

705. During 2004, the Committee on RTAs was informed that 65 RTAs previously in force and notified to the GATT/WTO had been terminated as a consequence of the enlargement of the European Union to include ten new member States on 1 May 2004 (see Annex V below for those RTAs notified under Article XXIV of the GATT 1994 or under GATT 1947, and the Chapter on the GATS, for those RTAs notified under Article V of the GATS)⁹⁹⁸, and that the ten acceding countries had become, or were in the process of becoming, parties to European Communities' free trade agreements and customs unions with third parties. At its 38th session held on 11 November 2004, the Committee agreed to terminate the examination process for these agreements.⁹⁹⁹

"The Committee on Regional Trade Agreement has conducted a series of informal consultations regarding the examination of regional trade agreements concluded by WTO Members with non-Members."¹⁰⁰⁰

(c) Absence of recommendation pursuant to Article XXIV:7

706. In *Turkey – Textiles*, Turkey argued before the Panel that as no Article XXIV:7 recommendation had ever been made to parties to a customs union to change or abolish any import restrictions and, in particular, that such recommendation had never been made in respect of previous Turkey/EC trade agreements, this

⁹⁹⁰ WT/L/29, paras. 2–4.

⁹⁹¹ WT/GC/M/5, item 11.

⁹⁹² WT/COMTD/M/3.

⁹⁹³ G/C/M/1, paras 7.1–7.12, and WT/REG3/1.

⁹⁹⁴ WT/GC/M/10, Section 11.

⁹⁹⁵ WT/L/127, para. 1(a).

⁹⁹⁶ RTAs terminated at the occasion of the enlargement of the European Union on 1 May 2004 are excluded from figures contained in this paragraph.

⁹⁹⁷ Updated figures on the basis of WT/REG/14 and WT/REG/14/Corr.1/Rev.1, Report (2004) of the Committee on RTAs to the General Council.

⁹⁹⁸ See documents WT/REG/GEN/N/2 and WT/REG/GEN/N/3.

⁹⁹⁹ WT/REG/M/38.

¹⁰⁰⁰ WT/REG/14, para. 9. A list of those RTAs is included in document WT/REG/14/Corr.1/Rev.1.

indicated that its measures were WTO-compatible. Recalling that a similar argument had been made before the GATT Panel in *EEC – Imports from Hong Kong*, the Panel cited approvingly the findings of the GATT Panel in this case:

“[I]t would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties.”¹⁰⁰¹

- (d) “Any substantial change in the plan and schedule . . . shall be communicated to the CONTRACTING PARTIES”

707. See paragraph 715 below.

5. Article XXIV:8

- (a) Article XXIV:8(a)(i)

708. In *Turkey – Textiles*, the Appellate Body addressed the internal trade aspect of a customs union, as set forth in Article XXIV:8(a)(i):

“Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a ‘customs union’. It requires the constituent members of a customs union to eliminate ‘duties and other restrictive regulations of commerce’ with respect to ‘substantially all the trade’ between them. Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term ‘substantially’ in this provision. It is clear, though, that ‘substantially all the trade’ is not the same as *all* the trade, and also that ‘substantially all the trade’ is something considerably more than merely *some* of the trade. We note also that the terms of sub-paragraph 8(a)(i) provide that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. Thus, we agree with the Panel that the terms of sub-paragraph 8(a)(i) offer ‘some flexibility’ to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph. Yet we caution that the degree of ‘flexibility’ that sub-paragraph 8(a)(i) allows is limited by the requirement that ‘duties and other restrictive regulations of commerce’ be ‘eliminated with respect to substantially all’ internal trade.”¹⁰⁰²

709. In *Turkey – Textiles*, the Appellate Body set out a two-prong test for assessing whether Article XXIV may justify a measure inconsistent with other WTO provisions: “First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a)

and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue.”¹⁰⁰³ With respect to the second condition, Turkey argued that “had it not introduced the quantitative restrictions on textile and clothing products from India that are at issue, the European Communities would have ‘exclud[ed] these products from free trade within the Turkey/EC customs union’”¹⁰⁰⁴ The Appellate Body found that Turkey was not required to introduce the quantitative restrictions at issue:

“As the Panel observed, there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i). For example, Turkey could adopt rules of origin for textile and clothing products that would allow the European Communities to distinguish between those textile and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of the customs union, *and* those textile and clothing products originating in third countries, including India. . . . A system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities are required to be terminated under the provisions of the ATC. Yet no use was made of this possibility to avoid trade diversion. Turkey preferred instead to introduce the quantitative restrictions at issue.

For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities.”¹⁰⁰⁵

710. In *Turkey – Textiles*, the Panel did not agree with the argument that a WTO right pertaining to a constituent member prior to the formation of a customs union could be “passed” or “extended” to other constituent members:

“[E]ven if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member’s exercise of such a specific right cannot suddenly be considered to exist for the other constituent members. We also consider that the right of Members to form a customs union is to be exercised in such a way so

¹⁰⁰¹ Panel Report on *EEC – Quantitative Restrictions against Imports of certain Products from Hong Kong*, adopted on 12 July 1983 (BISD 30S/129), para. 28, and Panel Report on *Turkey – Textiles*, adopted on 19 November 1999 (WT/DS34/R), paras. 9.172–9.174.

¹⁰⁰² Appellate Body Report on *Turkey – Textiles*, para. 48.

¹⁰⁰³ Appellate Body Report on *Turkey – Textiles*, para. 58.

¹⁰⁰⁴ Appellate Body Report on *Turkey – Textiles*, para. 61.

¹⁰⁰⁵ Appellate Body Report on *Turkey – Textiles*, paras. 62–63.

as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration.”¹⁰⁰⁶

(b) Reference to GATT practice

711. With respect to GATT practice on this subject-matter, see GATT Analytical Index, pages 820 and 824.

(c) Article XXIV:8(a)(ii)

(i) Interpretation

712. In *Turkey – Textiles*, the Appellate Body addressed the requirement contained in Article XXIV:8(a)(ii) that constituent members of a customs union apply “substantially the same” duties and other regulations of commerce to their external trade with third countries. The Appellate Body agreed with the Panel that the term “substantially the same” has both “qualitative and quantitative components”:

“Sub-paragraph 8(a)(ii) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a ‘customs union’. It requires the constituent members of a customs union to apply ‘substantially the same’ duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

‘[t]he ordinary meaning of the term ‘substantially’ in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression ‘substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union’ would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.’¹⁰⁰⁷ ¹⁰⁰⁸

713. The Appellate Body on *Turkey – Textiles* further agreed with the Panel that the phrase “substantially the same” in Article XXIV:8(a)(ii) offered a “certain degree of flexibility”. However, the Appellate Body objected to the standard of “comparable trade regulations having similar effects” developed by the Panel and held that this standard did not rise to the required standard of “sameness”:

“We also believe that the Panel was correct in its statement that the terms of sub-paragraph 8(a)(ii), and, in

particular, the phrase ‘substantially the same’ offer a certain degree of ‘flexibility’ to the constituent members of a customs union in ‘the creation of a common commercial policy.’¹⁰⁰⁹ Here too we would caution that this ‘flexibility’ is limited. It must not be forgotten that the word ‘substantially’ qualifies the words ‘the same’. Therefore, in our view, something closely approximating ‘sameness’ is required by Article XXIV:8(a)(ii).¹⁰¹⁰ We do not agree with the Panel that:

... as a general rule, a situation where constituent members have ‘comparable’ trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).¹⁰¹¹

Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to adopt ‘substantially the same’ trade regulations. In our view, ‘comparable trade regulations having similar effects’ do not meet this standard. A higher degree of ‘sameness’ is required by the terms of sub-paragraph 8(a)(ii).¹⁰¹²

(ii) Reference to GATT practice

714. With respect to GATT practice on this subject-matter, see GATT Analytical Index, page 827.

6. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

(a) Notification and reporting requirements in accordance with paragraphs 9 and 11 of the Understanding

715. In November 1998, the Council for Trade in Goods approved the recommendations adopted by the Committee on RTAs with respect to the required reporting on the operation of regional trade agreements, any significant changes and/or developments in the agreement or substantial changes in the plan and schedule of interim agreements.¹⁰¹³

¹⁰⁰⁶ WT/DS34/R, paras. 9.183–184.

¹⁰⁰⁷ (footnote original) Panel Report on *Turkey – Textiles*, para. 9.148.

¹⁰⁰⁸ Appellate Body Report on *Turkey – Textiles*, para. 49.

¹⁰⁰⁹ (footnote original) Panel Report on *Turkey – Textiles*, para. 9.148.

¹⁰¹⁰ The Appellate Body rejected the following finding of the Panel, para. 9.151 of its report:

... as a general rule, a situation where constituent members have “comparable” trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).

¹⁰¹¹ (footnote original) Panel Report on *Turkey – Textiles*, para. 9.151.

¹⁰¹² Appellate Body Report on *Turkey – Textiles*, para. 50.

¹⁰¹³ G/L/286. The text of the adopted Committee’s recommendation can be found in WT/REG/6.

716. Schedules for the submission of biennial reports were presented to the Committee on RTAs in December 1998, February 2001 and December 2003¹⁰¹⁴ (see Annex below).

(b) Paragraph 12 on dispute settlement

717. With reference to the question of a panel's jurisdiction to assess the compatibility of regional trade agreements with WTO rules, the Appellate Body, in *Turkey – Textiles*, stated:

“More specifically, with respect to the first condition, the Panel, in this case, did not address the question of whether the regional trade arrangement between Turkey and the European Communities is, in fact, a ‘customs union’ which meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV. The Panel maintained that ‘it is arguable’ that panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994. The Panel also considered that, on the basis of the principle of judicial economy, it was not necessary to assess the compatibility of the regional trade arrangement between Turkey and the European Communities with Article XXIV in order to address the claims of India. Based on this reasoning, the Panel assumed *arguendo* that the arrangement between Turkey and the European Communities is compatible with the requirements of Article XXIV:8(a) and 5(a) and limited its examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue. The assumption by the Panel that the agreement between Turkey and the European Communities is a ‘customs union’ within the meaning of Article XXIV was not appealed. Therefore, the issue of whether this arrangement meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV is not before us.”¹⁰¹⁵

718. In *Turkey – Textiles*, the Panel recalled the well-established WTO rules on burden of proof, whereby “... (b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met and ... (c) it is for the party asserting a fact to prove it”, noting a third party's argument that “since Article XXIV was an exception invoked by Turkey, it was for Turkey to bear the burden of proof.”¹⁰¹⁶ In the same case, the Appellate Body stated:

“[W]e would expect a panel, when examining such a measure [taken by a party to a customs union], to require a party to establish that both of these conditions [the customs union fully meets the requirements of XXIV:8(a) and 5(a) and that without such measure that customs

union could not be formed] have been fulfilled” (emphasis added)¹⁰¹⁷

E. RELATIONSHIP WITH OTHER ARTICLES

1. Article I

719. On the major question of whether Article XXIV should be considered as a derogation from the MFN obligation under Article I of the *GATT 1994* only, or from other *GATT 1994* provisions as well, the Appellate Body on *Turkey – Textiles* stated:

“Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.”¹⁰¹⁸

2. Article XI

720. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Turkey on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of *GATT 1994* (and consequently with Article 2.4 of the *Agreement on Textiles and Clothing*). The Panel rejected Turkey's defence that Article XXIV:5(a) of *GATT 1994* authorizes Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of the *GATT 1994* (and Article 2.4 of the *Agreement on Textiles and Clothing*).¹⁰¹⁹ The Appellate Body upheld the Panel's conclusion that “Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions ... which were found inconsistent with Articles XI and XIII of *GATT 1994* and Article 2.4 of the ATC”.¹⁰²⁰ However, the Appellate Body stressed that it was only finding that Turkey's quantitative restrictions at issue were not justified by Article XXIV but that it was not making a “finding on the issue of whether quantita-

¹⁰¹⁴ WT/REG/W/33, WT/REG/W/42 and WT/REG/W/48, respectively. The lists of the reports submitted are contained in the Committee's annual reports, WT/REG/9, 11 and 14.

¹⁰¹⁵ Appellate Body Report, adopted on 19 November 1999 (WT/DS34/AB/R), para. 60.

¹⁰¹⁶ WT/DS34/R, paras. 9.57 and 9.58.

¹⁰¹⁷ WT/DS34/AB/R, para. 59. (See also paragraph 32 below.)

¹⁰¹⁸ WT/DS34/AB/R, para. 58. That reversed the Panel finding that Article XXIV did not authorize a departure from GATT/WTO obligations other than Article I of the GATT (WT/DS34/R, paras. 9.186–9.188).

¹⁰¹⁹ Panel Report on *Turkey – Textiles*, para. 10.1.

¹⁰²⁰ Appellate Body Report on *Turkey – Textiles*, para. 64.

tive restrictions will *ever* be justified by Article XXIV”.¹⁰²¹ See paragraphs 708–709 above.

3. Article XIII

721. See paragraph 720 above.

F. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Agreement on Safeguards

(a) Footnote 1 to Article 2.1

722. In *Argentina – Footwear (EC)*, the Panel found that Argentina violated Article 2 of the *Agreement on Safeguards* by including imports from all sources in its investigation of “increased imports” of footwear products into its territory but excluding other MERCOSUR member States from the application of the safeguard measures. The Appellate Body reversed the Panel’s finding, holding that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applied to the facts of the case before it. The Appellate Body opined that “the footnote only applies when a customs union applies a safeguard measure ‘as a single unit or on behalf of a member State’; in the case before it, the Appellate Body found, MERCOSUR had not applied the safeguards measures at issue (the measures had been imposed by the Argentine authorities).¹⁰²²

723. In *US – Wheat Gluten*, the Panel found that the United States had acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by including imports from all sources in its investigation, but excluding imports from Canada from the application of the safeguard measure. On appeal, the United States argued, *inter alia*, that the Panel erred in failing to assess the legal relevance of footnote 1 to the *Agreement on Safeguards*, and Article XXIV of the GATT 1994 to this issue. The Appellate Body held:

“In this case, the Panel determined that this dispute does not raise the issue of whether, as a general principle, a member of a free-trade area can exclude imports from other members of that free-trade area from the application of a safeguard measure. The Panel also found that it could rule on the claim of the European Communities without having recourse to Article XXIV or footnote 1 to the *Agreement on Safeguards*. We see no error in this approach, and make no findings on these arguments.”¹⁰²³

(b) Article 2.2

724. The Appellate Body on *US – Line Pipe* avoided ruling on whether Article 2.2 of the *Agreement on Safeguards* “permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure”. Nevertheless, the Appellate Body asserted that the latter question becomes relevant in two circumstances:

“The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, and the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2.”¹⁰²⁴

2. Agreement on Textiles and Clothing

725. In *Turkey – Textiles*, the Panel found that the quantitative restrictions imposed by Turkey on imports from India of a number of textile and clothing products were inconsistent with Articles XI and XIII of the GATT 1994 and consequently with Article 2.4 of the *Agreement on Textiles and Clothing*. The Panel rejected Turkey’s defence that Article XXIV:5(a) of the GATT 1994 authorizes Members forming a customs union to deviate from the prohibitions contained in Article 2.4 of the *Agreement on Textiles and Clothing* (and Articles XI and XIII of the GATT 1994).¹⁰²⁵ The Appellate Body upheld the Panel’s conclusion that “Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions . . . which were found inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC”.¹⁰²⁶ However, the Appellate Body stressed that it was only finding that Turkey’s quantitative restrictions at issue were not justified by Article XXIV but that it was not making a “finding on the issue of whether quantitative restrictions will *ever* be justified by Article XXIV”.¹⁰²⁷ In this regard, the Appellate Body recalled that Article 2.4 of the *Agreement on Textiles and Clothing* refers to the “relevant GATT 1994 provisions” as an exception to the prohibition of new restrictions to trade and that, therefore, “Article XXIV of GATT 1994 is incorporated in the ATC and may be invoked as a defence to a claim of inconsistency of Article 2.4 of the ATC, provided that the conditions set forth in Article XXIV for the availability of this defence are met.”¹⁰²⁸

¹⁰²¹ Appellate Body Report on *Turkey – Textiles*, para. 65.

¹⁰²² Appellate Body Report on *Argentina – Footwear (EC)*, paras. 106–108.

¹⁰²³ Appellate Body Report on *US – Wheat Gluten*, para. 99.

¹⁰²⁴ Appellate Body Report on *US – Line Pipe*, para. 198.

¹⁰²⁵ Panel Report on *Turkey – Textiles*, para. 10.1.

¹⁰²⁶ Appellate Body Report on *Turkey – Textiles*, para. 64.

¹⁰²⁷ Appellate Body Report on *Turkey – Textiles*, para. 65.

¹⁰²⁸ Appellate Body Report on *Turkey – Textiles*, footnote 13 to para. 45.

G. ANNEX I

1. List of RTAs notified under Article XXIV of the GATT 1994 for which factual examination has been completed

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Free Trade Agreement between Chile and Costa Rica	14-May-02	WT/REG136/2	WT/REG136
Agreement between New Zealand and Singapore on a Closer Economic Partnership	19-Sep-01	WT/REG127/2	WT/REG127
Free Trade Agreement between the EFTA States and Mexico	22-Aug-01	WT/REG126/2	WT/REG126
Free Trade Agreement between Chile and Mexico	8-Mar-01	WT/REG125/2	WT/REG125
Free Trade Agreement between Israel and Mexico	8-Mar-01	WT/REG124/2	WT/REG124
Free Trade Area between the EFTA States and the Former Yugoslav Republic of Macedonia	31-Jan-01	WT/REG117/2 and Corr.1	WT/REG117
Free Trade Agreement between Turkey and the Former Yugoslav Republic of Macedonia	22-Jan-01	WT/REG115/2 and Corr.1	WT/REG115
Euro-Mediterranean Agreement between the European Communities and Israel	7-Nov-00	WT/REG110/2 and Corr.1	WT/REG110
Free Trade Agreement between EFTA and Morocco	18-Feb-00	WT/REG91/2	WT/REG91
Free Trade Agreement between Bulgaria and the Former Yugoslav Republic of Macedonia	18-Feb-00	WT/REG90/2	WT/REG90
Free Trade Agreement between the Kyrgyz Republic and Moldova	15-Jun-99	WT/REG76/2	WT/REG76
Free Trade Agreement between Turkey and Bulgaria	4-May-99	WT/REG72/2	WT/REG72
Central European Free Trade Agreement – Accession of Bulgaria	24-Mar-99	WT/REG11/11	WT/REG11
Euro-Mediterranean Agreement between the European Communities and Tunisia	23-Mar-99	WT/REG69/3	WT/REG69
Free Trade Agreement between Turkey and Israel	18-May-98	WT/REG60/2	WT/REG60
Free Trade Agreement between Turkey and Romania	18-May-98	WT/REG59/2	WT/REG59
Customs Union between the European Community and the Principality of Andorra	9-Mar-98	WT/REG53/2	WT/REG53
Central European Free Trade Agreement – Accession of Romania	8-Jan-98	WT/REG11/8	WT/REG11
Free Trade Agreement between Romania and the Republic of Moldova	24-Sep-97	WT/REG44/3	WT/REG44
Free Trade Agreement between Canada and Chile	26-Aug-97	WT/REG38/3	WT/REG38
Free Trade Agreement between the Government of Canada and the Government of the State of Israel	23-Jan-97	WT/REG31/3	WT/REG31
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Norway, on the other part	13-Mar-96	WT/REG25/2	WT/REG25
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Switzerland, on the other part	8-Mar-96	WT/REG24/2	WT/REG24
Agreement between the Government of Denmark and the Home Government of the Faroe Islands, on the one part, and the Government of Iceland, on the other part	23-Jan-96	WT/REG23/2	WT/REG23
Enlargement of the European Union – Accession of Austria, Finland and Sweden	20-Jan-95	WT/REG3/1 L/7614/Add.1	WT/REG3
Interim Agreement between Bulgaria and the European Communities	23-Dec-94	WT/REG1/2	WT/REG1
Interim Agreement between Romania and the European Communities	23-Dec-94	WT/REG2/2 and Corr. 1	WT/REG2
Central European Free Trade Agreement (CEFTA)	30-Jun-94	WT/REG11/1	WT/REG11
EFTA – Bulgaria Free Trade Agreement	7-Jul-93	WT/REG12/1	WT/REG12
EFTA – Romania Free Trade Agreement	24-May-93	WT/REG16/1	WT/REG16
North American Free Trade Agreement	1-Feb-93	WT/REG4/2	WT/REG4
EFTA – Israel Free Trade Agreement	1-Dec-92	WT/REG14/1	WT/REG14

H. ANNEX II

1. List of RTAs notified under Article XXIV of the GATT 1994 under factual examination

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Singapore-Australia Free Trade Agreement	1-Oct-03	WT/REG158/2	WT/REG158
Free Trade Agreement between Turkey and Croatia	8-Sep-03	WT/REG156/2	WT/REG156
Free Trade Agreement between the EFTA States and Singapore	24-Jan-03	WT/REG148/2	WT/REG148
Free Trade Agreement between Canada and Costa Rica	17-Jan-03	WT/REG147/2	WT/REG147
European Communities – Croatia Interim Agreement	20-Dec-02	WT/REG142/2	WT/REG142
European Communities – Jordan Euro-Mediterranean Agreement	20-Dec-02	WT/REG141/2	WT/REG141
Agreement between Japan and Singapore for a New-Age Economic Partnership	14-Nov-02	WT/REG140/2	WT/REG140
Free Trade Agreement between the United States and Jordan	5-Mar-02	WT/REG134/2	WT/REG134
Free Trade Agreement between the EFTA States and Jordan	22-Jan-02	WT/REG133/2	WT/REG133
Free Trade Agreement between the EFTA States and Croatia	22-Jan-02	WT/REG132/2	WT/REG132
Interim Agreement between the European Community and the Former Yugoslav Republic of Macedonia	21-Nov-01	WT/REG129/2	WT/REG129
Free Trade Agreement between Georgia and Armenia	21-Feb-01	WT/REG119/2 and Corr.1	WT/REG119
Free Trade Agreement between Georgia and Azerbaijan	21-Feb-01	WT/REG120/2 and Corr.1	WT/REG120
Free Trade Agreement between Georgia and Kazakhstan	21-Feb-01	WT/REG123/2 and Corr.1	WT/REG123
Free Trade Agreement between Georgia and the Russian Federation	21-Feb-01	WT/REG118/2 and Corr.1	WT/REG118
Free Trade Agreement between Georgia and Turkmenistan	21-Feb-01	WT/REG122/2 and Corr.1	WT/REG122
Free Trade Agreement between Georgia and Ukraine	21-Feb-01	WT/REG121/2 and Corr.1	WT/REG121
Free Trade Agreement between the Kyrgyz Republic and Armenia	4-Jan-01	WT/REG114/2 and Corr.1	WT/REG114
Euro-Mediterranean Agreement between the European Communities and Morocco	8-Nov-00	WT/REG112/2	WT/REG112
Free Trade Agreement between the European Communities and Mexico	1-Aug-00	WT/REG109/2	WT/REG109
Free Trade Agreement between Azerbaijan, Armenia, Belarus, Georgia, Moldova, Kazakhstan, Russian Federation, Ukraine, Uzbekistan Tajikistan and Kyrgyz Rep.	1-Oct-99	WT/REG82/2	WT/REG82
Free Trade Agreement between the Kyrgyz Republic and Kazakhstan	29-Sep-99	WT/REG81/2	WT/REG81
Free Trade Agreement between the Kyrgyz Republic and the Russian Federation	15-Jun-99	WT/REG73/2	WT/REG73
Free Trade Agreement between the Kyrgyz Republic and Ukraine	15-Jun-99	WT/REG74/2	WT/REG74
Free Trade Agreement between the Kyrgyz Republic and Uzbekistan	15-Jun-99	WT/REG75/2	WT/REG75
Agreement on Customs Union and Single Economic Area between the Kyrgyz Republic, the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Republic of Tajikistan	21-Apr-99	WT/REG71/3/Rev.1	WT/REG71
Agreement between the European Community on the one part and the Government of Denmark and the Home Government of the Faroe Islands on the other part	19-Feb-97	WT/REG21/2	WT/REG21
Customs Union between Turkey and the European Community	22-Dec-95	WT/REG22/4	WT/REG22

I. ANNEX III

1. List of RTAs notified under Article XXIV of the GATT 1994 for which factual examination has not yet commenced

Agreement	Date of Notification	Terms of Reference for the Examination	WTO Document series
Free Trade Agreement between Albania and Serbia Montenegro	19-Oct-04	WT/REG178/2	WT/REG178
Euro-Mediterranean Association Agreement between the European Community and Egypt	4-Oct-04	WT/REG177/2	WT/REG177
Southern African Development Community Free Trade Area	9-Aug-04	WT/REG176/3	WT/REG176
Free Trade Agreement between Armenia and Turkmenistan	27-Jul-04	WT/REG175/2	WT/REG175
Free Trade Agreement between Armenia and Russian Federation	27-Jul-04	WT/REG174/2	WT/REG174
Free Trade Agreement between Armenia and Moldova	27-Jul-04	WT/REG173/2	WT/REG173
Free Trade Agreement between Armenia and Kazakhstan	27-Jul-04	WT/REG172/2	WT/REG172
Free Trade Agreement between Armenia and Ukraine	27-Jul-04	WT/REG171/2	WT/REG171
Enlargement of the European Union	30-Apr-04	WT/REG170/1	WT/REG170
Free Trade Agreement between the Republic of Korea and Chile	19-Apr-04	WT/REG169/2	WT/REG169
Free Trade Agreement between Albania and the United Nations Interim Administration Mission in Kosovo (UNMIK)	8-Apr-04	WT/REG168/2	WT/REG168
Free Trade Agreement between Albania and Bulgaria	31-Mar-04	WT/REG167/2	WT/REG167
Free Trade Agreement between Croatia and Albania	31-Mar-04	WT/REG166/2	WT/REG166
Central European Free Trade Agreement – Accession of the Republic of Croatia	3-Mar-04	WT/REG11/13	WT/REG11
EC – Chile Interim Agreement	18-Feb-04	WT/REG164/3	WT/REG164
Free-Trade Agreement between Chile and El Salvador	16-Feb-04	WT/REG165/3	WT/REG165
Closer Economic Partnership Arrangement between China and Macao, China	12-Jan-04	WT/REG163/2	WT/REG163
Closer Economic Partnership Arrangement between China and Hong Kong, China	12-Jan-04	WT/REG162/2	WT/REG162
Free Trade Agreement between the United States and Singapore	19-Dec-03	WT/REG161/2	WT/REG161
Free Trade Agreement between the United States and Chile	19-Dec-03	WT/REG160/2	WT/REG160
Free Trade Agreement between Croatia and Bosnia and Herzegovina	6-Oct-03	WT/REG159/2	WT/REG159
Free Trade Agreement between Turkey and Bosnia and Herzegovina	8-Sep-03	WT/REG157/2	WT/REG157
EC – Lebanon Interim Agreement	4-Jun-03	WT/REG153/2	WT/REG153
Free Trade Agreement between Bulgaria and Israel	14-Apr-03	WT/REG150/2	WT/REG150
Trade, Development and Cooperation Agreement between the European Community and South Africa	21-Nov-00	WT/REG113/2	WT/REG113
Interim Agreement between the EFTA states and the Palestine Liberation Organization for the benefit of the Palestinian Authority	21-Sep-99	WT/REG79/2	WT/REG79
Euro-Mediterranean Interim Association Agreement on Trade and Co-operation between the European Community and the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and Gaza Strip	30-Jun-97	WT/REG43/2	WT/REG43

J. ANNEX IV

1. List of RTAs notified under Article XXIV of the GATT 1994 which have not yet been considered by the Council for Trade in Goods

Agreement	Date of Notification	WTO Document series
Free Trade Agreement between the United States and Australia	23-Dec-04	WT/REG184
Free Trade Agreement between Albania and Moldova	20-Dec-04	WT/REG183
Free Trade Agreement between Albania and FYROM	14-Dec-04	WT/REG182
Free Trade Agreement between Albania and Bosnia and Herzegovina	14-Dec-04	WT/REG181
Free Trade Agreement between Albania and Romania	14-Dec-04	WT/REG180
Free Trade Agreement between the EFTA States and Chile	10-Dec-04	WT/REG179

K. ANNEX V

1. RTAs notified under Article XXIV of the GATT 1994 which have been terminated following the Enlargement of the European Union on 1 May 2004

Agreement	Terms of Reference for the Examination	Notification of Termination	WTO Document series
Free Trade Agreement between the Czech Republic and the Republic of Estonia	WT/REG62/3	WT/REG/GEN/N/3	WT/REG62
Free Trade Agreement between the Czech Republic and the Republic of Latvia	WT/REG45/2	WT/REG/GEN/N/3	WT/REG45
Free Trade Agreement between the Czech Republic and the Republic of Lithuania	WT/REG46/1	WT/REG/GEN/N/3	WT/REG46
Free Trade Agreement between the Czech Republic and Israel	WT/REG56/3	WT/REG/GEN/N/3	WT/REG56
Free Trade Agreement between Turkey and the Czech Republic	WT/REG67/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG67
Free Trade Agreement between Turkey and Estonia	WT/REG70/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG70
Free Trade Agreement between Estonia and the Faroe Islands	WT/REG64/2	WT/REG/GEN/N/3	WT/REG64
Interim Agreement between the European Communities and Czech Republic	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Free Trade Agreement between Estonia and the European Communities	WT/REG8/2	WT/REG/GEN/N/3	WT/REG8/2
Interim Agreement between the European Communities and Hungary	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Free Trade Agreement between Latvia and the European Communities	WT/REG7/2	WT/REG/GEN/N/3	WT/REG7
Free Trade Agreement between Lithuania and the European Communities	WT/REG9/2	WT/REG/GEN/N/3	WT/REG9
Interim Agreement between the European Communities and Poland	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Interim Agreement between the European Communities and Slovak Republic	WT/REG18/1	WT/REG/GEN/N/3	WT/REG18
Interim Agreement between the European Communities and the Republic of Slovenia	WT/REG32/3	WT/REG/GEN/N/3	WT/REG32
Free Trade Agreement between the EFTA States and Estonia	WT/REG28/3	WT/REG/GEN/N/3	WT/REG28
EFTA – Hungary Free Trade Agreement	WT/REG13/1	WT/REG/GEN/N/3	WT/REG13
Free Trade Agreement between the EFTA States and Latvia	WT/REG29/3	WT/REG/GEN/N/3	WT/REG29
Free Trade Agreement between the EFTA States and Lithuania	WT/REG30/3	WT/REG/GEN/N/3	WT/REG30
EFTA – Poland Free Trade Agreement	WT/REG15/1	WT/REG/GEN/N/3	WT/REG15
EFTA – Slovenia Free Trade Agreement	WT/REG20/3	WT/REG/GEN/N/3	WT/REG20
Free Trade Agreement between Bulgaria and Estonia	WT/REG149/2	WT/REG/GEN/N/3	WT/REG149
Agreements between Estonia, Latvia and Lithuania	WT/REG77/2	WT/REG/GEN/N/3	WT/REG77
Free Trade Agreement between Estonia and Ukraine	WT/REG108/2	WT/REG/GEN/N/3	WT/REG108

Table (cont.)

Agreement	Terms of Reference for the Examination	Notification of Termination	WTO Document series
Free Trade Agreement between Hungary and Estonia	WT/REG128/2	WT/REG/GEN/N/3	WT/REG128
Free Trade Agreement between Hungary and Latvia	WT/REG84/2	WT/REG/GEN/N/3	WT/REG84
Free Trade Agreement between Hungary and Lithuania	WT/REG83/2	WT/REG/GEN/N/3	WT/REG83
Free Trade Agreement between Hungary and Israel	WT/REG54/2	WT/REG/GEN/N/3	WT/REG54
Free Trade Agreement between Turkey and Hungary	WT/REG58/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG58
Free Trade Agreement between Bulgaria and Latvia	WT/REG151/2	WT/REG/GEN/N/3	WT/REG151
Free Trade Agreement between Turkey and Latvia	WT/REG116/2 and Corr.1	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG116
Free Trade Agreement between Bulgaria and Lithuania	WT/REG152/2	WT/REG/GEN/N/3	WT/REG152
Free Trade Agreement between Turkey and Lithuania	WT/REG61/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG61
Agreement between Poland and the Government of Denmark and the Home Government of the Faroe Islands	WT/REG78/2	WT/REG/GEN/N/3	WT/REG78
Free Trade Agreement between Poland and Latvia	WT/REG80/2	WT/REG/GEN/N/3	WT/REG80
Free Trade Agreement between Poland and the Republic of Lithuania	WT/REG49/2	WT/REG/GEN/N/3	WT/REG49
Free Trade Agreement between Israel and Poland	WT/REG65/2	WT/REG/GEN/N/3	WT/REG65
Free Trade Agreement between Turkey and Poland	WT/REG107/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG107
Free Trade Agreement between the Slovak Republic and the Republic of Estonia	WT/REG63/3	WT/REG/GEN/N/3	WT/REG63
Free Trade Agreement between the Slovak Republic and the Republic of Latvia	WT/REG47/2	WT/REG/GEN/N/3	WT/REG47
Free Trade Agreement between the Slovak Republic and the Republic of Lithuania	WT/REG48/2	WT/REG/GEN/N/3	WT/REG48
Free Trade Agreement between Israel and the Slovak Republic	WT/REG57/3	WT/REG/GEN/N/3	WT/REG57
Free Trade Agreement between Turkey and the Slovak Republic	WT/REG68/3	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG68
Free Trade Agreement between Slovenia and Bosnia and Herzegovina	WT/REG131/2	WT/REG/GEN/N/3	WT/REG131
Free Trade Agreement between Croatia and Slovenia	WT/REG55/3	WT/REG/GEN/N/3	WT/REG55
Free Trade Agreement between Slovenia and Estonia	WT/REG37/2	WT/REG/GEN/N/3	WT/REG37
Free Trade Agreement between Israel and Slovenia	WT/REG66/2	WT/REG/GEN/N/3	WT/REG66
Free Trade Agreement between Turkey and Slovenia	WT/REG135/2	WT/REG/GEN/N/2 WT/REG/GEN/N/3	WT/REG135
Free Trade Agreement between the Former Yugoslav Republic of Macedonia and Slovenia	WT/REG36/3	WT/REG/GEN/N/3	WT/REG36
Free Trade Agreement between Latvia and Slovenia	WT/REG34/2	WT/REG/GEN/N/3	WT/REG34
Free Trade Agreement between Lithuania and Slovenia	WT/REG35/2	WT/REG/GEN/N/3	WT/REG35
Central European Free Trade Agreement – Accession of the Republic of Slovenia	WT/REG11/7	WT/REG11/N/7 WT/REG/GEN/N/3	WT/REG11

2. RTAs notified under the GATT 1947 which have been terminated following the Enlargement of the European Union on 1 May 2004

- Association Agreement between the European Community and Cyprus
- Association Agreement between the European Community and Malta
- EFTA – Czech Republic Free Trade Area
- EFTA – Slovak Republic Free Trade Area
- Czech and Slovak Customs Union

L. ANNEX VI

1. Reports on the operation of agreements – 2004 Schedule

Agreement	Document Reference	CRTA Reference
Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	not submitted	...
Australia-Papua New Guinea Agreement (PATCRA)	not submitted	...
Caribbean Community and Common Market (CARICOM)	not submitted	...
Czech and Slovak Customs Union	not submitted	...
European Free Trade Association	WT/REG85/R/B/3	WT/REG/M/37
EFTA – Turkey Free Trade Area	WT/REG86/R/B/3	WT/REG/M/37
EFTA – Czech Republic Free Trade Area	not submitted	...
EFTA – Slovak Republic Free Trade Area	not submitted	...
General Treaty on Central American Economic Integration	WT/REG93/R/B/2*	WT/REG/M/37
Agreement between the European Communities and Switzerland	WT/REG94/R/B/3	WT/REG/M/37
Agreement between the European Communities and Iceland	WT/REG95/R/B/3	WT/REG/M/37
Association of Certain Overseas Countries and Territories Europe with the European Community	WT/REG106/R/B/3	WT/REG/M/37
Agreement between the European Communities and Norway	WT/REG137/R/B/2	WT/REG/M/37
Co-operation Agreement between the European Community and Algeria	not submitted	...
Association Agreement between the European Community and Cyprus	not submitted	...
Co-operation Agreement between the European Community and Egypt	not submitted	...
Association Agreement between the European Community and Malta	not submitted	...
Co-operation Agreement between the European Community and Syria	not submitted	...
Free Trade Area Agreement between Israel and the United States	not submitted	...

* Also covers the 2001 schedule of reports.

2. Reports on the operation of agreements – 2001 Schedule

Agreement	Document Reference	CRTA Reference
Australia-Papua New Guinea Agreement (PATCRA)	not submitted	...
Caribbean Community and Common Market (CARICOM)	not submitted	...
European Free Trade Association	WT/REG85/R/B/2	WT/REG/M/30
EFTA – Turkey Free Trade Area	WT/REG86/R/B/2	WT/REG/M/30
EFTA – Czech Republic Free Trade Area	WT/REG87/R/B/2	WT/REG/M/30
EFTA – Slovak Republic Free Trade Area	WT/REG88/R/B/2	WT/REG/M/30
Czech Republic – Slovak Republic Customs Union	WT/REG89/R/B/2	WT/REG/M/33
Agreement between the European Communities and Switzerland	WT/REG94/R/B/2	WT/REG/M/33
Agreement between the European Communities and Iceland	WT/REG95/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Egypt	WT/REG98/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Jordan	WT/REG100/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Lebanon	WT/REG101/R/B/1	WT/REG/M/33
Co-operation Agreement between the European Community and Syria	WT/REG104/R/B/2	WT/REG/M/33
Co-operation Agreement between the European Community and Algeria	WT/REG105/R/B/1	WT/REG/M/33
Association of Certain Overseas Countries and Territories Europe with the European Community	WT/REG106/R/B/2	WT/REG/M/33
Association Agreement between the European Community and Cyprus	not submitted	...
Association Agreement between the European Community and Malta	not submitted	...
Australia and New Zealand Closer Economic Relations Trade Agreement	WT/REG111/R/B/2	WT/REG/M/33
Agreement between the European Communities and Norway	WT/REG137/R/B/1	WT/REG/M/33
Free Trade Area Agreement between Israel and the United States	not submitted	...

XXVI. ARTICLE XXV**A. TEXT OF ARTICLE XXV***Article XXV**Joint Action by the Contracting Parties*

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph¹.

(footnote original) ¹ The authentic text erroneously reads "sub-paragraph".

B. INTERPRETATION AND APPLICATION OF ARTICLE XXV

726. With respect to decision-making by the WTO, see Chapter on the *WTO Agreement*, Sections V.B.1(d) and X.B.1 and X.B.3.

1. Reference to GATT practice

727. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXV, pages 874–888.

XXVII. ARTICLE XXVI**A. TEXT OF ARTICLE XXVI***Article XXVI**Acceptance, Entry into Force and Registration*

1. The date of this Agreement shall be 30 October 1947.

2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary-General of the United Nations, who shall furnish certified copies thereof to all interested governments.

4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary⁵ to the Contracting Parties, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

(footnote original) ⁵ By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

5. (a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary⁵ to the CONTRACTING PARTIES at the time of its own acceptance.

(b) Any government, which has so notified the Executive Secretary⁵ under the exceptions in subparagraph (a) of this paragraph, may at any time give notice to the Executive Secretary⁵ that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.⁵

(c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with Executive Secretary⁶ to the Contracting Parties on behalf of governments

named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

(footnote original) ⁶ By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

728. With respect to acceptance, entry into force and deposit under the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section XV.B.

1. Reference to GATT practice

729. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXVI, pages 909–923.

XXVIII. ARTICLE XXVII

A. TEXT OF ARTICLE XXVII

Article XXVII

Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVII

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

730. With respect to GATT practice on this subject-matter, see GATT Analytical Index, Article XXVII, pages 927–930.

XXIX. ARTICLE XXVIII

A. TEXT OF ARTICLE XXVIII

*Article XXVIII**

Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the

CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

- (a) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.
- (b) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (b) of this Article shall apply.
- (c) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.
- (d) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (a) to have a principal supplying interest and any contracting party determined under paragraph 4 (a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may

elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

B. TEXT OF AD ARTICLE XXVIII

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may . . . modify or withdraw a concession" means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.

3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule, should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2, and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff

negotiations to take place within the period of six months before 1 January 1958, or before any other day determined pursuant to paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principal supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would, in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.

5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.

6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

7. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however,

intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation the CONTRACTING PARTIES shall authorize any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.

3. It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognized, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.

4. The determination referred to in paragraph 4 (d) shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 (d) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment.

C. UNDERSTANDING ON THE
INTERPRETATION OF ARTICLE XXVIII OF
THE GENERAL AGREEMENT ON TARIFFS
AND TRADE 1994

Members hereby agree as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26–28) shall apply in these cases.

3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia*, production capac-

ity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above-mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

- (a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 per cent, whichever is the greater; or
- (b) trade in the most recent year increased by 10 per cent.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.

D. INTERPRETATION AND APPLICATION OF
ARTICLE XXVIII

1. **Legal relevance of Article XXVIII negotiations in interpretation of GATT Articles**

731. In *EC – Poultry*, Brazil claimed that the MFN principle in Articles I and XIII did not apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the *GATT*. The Panel rejected this argument and held:

"[I]f a preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext

of 'compensatory adjustment' under Article XXVIII:2, it would create a serious loophole in the multilateral trading system. Such a result would fundamentally alter the overall balance of concessions Article XXVIII is designed to achieve."¹⁰²⁹

732. The Panel concluded that a tariff-rate quota which resulted from negotiations under Article XXVIII of the *GATT 1947*, and which was incorporated into a Member's Uruguay Round Schedule, must be administered in a non-discriminatory manner consistent with Article XIII of the *GATT 1994*.¹⁰³⁰ The Appellate Body agreed:

"We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the *GATT 1994*. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

'It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed 'Modification of Schedules'. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.'¹⁰³¹

Although this statement refers specifically to the MFN clause in Article I of the *GATT*, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the *GATT 1994*.¹⁰³²

2. Review of the Understanding on the Interpretation of Article XXVIII of the *GATT 1994*

733. On 24 January 2000, the Council for Trade in Goods requested the Committee on Market Access to conduct the review envisaged in paragraph 1 of the Understanding on the Interpretation of Article XXVIII of the *GATT 1994*.¹⁰³³ On 12 October 2000, the Committee on Market Access agreed to report to the Council for Trade in Goods that the review had been carried out as mandated by that body and that, at that stage, there was no basis to change the criterion contained in paragraph 1 of the aforementioned Understanding, with a reservation that in the future any Member would be free to raise this matter when necessary.¹⁰³⁴

3. Reference to *GATT* practice

734. With respect to *GATT* practice under Article XXVIII, see *GATT Analytical Index*, pages 933–984.

XXX. ARTICLE XXVIII BIS

A. TEXT OF ARTICLE XXVIII BIS

Article XXVIII bis *Tariff Negotiations*

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (a) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(b) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

- (a) the needs of individual contracting parties and individual industries;
- (b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special

¹⁰²⁹ Panel Report on *EC – Poultry*, para. 215.

¹⁰³⁰ Appellate Body Report on *EC – Poultry*, para. 102.

¹⁰³¹ (*footnote original*) EPCT/TAC/PV/18, p. 46; see Panel Report, para. 217.

¹⁰³² Appellate Body Report on *EC – Poultry*, para. 100.

¹⁰³³ G/C/M/42, para. 4.

¹⁰³⁴ G/MA/M/26, Section 6.

needs of these countries to maintain tariffs for revenue purposes; and

- (c) all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned.

B. TEXT OF AD ARTICLE XXVIII BIS

Ad Article XXVIII bis
Paragraph 3

It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purpose, or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII BIS

No jurisprudence or decision of a competent WTO body.

XXXI. ARTICLE XXIX

A. TEXT OF ARTICLE XXIX

Article XXIX

The Relation of this Agreement to the Havana Charter

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.*
2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.
3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.
4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis*, in the form in which they then appeared in the Havana Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.
5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree

whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

B. TEXT OF AD ARTICLE XXIX

Ad Article XXIX
Paragraph 1

Chapters VII and VIII of the Havana Charter have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

No jurisprudence or decision of a competent WTO body.

XXXII. ARTICLE XXX

A. TEXT OF ARTICLE XXX

Article XXX
Amendments

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.
2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XXX

735. With respect to amendments to the *WTO Agreement*, see Chapter on the *WTO Agreement*, Section XI.B.

1. Reference to GATT practice

736. With respect to GATT practice under Article XXX, see GATT Analytical Index, pages 1002–1008.

XXXIII. ARTICLE XXXI

A. TEXT OF ARTICLE XXXI

Article XXXI
Withdrawal

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary-General of the United Nations.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XXXI

737. With respect to withdrawal from the WTO, see Chapter on the *WTO Agreement*, Section XVI.B.

1. Reference to GATT practice

738. With respect to GATT practice under Article XXXI, see GATT Analytical Index, pages 1011–1012.

XXXIV. ARTICLE XXXII

A. TEXT OF ARTICLE XXXII

Article XXXII
Contracting Parties

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.

2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XXXII

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

739. With respect to GATT practice under Article XXXII, see GATT Analytical Index, pages 1013–1014.

XXXV. ARTICLE XXXIII

A. TEXT OF ARTICLE XXXIII

Article XXXIII
Accession

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XXXIII

740. With respect to accession to the WTO, see Chapter on the *WTO Agreement*, Section XIII.B.

1. Reference to GATT practice

741. With respect to GATT practice under Article XXXIII, see GATT Analytical Index, pages 1017–1028.

XXXVI. ARTICLE XXXIV

A. TEXT OF ARTICLE XXXIV

Article XXXIV
Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF
ARTICLE XXXIV

742. See Chapter on the *WTO Agreement*, Section III.B.

1. Reference to GATT practice

743. With respect to GATT practice under Article XXXIV, see GATT Analytical Index, page 1029.

XXXVII. ARTICLE XXXV**A. TEXT OF ARTICLE XXXV***Article XXXV****Non-application of the Agreement between Particular Contracting Parties***

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXV

744. With respect to the non-application of the Multilateral Trade Agreements between particular Members, see Chapter on the *WTO Agreement*, Section XIV.B.

1. Reference to GATT practice

745. With respect to GATT practice under Article XXXV, see GATT Analytical Index, pages 1031–1038.

PART IV*
TRADE AND DEVELOPMENT

XXXVIII. ARTICLE XXXVI**A. TEXT OF ARTICLE XXXVI***Article XXXVI**Principles and Objectives*

1.* The contracting parties,

- (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;
- (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of

their exports, and the prices received for these exports;

- (c) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;
- (d) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
- (e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures – and measures in conformity with such rules and procedures – as are consistent with the objectives set forth in this Article;
- (f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-

developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

B. TEXT OF AD ARTICLE XXXVI

Ad Article XXXVI

Paragraph 1

This Article is based upon the objectives set forth in Article I as it will be amended by Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX when that Protocol enters into force.¹

(*footnote original*)¹ This Protocol was abandoned on 1 January 1968.

Paragraph 4

The term "primary products" includes agricultural products, *vide* paragraph 2 of the note *ad* Article XVI, Section B.

Paragraph 5

A diversification programme would generally include the intensification of activities for the processing of primary products and the development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities.

Paragraph 8

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII *bis* (Article XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective²), Article XXXIII, or any other procedure under this Agreement.

(*footnote original*)² This Protocol was abandoned on 1 January 1968.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXXVI

746. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, paragraphs V.B.7. Also, with respect to special and preferential treatment for developing country Members, see V.B.7(a)(iv).

1. Reference to GATT practice

747. With respect to GATT practice under Article XXXVI, see GATT Analytical Index, pages 1055–1058.

XXXIX. ARTICLE XXXVII

A. TEXT OF ARTICLE XXXVII

Article XXXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible – give effect to the following provisions:

- (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;*
- (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and
- (c) (i) refrain from imposing new fiscal measures, and
 - (ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of

less-developed contracting parties, and which are applied specifically to those products.

2. (a) Whenever it is considered that effect is not being given to any of the provisions of subparagraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of subparagraph (a), (b) or (c) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of subparagraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

(a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

(b) give active consideration to the adoption of other measures* designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;

(c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

B. TEXT OF AD ARTICLE XXXVII

Ad Article XXXVII Paragraph 1 (a)

This paragraph would apply in the event of negotiations for reduction or elimination of tariffs or other restrictive regulations of commerce under Articles XXVIII, XXVIII *bis* (XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective¹³), and Article XXXIII, as well as in connection with other action to effect such reduction or elimination which contracting parties may be able to undertake.

Paragraph 3 (b)

The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage the consumption of particular products, or to introduce measures of trade promotion.

C. INTERPRETATION AND APPLICATION OF ARTICLE XXXVII

748. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, Section V.B.7. Also, with respect to special and preferential treatment for developing country Members, see Section V.B.7(a)(iv).

1. Reference to GATT practice

749. With respect to GATT practice under Article XXXVII, see GATT Analytical Index, pages 1061–1068.

XL. ARTICLE XXXVIII

A. TEXT OF ARTICLE XXXVIII

Article XXXVIII Joint Action

1. The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as

appropriate, to further the objectives set forth in Article XXXVI.

2. In particular, the CONTRACTING PARTIES shall:

- (a) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;
- (b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;
- (c) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtain-

ing a clear analysis of export potential, market prospects and any further action that may be required;

- (d) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;
- (e) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and
- (f) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXXVIII

750. With respect to the issue of trade and development under the *WTO Agreement*, see the Chapter on the *WTO Agreement*, Section V.B.7. Also, with respect to special and preferential treatment for developing country Members, see V.B.7.(a)(iv).

1. Reference to GATT practice

751. With respect to GATT practice under Article XXXVIII, see GATT Analytical Index, page 1071.

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having decided to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration;

Recalling that their long-term objective as agreed at the Mid-Term Review of the Uruguay Round “is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines”;

Recalling further that “the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets”;

Committed to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues;

Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;

Noting that commitments under the reform programme should be made in an equitable way among all

Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries;

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. “objectives of the negotiations as set out in the Punta del Este Declaration”

1. The objectives of the Uruguay Round negotiations in the agriculture sector are set out in the Ministerial Declaration on the Uruguay Round.¹

2. Long-term objective of the reform process and the Mid-Term Review

2. At the Mid-Term Review of the Uruguay Round, Ministers agreed on the long-term objective of the Uruguay Round negotiations in the agriculture sector.²

PART I

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

Definition of Terms

In this Agreement, unless the context otherwise requires:

- (a) “Aggregate Measurement of Support” and “AMS” mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:
 - (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member’s Schedule; and
 - (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material

¹ BISD 33S/19, Part I, Section D.

² MTN.TNC/11, pp. 6–7.

- incorporated by reference in Part IV of the Member's Schedule;
- (b) "basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material;
- (c) "budgetary outlays" or "outlays" includes revenue foregone;
- (d) "Equivalent Measurement of Support" means the annual level of support, expressed in monetary terms, provided to producers of a basic agricultural product through the application of one or more measures, the calculation of which in accordance with the AMS methodology is impracticable, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, and which is:
- (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
- (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 4 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;
- (e) "export subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement;
- (f) "implementation period" means the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995;
- (g) "market access concessions" includes all market access commitments undertaken pursuant to this Agreement;
- (h) "Total Aggregate Measurement of Support" and "Total AMS" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:
- (i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and
- (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;
- (i) "year" in paragraph (f) above and in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1(a)(ii)

3. The Panel on *Korea – Various Measures on Beef*, in a finding later reversed by the Appellate Body³, agreed with the complainants that Korea had provided domestic support to its beef industry in excess of its commitment levels for 1997 and 1998. In its notifications, Korea had determined that its Current AMS for beef was below the *de minimis* threshold as set out in Article 6.4; as a result, Korea argued, this domestic support item did not have to be included in the calculation of its Current Total AMS. The Panel found that Korea's calculations in this respect were in error. Korea argued that its calculation was correct, because it was based on the "constituent data and methodology" used in its Schedule, in accordance with Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*. The Appellate Body, with respect to the calculation of the Current AMS, first recalled the wording of Article 1(a)(ii) of the *Agreement on Agriculture* which contains the definition of the term "Current AMS" stating:

"To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be

'calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; . . . (emphasis added)'

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be

³ See Appellate Body Report on *Korea – Various Measures on Beef*, paras. 126, 127 and 129.

'calculated *in accordance with* the provisions of Annex 3 of this Agreement'. The ordinary meaning of 'accordance' is 'agreement, conformity, harmony'.⁴ Thus, Current AMS must be calculated in 'conformity' with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while 'taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.' 'Take into account' is defined as 'take into consideration, notice'.⁵ Thus, when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be 'taken into account', that is, it must be 'considered'.⁶⁻⁷

4. The Appellate Body subsequently held that Article 1(a)(ii) accorded "higher priority" to the provisions of Annex 3 than to "constituent data and methodology" contained in a Member's Schedule, but noted that in the case before it, it was not necessary to decide a conflict between the two, because there was no specific Korean "constituent data and methodology". As a result, the Current AMS was to be calculated in accordance with the provisions of Annex 3:

"Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to 'the provisions of Annex 3' than to the 'constituent data and methodology'. From the viewpoint of ordinary meaning, the term 'in accordance with' reflects a more rigorous standard than the term 'taking into account'.

We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between 'the provisions of Annex 3' and the 'constituent data and methodology'.⁸ Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no 'constituent data or methodology' to refer to, so that the only means available for calculating domestic support is that provided in Annex 3. As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.

In the circumstances of the present case, it is not necessary to decide how a conflict between 'the provisions of Annex 3' and the 'constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule' would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef.⁹ Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem

to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone."¹⁰

5. Further, in *Korea – Various Measures on Beef*, the Panel held that Korea had calculated its Current AMS for beef on the basis of a fixed external reference price for the period 1989–1991, rather than the period 1986–88, as set forth in paragraph 9 of Annex 3. Korea argued that its use of the period 1989–1991 was justified, because this period was referred to in the constituent data and methodology (used with respect to products other than beef) contained in a table of supporting material incorporated in its Schedule. The Appellate Body agreed with the Panel and recalled its findings referenced in paragraph 4 above:

"The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989–1991. Korea justifies this choice by invoking the 'constituent data and methodology' used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989–1991 for the fixed external reference price.

We have already explained above that we share the Panel's view with respect to Korea's argument on "constituent data and methodology" used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, "[t]he fixed external reference price shall be based on the years

⁴ (footnote original) *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.

⁵ (footnote original) *Ibid.*

⁶ (footnote original) We note that this difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". (emphasis added)

⁷ Appellate Body Report on *Korea – Various Measures on Beef*, para. 111.

⁸ (footnote original) On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Panel Report, para. 811.

⁹ (footnote original) . . . In other words, there is no *data* (product) in respect of which the *methodology* of Schedule LX of Korea (that is, the use of figures for the years 1989–1991) could be applied, in so far as beef is concerned.

¹⁰ Appellate Body Report on *Korea – Various Measures on Beef*, paras. 112–114.

1986 to 1988". We, therefore, also agree with the Panel that in calculating the product specific AMS for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986–1988, instead of data for 1989–1991."¹¹

2. Article 1(e)

(a) Definition of the term "subsidy"

6. In *Canada – Dairy*, the Appellate Body recalled its finding in *Canada – Aircraft* where it had stated that a subsidy "arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace".¹²

7. In *US – FSC*, the Appellate Body, noting "that the *Agreement on Agriculture* does not contain a definition of the terms 'subsidy' or 'subsidies'"¹³, reiterated the approach it followed in *Canada – Dairy* as follows:

"Therefore, in this case, we will consider, first, whether the FSC measure involves a transfer of economic resources by the grantor, which in this dispute is the government of the United States, and, second, whether any transfer of economic resources involves a benefit to the recipient."¹⁴

8. As regards the definition of a subsidy under the *SCM Agreement*, see Section I.B.2(a) of the Chapter on the *SCM Agreement*.

(b) "contingent upon export performance"

9. In *US – FSC*, the Appellate Body interpreted the requirement of export contingency also with reference to the *SCM Agreement*, stating that:

"We see no reason, and none has been pointed out to us, to read the requirement of 'contingent upon export performance' in the *Agreement on Agriculture* differently from the same requirement imposed by the *SCM Agreement*. The two Agreements use precisely the same words to define 'export subsidies'. Although there are differences between the export subsidy disciplines established under the two Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency. Therefore, we think it appropriate to apply the interpretation of export contingency that we have adopted under the *SCM Agreement* to the interpretation of export contingency under the *Agreement on Agriculture*."¹⁵

10. As regards the concept of export contingency under the *SCM Agreement*, see Section III.B.1 of the Chapter on the *SCM Agreement*.

3. Article 1(h)

11. In *Korea – Various Measures on Beef*, the Panel and the Appellate Body addressed Korea's argument that its

method for calculation of domestic support was justifiable because it was based upon "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", although it was not consistent with the methodology set out in Annex 3 to the *Agreement on Agriculture*. See paragraphs 3–5 above.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2 *Product Coverage*

This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

No jurisprudence or decision of a competent WTO body.

PART II

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3 *Incorporation of Concessions and Commitments*

1. The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.

2. Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

3. Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

¹¹ Appellate Body Report on *Korea – Various Measures on Beef*, paras. 117–118.

¹² Appellate Body Report on *Canada – Dairy*, para. 87.

¹³ Appellate Body Report on *US – FSC*, para. 136.

¹⁴ Appellate Body Report on *US – FSC*, para. 137.

¹⁵ Appellate Body Report on *US – FSC*, para. 141. This was confirmed in the Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras 192–195.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.2

12. In *Korea – Various Measures on Beef*, examining whether Korea’s domestic support to its cattle industry was consistent with Articles 3, 6 and 7 of the *Agreement on Agriculture*, the Panel indicated, in a statement subsequently not reviewed by the Appellate Body:

“It is, therefore, clear that Article 3 provides that support in favour of domestic producers (and here explicit reference is made to ‘subject to Article 6’) cannot exceed the level of support provided for in a Member’s schedule. So, when assessing the WTO compatibility of domestic support, two parameters are indicated: first the provisions of Article 6 which refer to the object of those same ‘commitments’ on domestic support; and second, Section I of Part IV of a Member’s schedule.”¹⁶

2. Article 3.3

13. With respect to Members’ export subsidy commitments and related waivers, see also paragraphs 54–80 below.

14. In *US – FSC*, the Appellate Body explained the obligations set forth in Article 3.3 by distinguishing two distinct types of “commitments”:

“Under Article 3, Members have undertaken two different types of ‘export subsidy commitments’. Under the first clause of Article 3.3, Members have made a commitment that they will not ‘provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitments levels specified therein’. This is the commitment for *scheduled* agricultural products.

...

Under the second clause of Article 3.3, Members have committed *not* to provide *any* export subsidies, *listed in Article 9.1*, with respect to *unscheduled* agricultural products. This clause clearly also involves ‘export subsidy commitments’ within the meaning of Article 10.1. Our interpretation of this term is confirmed by the title of Article 9, which is ‘*Export Subsidy Commitments*’. Consistently with our reading of that term, Article 9.1 relates *both* to (1) the commitments made for *scheduled* agricultural products, under the first clause of Article 3.3, and to (2) the general prohibition, in the second clause of Article 3.3, against providing export subsidies listed in Article 9.1 to *unscheduled* agricultural products.”¹⁷

15. The Appellate Body on *US – FSC* further stated that with regard to *unscheduled* products, Members are prohibited from providing any export subsidies, while in respect of *scheduled* agricultural products the

“nature of the commitment made under the first clause of Article 3.3 is different”:

“With respect to *unscheduled* agricultural products, Members are *prohibited* under Article 3.3 from providing *any* export subsidies as listed in Article 9.1. Article 10.1 prevents the application of export subsidies which ‘*results in, or which threatens to lead to, circumvention*’ of that prohibition. Members would certainly have ‘found a way round’, a way to ‘evade’, this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1. Thus, with respect to the *prohibition* against providing subsidies listed in Article 9.1 on *unscheduled* agricultural products, we believe that the FSC measure involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, ‘*threatens to lead to circumvention*’ of that ‘export subsidy commitment’ in Article 3.3.

With respect to *scheduled* agricultural products, the nature of the commitment made under the first clause of Article 3.3 is different. Members are not subject to a general prohibition against providing export subsidies as listed in Article 9.1; rather, there is a *limited authorization* for Members to provide such subsidies up to the level of the reduction commitments specified in their Schedule.

...

As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies.

...

In our view, Members would have found ‘a way round’, a way to ‘evade’, their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1.”¹⁸

PART III

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4 Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

¹⁶ Panel Report on *Korea – Various Measures on Beef*, para. 803.

¹⁷ Appellate Body Report on *US – FSC*, paras. 145–146.

¹⁸ Appellate Body Report on *US – FSC*, paras. 150–152.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties¹, except as otherwise provided for in Article 5 and Annex 5.

(*footnote original*) ¹ These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

(a) Purpose of Article 4

16. In *Chile – Price Band System*, the Appellate Body explained the background of the negotiations which produced the text of Article 4, “which is the main provision of Part III of the *Agreement on Agriculture*”, and indicated that Article 4 “is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products”:

“[W]e turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with “Market Access”.¹⁹ During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved – both in the short term and in the long term – through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members’ Schedules.

Thus, Article 4 of the *Agreement on Agriculture* is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products

...²⁰

(b) Notification requirements

17. With respect to the notification requirements concerning tariff quotas and other quotas, see paragraph 116 below.²¹

2. Article 4.1

18. In *EC – Bananas III*, the Appellate Body upheld the Panel’s finding that Article 4.1 cannot be interpreted so as to allow an inconsistency with GATT Article XIII of the European Communities import scheme for bananas. See paragraph 126 below.

3. Article 4.2

(a) “any measures which have been required to be converted into ordinary customs duties”

(i) Interpretation

Ordinary meaning in its context and in light of its object and purpose

19. In *Chile – Price Band System*, the Appellate Body interpreted the ordinary meaning of the phrase “measures which have been required to be converted into ordinary customs duties”, in its context and in light of its object and purpose.²² The Appellate Body first focussed on the present perfect tense in that phrase (“have been required”) and considered that “Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round – but that had not been converted – could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995”. The Appellate Body therefore concluded that this phrase could not be interpreted as limiting the obligation “only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round”:

“Article 4.2 of the *Agreement on Agriculture* should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision – particularly in the light of the fact that most of the other obligations in the *Agreement on Agriculture* and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue

¹⁹ (*footnote original*) Part III contains only one other provision, namely, Article 5, which provides for a special safeguard mechanism that may be used to derogate from the requirements of Article 4 when certain conditions are met. We will discuss Article 5 later in this section.

²⁰ Appellate Body Report on *Chile – Price Band System*, paras. 200–201.

²¹ G/AG/2, pp. 2–4.

²² See Section III.B.1 of the Chapter on the DSU.

to apply at present.²³ As used in Article 4.2, this temporal connotation relates to the date *by which* Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date *from which* Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began *during* the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to 'compensate' for and replace converted border measures were to be recorded in Members' draft WTO Schedules by the *conclusion* of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the *WTO Agreement* on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the *WTO Agreement* on 1 January 1995, Members are required not to 'maintain, revert to, or resort to' measures covered by Article 4.2 of the *Agreement on Agriculture*.

If Article 4.2 were to read 'any measures of the kind which *are* required to be converted', this would imply that if a Member – for whatever reason – had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, *even today*, replace that measure with ordinary customs duties in excess of bound tariff rates.²⁴ But, as Chile and Argentina have agreed, this is clearly not so. (footnote omitted) It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round – but were not converted – could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995.

Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phrase 'have been required' does not suggest that the scope of the phrase 'any measures of the kind which have been required to be converted into ordinary customs duties' must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word 'any' and the phrase 'of the kind', which are descriptive of the word 'measures' in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word 'any' and the phrase 'of the kind' in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round."²⁵

Footnote 1

20. The Appellate Body on *Chile – Price Band System*, referred to the wording of footnote 1 to the *Agreement on Agriculture* as confirmation of its interpretation of the phrase "measures which have been required to be converted into ordinary customs duties" (see paragraph 19 above):

"The wording of footnote 1 to the *Agreement on Agriculture* confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of 'measures of the kind which have been required to be converted', and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*. Specifically, and as both participants agree (footnote omitted), the use of the word 'include' in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be 'measures of the kind which have been required to be converted' that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.

Footnote 1 also refers to a residual category of 'similar border measures other than ordinary customs duties', which indicates that the drafters of the Agreement did not seek to identify all 'measures which have been required to be converted' during the Uruguay Round negotiations. The existence of this residual category confirms our interpretation that Article 4.2 covers more than merely the measures that had been specifically identified or challenged by other negotiating partners in the course of the Uruguay Round."²⁶

Article 5 as context for Article 4.2 interpretation

21. The Appellate Body on *Chile – Price Band System* further indicated that the context of Article 4.2 confirms its interpretation (see paragraph 19 above). In this regard, the Appellate Body referred to Article 5.1 as an illustration that "where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation":

²³ (footnote original) G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 1979), paras 112–119. R. Quirk and S. Greenbaum, *A University Grammar of English*, (Longman, 1979), paras. 328–330.

²⁴ (footnote original) Bound tariffs could, however, be renegotiated pursuant to Article XXVIII of the GATT 1994.

²⁵ Appellate Body Report on *Chile – Price Band System*, paras. 206–208.

²⁶ Appellate Body Report on *Chile – Price Band System*, paras. 209–210.

"[T]he context of Article 4.2 confirms our interpretation. Article 5.1 of the *Agreement on Agriculture*, the only provision in addition to Article 4 that is included in Part III of that Agreement, specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product 'in respect of which measures referred to in [Article 4.2] have been converted into an ordinary customs duty'. (emphasis added) In our view, the phrase 'have been required to be converted' in Article 4.2 has a broader connotation than the phrase 'have been converted' in Article 5.1.²⁷ Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 'have been converted' – that is, have in fact already been converted – into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation."²⁸

22. The Appellate Body on *Chile – Price Band System* further considered that Article 5 lends contextual support to its interpretation of Article 4.2 (see paragraph 19 above) since "the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5":

"Article 5, also found in Part III of the *Agreement on Agriculture* on "Market Access", lends contextual support to our interpretation of Article 4.2. In our view, the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5 – but without respecting the conditions set out in that provision for invoking such measures – it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5.²⁹³⁰

Subsequent practice

23. In *Chile – Price Band System*, Chile had argued that, in interpreting this Article 4.2 phrase, it was "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round had actually converted it into ordinary customs duties. The Appellate Body looked into the possibility that this practice could be considered "subsequent practice"³¹ pursuant to Article 31(3)(b) of the *Vienna Con-*

vention and therefore a practice relevant to the interpretation of Article 4.2. The Appellate Body referred to its definition of "subsequent practice" in its Report in *Japan – Alcoholic Beverages*³² and noted that neither the Panel record nor the submissions of the parties suggested that there was a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of Article 4.2. The Appellate Body thus concluded that this practice of some Members alleged by Chile did not amount to a "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.³³

(ii) "converted"

24. In *Chile – Price Band System*, the Appellate Body looked at the meaning of "converted" in the phrase "any measures which have been required to be converted into ordinary customs duties" and concluded, on the basis of the dictionary meanings of "convert" and "converted" that those measures "had to be transformed into something they were not – namely, ordinary customs duties". In this case, Chile had argued that its price band system was not a measure of the kind which had been required to be converted, but rather a system for determining the level of the resulting ordinary customs duties. The Appellate Body considered that the "mere fact that . . . measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures":

"Article 4.2 speaks of 'measures of the kind which have been required to be converted into ordinary customs duties'. The word 'convert' means 'undergo transformation'.³⁴ The word 'converted' connotes 'changed in their nature', 'turned into something different'.³⁵ Thus, 'measures which have been required to be converted into ordinary customs duties' had to be transformed into something they were not – namely, ordinary customs duties. The following example illustrates this point.

²⁷ (footnote original) In this context, we note that a special safeguard can be imposed only on those agricultural products for which a Member has reserved its right to do so in its Schedule.

²⁸ Appellate Body Report on *Chile – Price Band System*, para. 211.

²⁹ (footnote original) We note that Chile has not reserved, in its Schedule, the right to apply special safeguards. In response to questioning at the oral hearing, no participant suggested that the interpretation of Article 4.2 should be different depending on whether or not a Member reserved such a right.

³⁰ Appellate Body Report on *Chile – Price Band System*, para. 217.

³¹ See Section III.B.1(iii)(c) of the Chapter on the *DSU*.

³² "... a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation." Appellate Body Report on *Japan – Alcoholic Beverages*, para. 107.

³³ Appellate Body Report on *Chile – Price Band System*, paras. 213–214.

³⁴ (footnote original) *The New Shorter Oxford Dictionary*, L. Brown (ed.) (Clarendon Press), 1993, Vol. I, p. 502.

³⁵ (footnote original) *Ibid.*

The application of a 'variable import levy', or a 'minimum import price', as the terms are used in footnote 1, can result in the levying of a specific duty equal to the difference between a reference price and a target price, or minimum price. These resulting levies or specific duties take the same *form* as ordinary customs duties. However, the mere fact that a duty imposed on an import at the border is in the same *form* as an ordinary customs duty, does not mean that it is *not* a 'variable import levy' or a 'minimum import price'. Clearly, as measures listed in footnote 1, 'variable import levies' and 'minimum import prices' had to be *converted into* ordinary customs duties by the end of the Uruguay Round. The mere fact that such measures result in the payment of duties does not exonerate a Member from the requirement not to maintain, resort to, or revert to those measures."³⁶

(iii) "ordinary customs duties"

25. In *Chile – Price Band System*, the Appellate Body reversed the Panel's definition of "ordinary customs duty". The Panel had found that "[a]ll "ordinary" customs duties may . . . be said to take the form of *ad valorem* or specific duties (or combinations thereof)".³⁷ The Panel further found that the term "ordinary customs duty" has a "normative connotation".³⁸ The Appellate Body disagreed:

"We do not agree with the Panel's reasoning that, necessarily, '[a]s a *normative* matter, . . . those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties.'³⁹ (emphasis in original, underlining added) Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term 'ordinary customs duty' to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby 'when a comparison of the authentic texts discloses a difference of meaning . . . , the meaning which best *reconciles* the texts . . . shall be adopted.' (emphasis added).

We also find it difficult to understand how the Panel could find 'normative' support for its reasoning by examining the Schedules of WTO Members. We have observed in a previous case that '[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations'.⁴⁰ A Member's Schedule imposes obligations on the Member who has made the concessions. The Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b)

of the *Vienna Convention*.⁴¹ In this case the Panel Report contains no support for the conclusion that the scheduling activity of WTO Members amounts to 'subsequent practice'.

[N]ot each and every duty that is calculated on the basis of the *value* and/or *volume* of imports is necessarily an 'ordinary customs duty'. For example, in the case at hand, the *ad valorem* duty is calculated on the *value* of the imports. The calculation of the *specific* duty resulting from Chile's price band system is, on the other hand, based, not only on the difference between the lower threshold of the price band and the applicable reference price, but also on the *volume* per unit of the imports."⁴²

26. The Appellate Body on *Chile – Price Band System* also disagreed and thus reversed the Panel's finding that the term "ordinary customs duty", as used in Article 4.2 of the *Agreement on Agriculture*, is to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature":⁴³

"Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column

³⁶ Appellate Body Report on *Chile – Price Band System*, para. 216.

³⁷ The Panel found that "[a]s an *empirical* matter, we observe that Members, in regular practice, invariably express commitments in the ordinary customs duty column of their Schedules as *ad valorem* or specific duties, or combinations thereof. All "ordinary" customs duties may therefore be said to take the form of *ad valorem* or specific duties (or combinations thereof)." Panel Report on *Chile – Price Band System*, para. 7.52.

³⁸ The Panel had found that "[a]s a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of imported goods, in the case of specific duties." Panel Report on *Chile – Price Band System*, para. 7.52.

³⁹ (footnote original) *Ibid.*, para. 7.52.

⁴⁰ (footnote original) Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, para. 154. Panel Report in *United States Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331, para. 5.2.

⁴¹ (footnote original) Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paras. 84, 90 and 93. See also our paras. 213–214 of this Report.

⁴² Appellate Body Report on *Chile – Price Band System*, paras. 271, 272 and 274.

⁴³ The Panel had found that "for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an "ordinary" customs duty, that is, a customs duty *senso strictu*, is to be understood as referring to a customs duty which is not applied on the basis of factors of an exogenous nature". Panel Report on *Chile – Price Band System*, para. 7.52.

of a Member's Schedule. We see no legal basis for such a conclusion.^{44, 45}

27. The Appellate Body on *Chile – Price Band System* further noted that “in examining Article 4.2 of the *Agreement on Agriculture*, the *second* sentence of Article II:1(b) of the *GATT 1994*, does *not* specify what form “other duties or charges” must take to qualify as such within the meaning of that sentence”:

“We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the *GATT 1994*, does *not* specify what form ‘other duties or charges’ must take to qualify as such within the meaning of that sentence. The Panel’s own approach of reviewing Members’ Schedules reveals that many, if not most, ‘other duties or charges’ are expressed in *ad valorem* and/or specific terms, which does not, of course, make them ‘ordinary customs duties’ under the first sentence of Article II:1(b).”⁴⁶

28. The Appellate Body on *Chile – Price Band System*, pointed to Article II:2 of the *GATT 1994* and Annex 5 to the *Agreement on Agriculture* as contextual support for interpreting the term “ordinary customs duties”:

“As context for this phrase in Article 4.2 of the *Agreement on Agriculture*, we observe that Article II:2 of the *GATT 1994* sets out examples of measures that do not qualify as either ‘ordinary customs duties’ or ‘other duties or charges’. These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from ‘ordinary customs duties’ by providing that ‘[n]othing in [Article II] shall prevent any Member from imposing’ them ‘at any time on the importation of any product’.

Contextual support for interpreting the term ‘ordinary customs duties’ also appears in Annex 5 to the *Agreement on Agriculture*. Annex 5, read together with the Attachment to Annex 5 (*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*), contemplates the calculation of ‘tariff equivalents’ in a way that would result in ordinary customs duties ‘expressed as *ad valorem* or specific rates’. We do not find an obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls ‘exogenous factors’. Rather, all that is required is that ‘ordinary customs duties’ be expressed in the *form* of ‘*ad valorem* or specific rates’.”⁴⁷

Measure resulting in ordinary customs duties

29. In *Chile – Price Band System*, Argentina had argued before the Panel that Chile’s price band system was a measure “of the kind which has been required to be converted into ordinary customs duties” and which, by the terms of

Article 4.2 of the *Agreement on Agriculture*, Members are required not to maintain. Chile had refuted such an allegation and claimed that the duties resulting from its price band system were “ordinary customs duties” and that its price band system was merely a system for determining the level of those duties and, therefore, consistent with Article 4.2. The Appellate Body agreed with the Panel as regards the inconsistency of Chile’s price band system with Article 4.2 (although not as regards the Panel’s reasoning) and found that “the fact that the *duties* that result from the application of Chile’s price band system take the same form as “ordinary customs duties” does not imply that the underlying measure is consistent with Article 4.2 of the *Agreement on Agriculture*.”⁴⁸

(iv) Timing of the obligation

30. The Appellate Body on *Chile – Price Band System* concluded that “the obligation in Article 4.2 not to “maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties” applies from the date of the entry into force of the *WTO Agreement* – regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round.”⁴⁹

(b) Relation with Article XI of GATT and its *Ad Note*

31. The Panel on *Korea – Various Measures on Beef*, in a statement not reviewed by the Appellate Body, held with respect to a certain practice of the Korean state trading agency for beef imports:

“[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.”⁵⁰

⁴⁴ (*footnote original*) We stated in *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46, that “a tariff binding in a Member’s Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule.” Thus, the fact that the “cap” (recorded in the ordinary customs duty” column of a schedule) is a specific or an *ad valorem* duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls “*exogenous*” factors. Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.

⁴⁵ Appellate Body Report on *Chile – Price Band System*, para. 273.

⁴⁶ Appellate Body Report on *Chile – Price Band System*, para. 275.

⁴⁷ Appellate Body Report on *Chile – Price Band System*, paras. 276–277.

⁴⁸ Appellate Body Report on *Chile – Price Band System*, para. 279.

⁴⁹ Appellate Body Report on *Chile – Price Band System*, para. 212.

⁵⁰ Panel Report on *Korea – Various Measures on Beef*, para. 762.

(c) Special treatment

32. With respect to the special treatment in connection with paragraph 2 of Article 4, see Article 5, Section VI below, and Annex 5, Section XXVII below.

4. Footnote 1

(a) “variable import levies”

33. In *Chile – Price Band System*, the Appellate Body, which overturned the Panel’s interpretation of this term⁵¹, noted that the “WTO Members have not chosen to define [this] “term of art” in the *Agreement on Agriculture* or anywhere else in the *WTO Agreement*”⁵². The Appellate Body concluded that a variable import duty requires the presence of both a formula causing automatic and continuous variability of duties and additional features that undermine the object and purpose of Article 4 because they include a lack of transparency and a lack of predictability in the level of duties that will result from such measures:

“In examining the ordinary meaning of the term ‘variable import levies’ as it appears in footnote 1, we note that a ‘levy’ is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.⁵³ An ‘import’ levy is, of course, a duty assessed upon importation. A levy is ‘variable’ when it is ‘liable to vary’.⁵⁴ This feature alone, however, is not conclusive as to what constitutes a ‘variable import levy’ within the meaning of footnote 1. An ‘ordinary customs duty’ could also fit this description. A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member’s Schedule).⁵⁵ This change in the *applied* rate of duty could be made, for example, through an act of a Member’s legislature or executive at any time. Moreover, it is clear that the term ‘variable import levies’ as used in footnote 1 must have a meaning different from ‘ordinary customs duties’, because ‘variable import levies’ must be *converted into* ‘ordinary customs duties’. Thus, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of ‘variable import levies’ for purposes of footnote 1.

To determine *what kind* of variability makes an import levy a ‘variable import levy’, we turn to the immediate context of the other words in footnote 1. The term ‘variable import levies’ appears after the introductory phrase ‘[t]hese *measures* include’. Article 4.2 – to which the footnote is attached – also speaks of ‘*measures*’. This suggests that at least one feature of ‘variable import levies’ is the fact that the *measure* itself – as a mechanism – must impose the *variability* of the duties. Variability is inherent in a measure if the measure incorporates a scheme or formula that causes and ensures that levies change automatically and continuously. Ordinary cus-

toms duties, by contrast, are subject to discrete changes in applied tariff rates that occur independently, and unrelated to such an underlying scheme or formula. The level at which ordinary customs duties are applied can be *varied* by a legislature, but such duties will not be automatically and continuously *variable*. To vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term ‘variable’ implies that *no* such action is required.

However, in our view, the presence of a formula causing automatic and continuous variability of duties is a *necessary*, but by no means a *sufficient*, condition for a particular measure to be a ‘variable import levy’ within the meaning of footnote 1. (*footnote omitted*) ‘Variable import levies’ have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. . . . an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be. (i) This lack of transparency and predictability will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.”⁵⁶

34. As regards the question whether a measure ceases to be similar to a “variable import levy” because it is subject to a tariff cap, see paragraphs 38–39 below.

(b) “minimum import prices”

35. In *Chile – Price Band System*, unlike with the definition of “variable import levies” (see paragraph 33 above), the Appellate Body did not overturn the Panel’s interpretation of the term “minimum import price” and

⁵¹ The Panel had concluded that it could not develop an interpretation of the term “variable import levies” solely on the basis of the methods of interpretation codified in Article 31 of the *Vienna Convention*. and decided, therefore, to have recourse to “supplementary means of interpretation” within the meaning of Article 32 of that Convention. This led to the Panel’s identification of what it described as “fundamental characteristics” of “variable import levies”. Panel Report on *Chile – Price Band System*, paras. 7.35–7.36. The Appellate Body, nevertheless, upheld the Panel’s finding, in para. 7.47 of the Panel Report, that Chile’s price band system is a “border measure similar to ‘variable import levies’ and ‘minimum import prices’” within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*. Appellate Body Report on *Chile – Price Band System*, para. 262.

⁵² Appellate Body Report on *Chile – Price Band System*, para. 229.

⁵³ (*footnote original*) *The New Shorter Oxford English Dictionary*, *supra*, footnote 190, p. 1574.

⁵⁴ (*footnote original*) *Ibid.*, p. 3547.

⁵⁵ (*footnote original*) Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

⁵⁶ Appellate Body Report on *Chile – Price Band System*, paras. 232–234.

simply noted that the parties did not disagree with it.⁵⁷ The Appellate Body, after indicating that the “term “minimum import price” refers generally to the lowest price at which imports of a certain product may enter a Member’s domestic market” and that “no definition has been provided by the drafters of the *Agreement on Agriculture*”, quoted the Panel’s description of “minimum import prices” as follows:

“The term ‘minimum import price’ refers generally to the lowest price at which imports of a certain product may enter a Member’s domestic market. Here, too, no definition has been provided by the drafters of the *Agreement on Agriculture*. However, the Panel described ‘minimum import prices’ as follows:

‘[these] schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.’⁵⁸

The Panel also said that minimum import prices ‘are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated.’⁵⁹ The main difference between minimum import prices and variable import levies is, according to the Panel, that ‘variable import levies are generally based on the difference between the *governmentally determined threshold* and the lowest world market offer price for the product concerned, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports.’⁶⁰ (emphasis added)

... the participants said they do not object to the Panel’s definition of a ‘minimum import price’...⁶¹

(c) “similar border measures”

(i) *Concept of similarity*

36. In *Chile – Price Band System*, the Appellate Body agreed with the Panel’s definition of the term “similar” as “having a resemblance or likeness”, “of the same nature or kind”, and “having characteristics in common”. The Appellate Body, however, disagreed with the Panel’s emphasis on the degree to which measures share characteristics of a “fundamental” nature.⁶² The Appellate Body found that the appropriate approach to determine similarity was to ask “whether two or more things have likeness or resemblance sufficient to be similar to each other”. The Appellate Body further considered that, for a measure to be “similar” to a border measure, it must have “sufficient ‘resemblance or likeness to’, or be ‘of the same nature or kind’ as, *at least one* of the specific categories of measures listed in footnote 1”:

“We agree with the first part of the Panel’s definition of the term ‘similar’ as ‘having a resemblance or likeness’,

‘of the same nature or kind’, and ‘having characteristics in common’.⁶³ However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a ‘fundamental’ nature. We see no basis for determining similarity by relying on characteristics of a ‘fundamental’ nature. The Panel seems to substitute for the task of defining the term ‘similar’ that of defining the term ‘fundamental’. This merely complicates matters, because it raises the question of how to distinguish ‘fundamental’ characteristics from those of a *less than* ‘fundamental’ nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.

... To be ‘similar’, Chile’s price band system – in its specific factual configuration – must have, to recall the dictionary definitions we mentioned, sufficient ‘resemblance or likeness to’, or be ‘of the same nature or kind’ as, *at least one* of the specific categories of measures listed in footnote 1.”⁶⁴

37. The Appellate Body on *Chile – Price Band System* stressed that “any examination of similarity presupposes a *comparative analysis*” and therefore, to determine whether a measure is “similar” within the meaning of within the meaning of footnote 1, it is necessary to identify *with which categories* that [measure] must be compared”.⁶⁵

(ii) *Relevance of tariff caps in the similarity analysis*

38. In *Chile – Price Band System*, Chile had argued that the Panel had failed to take proper account of the fact that the total amount of duties that may be levied

⁵⁷ Appellate Body Report on *Chile – Price Band System*, para. 238.

⁵⁸ (original footnote) Panel Report, para. 7.36(e).

⁵⁹ (footnote original) *Ibid.*

⁶⁰ (footnote original) *Ibid.*

⁶¹ Appellate Body Report on *Chile – Price Band System*, paras. 236–238.

⁶² The Panel’s reasoning was the following: “First, as regards the term ‘similar’, dictionaries define this term as ‘having a resemblance or likeness’, ‘of the same nature or kind’, and ‘having characteristics in common’. Two measures are in our view ‘similar’ if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered ‘similar.’” Panel Report on *Chile – Price Band System*, para. 7.26.

⁶³ (footnote original) *The New Shorter Oxford English Dictionary*, supra, [], p. 2865.

⁶⁴ Appellate Body Report on *Chile – Price Band System*, paras. 226–227.

⁶⁵ Appellate Body Report on *Chile – Price Band System*, para. 228. In this case, Chile’s price band system was compared to and found to be sufficiently similar to a “variable import levy” and “minimum import price” to make it a “similar border measure”. Para. 252.

as a result of Chile's price band system was "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule. The Appellate Body thus considered whether Chile's price band system ceases to be similar to a "variable import levy" because it is subject to a cap. The Appellate Body concluded:

"[W]e find nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap. Before the conclusion of the Uruguay Round, a measure could be recognized as a "variable import levy" even if the products to which the measure applied were subject to tariff bindings.⁶⁶ And, there is nothing in the text of Article 4.2 to indicate that a measure, which was recognized as a "variable import levy" before the Uruguay Round, is exempt from the requirements of Article 4.2 simply because tariffs on some, or all, of the products to which that measure *now* applies were bound as a result of the Uruguay Round."⁶⁷

39. The Appellate Body on *Chile – Price Band System*, found support for this view in the context of Article 4.2, which includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex* ("Guidelines"), which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4*, and Articles II and XI of the GATT 1994.

"The context of Article 4.2 lends support to this interpretation. That context includes the Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ('Guidelines'), which are an Attachment to Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4. Both the Attachment and the Annex form part of the Agreement on Agriculture. Paragraph 6 of the Guidelines⁶⁸ envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 may exceed previous bound rates. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded per se from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.

Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a 'cap' – which, in the absence of that 'cap', would be a prohibited 'variable import levy' – Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the 'restrictions other than taxes, duties and charges' that are prohibited by Article XI:1. (*footnote omitted*) In any event, it is difficult to see why Uruguay Round negotia-

tors would 'compensate' Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding – even at a higher level – on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound."⁶⁹

(iii) Common features of border measures

40. In *Chile – Price Band System*, the Appellate Body noted that trade distortive objectives and effects are common to all border measures:

"[W]e note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market."⁷⁰

(d) Relation with Article 4.2

41. The Appellate Body on *Chile – Price Band System*, referred to the wording of footnote 1 to the *Agreement on Agriculture* as confirmation of its interpretation⁷¹ of the phrase "measures which have been required to be converted into ordinary customs duties" of Article 4.2. See paragraph 20 above.

⁶⁶ (*footnote original*) In this respect, we note that, as illustrated by documents from GATT 1947, Contracting Parties to GATT 1947 regarded import levies which were applied to products subject to a tariff binding as variable import levies in spite of the existence of that binding:

The General Agreement contains no provision on the use of 'variable import levies'. It is obvious that *if any such duty or levy is imposed on a 'bound' item*, the rate must not be raised in excess of what is permitted by Article II (emphasis added)

See Note by the Executive Secretary on "Questions relating to Bilateral Agreements, discrimination and Variable Taxes", dated 21 November 1961, GATT document L/1636, paras. 7–8.

⁶⁷ Appellate Body Report on *Chile – Price Band System*, para. 254.

⁶⁸ (*footnote original*) Paragraph 6 provides:

Where a tariff equivalent resulting from these guidelines is negative or lower than the *current bound rate*, the initial tariff equivalent may be established at the *current bound rate* or on the basis of national offers for that product. (emphasis added)

⁶⁹ Appellate Body Report on *Chile – Price Band System*, paras. 255–256

⁷⁰ Appellate Body Report on *Chile – Price Band System*, para. 227.

⁷¹ For this interpretation, see para. 19. of this Chapter.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. GATT 1994

42. The Appellate Body on *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the *Agreement on Agriculture*, referred to Article II:1(b) of the *GATT 1994*. See paragraphs 24–28 above. The Appellate Body also indicated that if it were to find that Chile’s price band system was inconsistent with Article 4.2 of the *Agreement on Agriculture*, it would not need to make a separate finding on whether Chile’s price band system also results in a violation of Article II:1(b) of the *GATT 1994* to resolve this dispute.⁷²

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Special Safeguard Provisions

1. Notwithstanding the provisions of paragraph 1(b) of Article II of *GATT 1994*, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol “SSG” as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

- (a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:
- (b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price² for the product concerned.

(footnote original)² The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

2. Imports under current and minimum access commitments established as part of a concession referred to

in paragraph 1 above shall be counted for the purpose of determining the volume of imports required for invoking the provisions of subparagraph 1(a) and paragraph 4, but imports under such commitments shall not be affected by any additional duty imposed under either subparagraph 1(a) and paragraph 4 or subparagraph 1(b) and paragraph 5 below.

3. Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed under subparagraph 1(a) and paragraph 4 shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of subparagraph 1(a) in that year.

4. Any additional duty imposed under subparagraph 1(a) shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption³ during the three preceding years for which data are available:

(footnote original)³ Where domestic consumption is not taken into account, the base trigger level under subparagraph 4(a) shall apply.

- (a) where such market access opportunities for a product are less than or equal to 10 percent, the base trigger level shall equal 125 percent;
- (b) where such market access opportunities for a product are greater than 10 percent but less than or equal to 30 percent, the base trigger level shall equal 110 percent;
- (c) where such market access opportunities for a product are greater than 30 percent, the base trigger level shall equal 105 percent.

In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 percent of the average quantity of imports in (x) above.

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

⁷² Appellate Body Report on *Chile – Price Band Systems*, para. 190.

- (a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 percent of the trigger price, no additional duty shall be imposed;
- (b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 percent but less than or equal to 40 percent of the trigger price, the additional duty shall equal 30 percent of the amount by which the difference exceeds 10 percent;
- (c) if the difference is greater than 40 percent but less than or equal to 60 percent of the trigger price, the additional duty shall equal 50 percent of the amount by which the difference exceeds 40 percent, plus the additional duty allowed under (b);
- (d) if the difference is greater than 60 percent but less than or equal to 75 percent, the additional duty shall equal 70 percent of the amount by which the difference exceeds 60 percent of the trigger price, plus the additional duties allowed under (b) and (c);
- (e) if the difference is greater than 75 percent of the trigger price, the additional duty shall equal 90 percent of the amount by which the difference exceeds 75 percent, plus the additional duties allowed under (b), (c) and (d).
6. For perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b).
7. The operation of the special safeguard shall be carried out in a transparent manner. Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. In cases where changes in consumption volumes must be allocated to individual tariff lines subject to action under paragraph 4, relevant data shall include the information and methods used to allocate these changes. A Member taking action under paragraph 4 shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action. Any Member taking action under subparagraph 1(b) above shall give notice in writing, including relevant data, to the Committee on Agriculture

within 10 days of the implementation of the first such action or, for perishable and seasonal products, the first action in any period. Members undertake, as far as practicable, not to take recourse to the provisions of subparagraph 1(b) where the volume of imports of the products concerned are declining. In either case a Member taking such action shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action.

8. Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

9. The provisions of this Article shall remain in force for the duration of the reform process as determined under Article 20."

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1(b)

43. In *EC – Poultry*, Brazil argued that the European Communities had failed to comply with Article 5 of the *Agreement on Agriculture* in the implementation of the special safeguard measures for imports of poultry meat outside tariff quotas. The European Communities contested the finding of the Panel that the phrase in Article 5.1(b) "on the basis of the c.i.f. import price" referred to the c.i.f. price *plus* import duties. Reversing the Panel's findings on Article 5.1(b), the Appellate Body first explored the circumstances in which this specific question could become relevant and then went on to distinguish between an entry into the customs territory on the one hand, and an entry into the domestic market on the other:

"This dispute has no practical significance if both the c.i.f. import price and the c.i.f. import price plus customs duties fall above or below the trigger price. If both prices are above the trigger price, then additional duties cannot be imposed. And, if both prices fall below the trigger price, then additional duties may be imposed regardless of which definition of the relevant import price is adopted. However, the practical significance of this dispute becomes apparent whenever the trigger price falls between the other two prices, that is, when the trigger price is greater than the c.i.f. import price but smaller than the c.i.f. import price plus customs duties. . . . [I]f the relevant price is defined as the c.i.f. import price plus customs duties, additional duties may not be imposed since the relevant price is well above the trigger price. If, on the other hand, it is defined as the c.i.f. import price only (that is, without customs duties), additional duties may be imposed because the relevant price is below the trigger price. Thus, to adopt one definition, rather than

another, will determine whether or not an importing Member may impose additional safeguard duties.

...

The relevant import price in Article 5.1(b) is described as 'the price at which imports of that product *may enter the customs territory* of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned'. It is noteworthy that the drafters of the *Agreement on Agriculture* chose to use as the relevant import price the entry price into the *customs territory*, rather than the entry price into the *domestic market*. This suggests that they had in mind the point of time *just before* the entry of the product concerned into the customs territory, and certainly before entry into the domestic market, of the importing Member. The ordinary meaning of these terms in Article 5.1(b) supports the view that the 'price at which that product may enter the customs territory' of the importing Member should be construed to mean just that – the price at which the product may enter the *customs territory*, not the price at which the product may enter the *domestic market* of the importing Member. And that price is a price that does not include customs duties and internal charges. It is upon entry of a product into the customs territory, but before the product enters the domestic market, that the obligation to pay customs duties and internal charges accrues."⁷³

44. The Appellate Body on *EC – Poultry* then noted that the *Agreement on Agriculture* does not define the term "c.i.f. import price", but considered the customary usage of this term in international trade:

"Article 5.1(b) also states that the relevant import price is to be 'as determined *on the basis of* the c.i.f. import price of the shipment concerned'. (emphasis added) The Panel interprets this phrase to mean 'that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters.'⁷⁴ We disagree. In the light of our construction of the preceding phrase 'the price at which imports of the product may enter the customs territory of the Member granting the concession', we conclude that the phrase 'as determined *on the basis of* the c.i.f. import price of the shipment concerned' in Article 5.1(b) refers simply to the c.i.f. price without customs duties and taxes. There is no definition of the term 'c.i.f. import price' in the *Agreement on Agriculture* or in any of the other covered agreements. However, in customary usage in international trade, the c.i.f. import price does not include any taxes, customs duties, or other charges that may be imposed on a product by a Member upon entry into its customs territory.⁷⁵ We think it significant also that ordinary customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is 'the c.i.f. price plus ordinary customs duties'. Accordingly, to read the inclusion of customs duties into the definition of the

c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there."⁷⁶

45. The Appellate Body on *EC – Poultry* found support for its finding referenced in paragraph 44 above in the context of Article 5.1(b):

"This reading of the text of Article 5.1(b) is supported by our reading of the context of that provision in accordance with Article 31 of the *Vienna Convention*, which specifies that the ordinary meaning of the terms of a treaty should be interpreted in their context.

We look first to the rest of Article 5.1. In considering when additional special safeguard duties under Article 5.1(b) may be imposed, the relevant import price must be compared with a trigger price. According to Article 5.1(b), this trigger price is 'equal to the average 1986 to 1988 reference price for the product concerned'. Footnote 2 to Article 5.1(b) states:

The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

Thus, the reference price with which the relevant price is compared under Article 5.1 does *not* include ordinary customs duties. It is simply the average c.i.f. import price of the product concerned during the reference period, 1986–1988. Given this definition of the reference price, it could not have been the intention of the drafters to compare a c.i.f. price exclusive of customs duties for the reference period with a c.i.f. price inclusive of such duties today.

Paragraph 5 of Article 5 is also part of the context of Article 5.1(b). This provision establishes a link between the amount of the additional duty to be imposed and the difference between the c.i.f. import price of the shipment and the trigger price. According to the schedule contained in paragraph 5, when the difference between the c.i.f. import price of the shipment and the trigger price is not greater than 10 per cent, no additional duty shall be imposed. When the difference is greater than 10 per

⁷³ Appellate Body Report on *EC – Poultry*, paras. 143 and 145.

⁷⁴ (footnote original) Panel Report, para. 278.

⁷⁵ (footnote original) We note that the *Incoterms 1990* of the International Chamber of Commerce explains what the acronym "c.i.f." means "cost, insurance and freight", but does not give a definition of "c.i.f. import price". However, according to customary usage in international trade, c.i.f. import price, or simply c.i.f. price, is equal to the price of the product in the exporting country plus additional costs, insurance and freight to the importing country. This definition may also be inferred from paragraph 2 of the *Attachment to Annex 5 of the Agreement on Agriculture*.

⁷⁶ Panel Report on *EC – Poultry*, para. 146.

cent, additional duties may be imposed. The amount of the additional safeguard duties increases as the difference in the two prices increases. We see no reference in paragraph 5 to ‘c.i.f. import price *plus* ordinary customs duties’. The price used to determine when the special safeguard may be triggered and the price used to calculate the amount of the additional duties must be one and the same.”⁷⁷

46. The Appellate Body on *EC – Poultry*, after making the findings referenced in paragraphs 43–45 above, considered what it termed two “anomalies” which would arise under the interpretation given to Article 5.1(b) by the Panel:

“Certain anomalies would arise from the interpretation adopted by the majority of the Panel. One of these anomalies was cited in the opinion of the dissenting member of the Panel.⁷⁸ If tariffication of non-tariff barriers on a certain product took the form of specific duties that were greater than the trigger price, then an importing Member may never be able to invoke Article 5.1(b). The truth of this observation is evident from the fact that the c.i.f. import price plus customs duties may never fall below the trigger price. This consequence is not limited to the case of specific duties that exceed the trigger price. It could also occur in cases where tariffication takes the form of *ad valorem* duties. We know that tariffication has resulted in tariffs which are, in a large number of cases, very high. The probability is strong, therefore, that the *ad valorem* duties could exceed the percentage decrease in the c.i.f. import price by a substantial margin. In such cases, the decrease in the c.i.f. price would have to be very deep before the relevant import price would fall below the trigger price. Thus, the provisions of Article 5.1(b) would not be operational in many cases. It is doubtful that this was intended by the drafters of the ‘Special Safeguard Provisions’.

Another anomaly that would arise from defining the relevant import price as the c.i.f. import price *plus* ordinary customs duties would be that the right of Members to invoke the provisions of Article 5.1(b) would depend on the level of tariffs resulting from tariffication. Faced with a certain decline in the c.i.f. price – say, 20 per cent – some Members would find themselves in a situation where they could not invoke the price safeguard; others would have the right to do so. The first category would comprise those Members with a relatively high level of tariffied duties; the second would be those with a relatively moderate level. Thus, the rights of Members would ultimately depend on the level of their tariffied duties. It is doubtful, too, that this was intended by the drafters of the ‘Special Safeguard Provisions’.”⁷⁹

47. As a result of the reasoning referenced in paragraphs 43–46 above, the Appellate Body in *EC – Poultry* concluded:

“[W]e interpret the ‘price at which the product concerned may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price’ in Article 5.1(b) as the c.i.f. import price not including ordinary customs duties.”⁸⁰

2. Article 5.5

48. Regarding Article 5.5, in *EC – Poultry*, the Appellate Body examined whether it was permissible for the importing Member to offer the importer a choice between the use of the c.i.f. price of the shipment as provided in that provision, and another method of calculation which departs from this principle. Under the relevant regulation, the European Communities calculated a periodic representative price, based, *inter alia*, in part on prices in third-country markets and prices at various stages of marketing within the European Communities. The Commission, in its determination of the trigger price for the purposes of the special safeguard provision, would use this “representative price”, unless the importer specifically requested the use of the c.i.f. price, conditional upon the presentation of certain documents and the lodging of a security by the importer. The Appellate Body held as follows:

“[N]either the text nor the context of Article 5.5 of the *Agreement on Agriculture* permits us to conclude that the additional duties imposed under the special safeguard mechanism in Article 5 of the *Agreement on Agriculture* may be established by any method other than a comparison of the *c.i.f. price of the shipment* with the trigger price.”⁸¹

3. Article 5.7

(a) Notification requirements

49. With respect to notification requirements concerning the special safeguard provisions, see paragraphs 116–118 below.

PART IV

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Domestic Support Commitments

1. The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of

⁷⁷ Appellate Body Report on *EC – Poultry*, paras. 147–150. (*footnote original*) Panel Report, para. 291.

⁷⁸ Appellate Body Report on *EC – Poultry*, paras. 151–152.

⁸⁰ Appellate Body Report on *EC – Poultry*, para. 153.

⁸¹ Appellate Body Report on *EC – Poultry*, para. 168.

agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels".

2. In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.

3. A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

4. (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

- (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of that Member's total value of production of a basic agricultural product during the relevant year; and
- (ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 percent of the value of that Member's total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 percent.

5. (a) Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:

- (i) such payments are based on fixed area and yields; or

- (ii) such payments are made on 85 percent or less of the base level of production; or
- (iii) livestock payments are made on a fixed number of head.

(b) The exemption from the reduction commitment for direct payments meeting the above criteria shall be reflected by the exclusion of the value of those direct payments in a Member's calculation of its Current Total AMS.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Notification requirements

50. With respect to the notification requirements concerning domestic support, see paragraphs 116–118 below.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

General Disciplines on Domestic Support

1. Each Member shall ensure that any domestic support measures in favour of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 to this Agreement are maintained in conformity therewith.

2. (a) Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.

(b) Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

51. No jurisprudence or decision of a competent WTO body.

1. Relationship with Annex 2

52. In order to consult the criteria established in Annex 2, see Section XXIV below.

PART V

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

*Article 8**Export Competition Commitments*

Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. General

53. With respect to Members' export subsidy commitments, see paragraphs 14–15 above and paragraphs 54–80 below.

2. Waivers from export subsidy commitments

54. On 22 October 1997, the General Council decided to grant a waiver from the export subsidy commitments to Hungary, in accordance with Article IX of the *WTO Agreement*.⁸² See Chapter on the *WTO Agreement*, Section X.B.3 for a list of the waivers currently in force.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

*Article 9**Export Subsidy Commitments*

1. The following export subsidies are subject to reduction commitments under this Agreement:

- (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;
- (b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;
- (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned

or on an agricultural product from which the exported product is derived;

- (d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;
 - (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;
 - (f) subsidies on agricultural products contingent on their incorporation in exported products.
2. (a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, as specified in a Member's Schedule, represent with respect to the export subsidies listed in paragraph 1 of this Article:
- (i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and
 - (ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.
- (b) In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that:
- (i) the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule by more than 3 percent of the base period level of such budgetary outlays;
 - (ii) the cumulative quantities exported with the benefit of such export subsidies, from

⁸² WT/L/238.

the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Member's Schedule by more than 1.75 percent of the base period quantities;

- (iii) the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance with the relevant annual commitment levels specified in the Member's Schedule; and
- (iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 percent and 79 percent of the 1986–1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 percent, respectively.

3. Commitments relating to limitations on the extension of the scope of export subsidization are as specified in Schedules.

4. During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments."

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. General

(a) Notification requirements

55. With respect to notification requirements concerning export subsidies, see paragraphs 116–118 below.

2. Article 9.1(a)

(a) "direct subsidies, including payments-in-kind"

56. The Panel on *Canada – Dairy* held that "payments-in-kind are a form of direct subsidy" and that "a determination in the instant matter that 'payments-in-kind' exist would also be a determination of the existence of a *direct subsidy*." (Emphasis added)⁸³ The Appellate Body disagreed and held, *inter alia*, that "[w]here the

recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives":

"In our view, the term 'payments-in-kind' describes one of the *forms* in which 'direct subsidies' may be granted. Thus, Article 9.1(a) applies to 'direct subsidies', including 'direct subsidies' granted in the form of 'payments-in-kind'. We believe that, in its ordinary meaning, the word 'payments', in the term 'payments-in-kind', denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a 'payment-in-kind' has been made provides no indication as to the economic *value* of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A 'payment-in-kind' may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration. As we said in our Report in *Canada – Aircraft*, a 'subsidy', within the meaning of Article 1.1 of the *SCM Agreement*, arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace. Where the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives. It follows, in our view, that the mere fact that a 'payment-in-kind' has been made does not, *by itself*, imply that a 'subsidy', 'direct' or otherwise, has been granted.

[T]he Panel erred in finding that 'a determination in the instant matter that 'payments-in-kind' exist would also be a determination of the existence of a direct subsidy.' The Panel should have considered whether the particular 'payment-in-kind' that it found existed was a 'direct subsidy'. Instead, because the Panel assumed that a 'payment-in-kind' is necessarily a 'direct subsidy', it did not address specifically either the meaning of the term 'direct subsidies' or the question whether the provision of milk to processors for export under Special Classes 5(d) and 5(e) constitutes 'direct subsidies'."⁸⁴

(b) "governments or their agencies"

57. In *Canada – Dairy*, the Appellate Body addressed the phrase "governments or their agencies" and held that the fact that such an agency enjoys a "degree of discretion" does not remove its quality of being a government agency:

"According to *Black's Law Dictionary*, 'government' means, *inter alia*, '[t]he regulation, restraint, supervision, or control which is exercised upon the individual

⁸³ Panel Report on *Canada – Dairy*, para. 7.43.

⁸⁴ Appellate Body Report on *Canada – Dairy*, paras. 87–88.

members of an organized jural society *by those invested with authority*. (emphasis added) This is similar to meanings given in other dictionaries. The essence of ‘government’ is, therefore, that it enjoys the effective power to ‘regulate’, ‘control’ or ‘supervise’ individuals, or otherwise ‘restrain’ their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions. A ‘government agency’ is, in our view, an entity which exercises powers vested in it by a ‘government’ for the purpose of performing functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens. As with any agency relationship, a ‘government agency’ may enjoy a degree of discretion in the exercise of its functions.”⁸⁵

3. Article 9.1(c)

(a) “payments”

(i) *A payment includes a payment-in-kind*

58. In *Canada – Dairy*, the Appellate Body interpreted the term “payments” to include a transfer of resources other than money, including a “payment in kind”:

“We have found that the word ‘payments’, in the term ‘payments-in-kind’ in Article 9.1(a), denotes a transfer of economic resources.⁸⁶ We believe that the same holds true for the word ‘payments’ in Article 9.1(c). The question which we now address is whether, under Article 9.1(c), the economic resources that are transferred by way of a ‘payment’ must be in the form of money, or whether the resources transferred may take other forms. As the Panel observed, the dictionary meaning of the word ‘payment’ is not limited to payments made in monetary form. In support of this, the Panel cited the *Oxford English Dictionary*, which defines ‘payment’ as ‘the remuneration of a person with money or its equivalent’.⁸⁷ (emphasis added) Similarly, the *Shorter Oxford English Dictionary* describes a ‘payment’ as a ‘sum of money (or other thing) paid’.⁸⁸ (emphasis added) Thus, according to these meanings, a ‘payment’ could be made in a form, other than money, that confers value, such as by way of goods or services. A ‘payment’ which does not take the form of money is commonly referred to as a ‘payment in kind’.

We agree with the Panel that the ordinary meaning of the word ‘payments’ in Article 9.1(c) is consistent with the dictionary meaning of the word. Under Article 9.1(c), ‘payments’ are ‘financed by virtue of governmental action’ and they may or may not involve ‘a charge on the public account’. Neither the word ‘financed’ nor the term ‘a charge’ suggests that the word ‘payments’ should be interpreted to apply solely to money payments. A payment made in the form of goods or services

is also ‘financed’ in the same way as a money payment, and, likewise, ‘a charge on the public account’ may arise as a result of a payment, or a legally binding commitment to make payment by way of goods or services, or as a result of revenue foregone.”⁸⁹

59. The Appellate Body on *Canada – Dairy* considered that the context of Article 9.1(c) also supported a reading of the word “payments” that covered “payments-in-kind”.

“The context of Article 9.1(c) also supports a reading of the word ‘payments’ that embraces ‘payments-in-kind’. That context includes the other sub-paragraphs of Article 9.1. As the Panel explained, *none* of the export subsidies listed in Article 9.1 is restricted to grants made solely in money form and several expressly involve subsidies granted in a form other than money.⁹⁰ Under Article 9.1(a), ‘payments-in-kind’ are specifically included as a form of ‘direct subsidies’. Similarly, under Articles 9.1(b), the export subsidy identified may involve the disposal of agricultural goods *at less than domestic price*. Under Article 9.1(e), the provision of transport services for export shipments at *prices lower than the price charged for domestic shipments* is also an export subsidy. Thus, each of these three sub-paragraphs of Article 9.1 specifically contemplates that the export subsidy may be granted in a form other than a money payment.

The context, in our view, also includes Article 1(c) of the *Agreement on Agriculture*. In terms of that provision, ‘revenue foregone’ is to be taken into account in determining whether ‘budgetary outlay’ commitments, made with respect to export subsidies as listed in Article 9.1, have been exceeded. In our view, the foregoing of revenue usually does not involve a monetary payment. Thus, if a restrictive reading of the words ‘payments’ were adopted, such that ‘payments’ under Article 9.1(c) had to be monetary, no account could be taken, under Article 9.1(c), of ‘revenue foregone’. This would, we believe, prevent a proper assessment of the commitments made by WTO Members under Article 9.2, as envisaged by Article 1(c) of the *Agreement on Agriculture*. We, therefore, prefer a reading of Article 9.1(c) that allows full account to be taken of ‘revenue foregone’. The contrary view would, in our opinion, elevate form over substance and permit Members to circumvent the subsidy disciplines set forth in Article 9 of the *Agreement on Agriculture*.”⁹¹

60. The Appellate Body on *Canada – Dairy* acknowledged that Article 9.1(c) did not refer explicitly to

⁸⁵ Appellate Body Report on *Canada – Dairy*, para. 97.

⁸⁶ (footnote original) *Supra*, para. 87.

⁸⁷ (footnote original) Panel Report, para. 7.92.

⁸⁸ (footnote original) *The Shorter Oxford English Dictionary*, C.T. Onions (ed.) (Guild Publishing, 1983), Vol. II, p. 1532.

⁸⁹ Appellate Body Report on *Canada – Dairy*, paras. 107–108.

⁹⁰ (footnote original) See Panel Report, para. 7.95.

⁹¹ Appellate Body Report on *Canada – Dairy*, paras. 109–110.

‘payments-in-kind’, unlike other provisions of the *Agreement on Agriculture*, but held that the purpose of its express inclusion was ‘to counter any suggestion that the ordinary meaning of the terms ‘direct subsidies’ and ‘direct payments’ does not include ‘payments-in-kind’:

“It is true, as Canada argues, that Article 9.1(c) does not expressly include ‘payments-in-kind’ within its scope, whereas Article 9.1(a) and paragraph 5 of Annex 2 to the *Agreement on Agriculture* do. However, we do not regard the express inclusion of ‘payments-in-kind’ in these two provisions as necessarily implying the exclusion of ‘payments-in-kind’ under Article 9.1(c). In Article 9.1(a) and in paragraph 5 of Annex 2, the term ‘payments-in-kind’ is used in conjunction with the words ‘direct subsidies’ and ‘direct payments’, respectively. We believe that reference is made to ‘payments-in-kind’ in these two provisions to counter any suggestion that the ordinary meaning of the terms ‘direct subsidies’ and ‘direct payments’ does not include ‘payments-in-kind’. By contrast, since the ordinary meaning of the word ‘payments’ in Article 9.1(c) includes ‘payments-in-kind’, there was no need for ‘payments-in-kind’ to be expressly provided for. Moreover, if ‘payments-in-kind’ are included in the qualified concept of ‘direct payments’ under Annex 2, paragraph 5, it would be incongruous to exclude them from the broader concept of ‘payments’ in Article 9.1(c).”⁹²

61. The Appellate Body on *Canada – Dairy* consequently agreed with the Panel that the ordinary meaning of the word “payments” in Article 9.1(c) encompassed “payments” in forms other than money, including revenue foregone:

“In our view, the provision of milk at discounted prices to processors for export under Special Classes 5(d) and 5(e) constitutes ‘payments’, in a form other than money, within the meaning of Article 9.1(c). If goods or services are supplied to an enterprise, or a group of enterprises, at reduced rates (that is, at below market-rates), ‘payments’ are, in effect, made to the recipient of the portion of the price that is not charged. Instead of receiving a monetary payment equal to the revenue foregone, the recipient is paid in the form of goods or services. But, as far as the recipient is concerned, the economic value of the transfer is precisely the same.

We, therefore, uphold the Panel’s finding, in paragraph 7.101 of the Panel Report, that the provision of discounted milk to processors or exporters under Special Classes 5(d) and 5(e) involves ‘payments’ within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.”^{93 94}

(ii) *Benchmark to be applied when assessing payments*

62. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* explained the importance

of a benchmark when assessing if the measure at issue involves “payments” under Article 9.1(c):

“Thus, the determination of whether ‘payments’ are involved requires a comparison between the price actually charged by the provider of the goods or services – the prices of CEM in this case – and some objective standard or benchmark which reflects the proper value of the goods or services to their provider – the milk producer in this case. We do not accept Canada’s argument that as the producer negotiates freely the price with the processor, and CEM prices are, therefore, market-determined, it is not necessary to compare these prices with an objective standard.

Article 9.1(c) of the *Agreement on Agriculture* does not expressly identify any standard for determining when a measure involves ‘payments’ in the form of payments-in-kind. The absence of an express standard in Article 9.1(c) may be contrasted with several other provisions involving export subsidies which do provide an express standard. Thus, for instance, even within Article 9.1 itself, sub-paragraphs (b) and (e) expressly provide that the domestic market constitutes the appropriate basis for comparison.⁹⁵

We believe that it is significant that Article 9.1(c) of the *Agreement on Agriculture* does not expressly identify a standard or benchmark for determining whether a measure involves ‘payments’. It is clear that the notion of ‘payments’ encompasses a diverse range of practices involving a transfer of resources, either monetary or in-kind. Moreover, the ‘payments’ may take place in many different factual and regulatory settings. Accordingly, we believe that it is necessary to scrutinize carefully the facts and circumstances of a disputed measure, including the regulatory framework surrounding that measure, to determine the appropriate basis for comparison in assessing whether the measure involves ‘payments’ under Article 9.1(c).”⁹⁶

⁹² Appellate Body Report on *Canada – Dairy*, para. 111.

⁹³ Appellate Body Report on *Canada – Dairy*, paras. 113–114.

⁹⁴ The Panel on *Canada – Dairy (Article 21.5 – New Zealand and US II)* recalled that, as found by the Panel (Panel Report on *Canada – Dairy*, para.7.101) and confirmed by the Appellate Body (Appellate Body Report on *Canada – Dairy*, para.112) in the original *Canada – Dairy* case, a payment under Article 9.1(c) includes a “payment-in-kind.” This finding had been reaffirmed by the Panel (Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.12) and Appellate Body (Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras.71 and 76) in the first *Canada – Dairy* compliance case. The point had not been re-argued by the parties before The Panel on the second *Canada – Dairy* compliance case: Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 5.26.

⁹⁵ (footnote original) See also, items (c), (d), (f), (g), (h), (j) and (k) of the Illustrative List of the *SCM Agreement*, each of which expressly identifies one or more benchmarks to be used as a basis for comparison in determining whether a measure involves export subsidies. See further, paragraphs 8 and 13 of Annex 3, and paragraph 2 of Annex 4, of the *Agreement on Agriculture*, which expressly identify one or more benchmarks for calculating the amount of domestic support.

⁹⁶ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 74–76.

63. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* rejected the Panel’s suggestion that the domestic market provided the “right benchmark” for the dispute.

“The domestic price in this case is an administered price fixed by the Canadian government as part of the regulatory framework established by it for managing the supply of milk destined for consumption in the domestic market. As with administered prices in general, this price expresses a government policy choice based, not only on economic considerations, but also on other social objectives. The Canadian regulatory framework for managing domestic milk supply, including the establishment of the administered price, is not in dispute in this case. There can be little doubt, however, that the administered price is a price that is favourable to the domestic producers. Consequently, sale of CEM by the producer at less than the administered domestic price does not, necessarily, imply that the producer has foregone a portion of the proper value of the milk to it. In the situation where the producer, rather than the government, chooses to produce and sell CEM in the marketplace at a price it freely negotiates, we do not believe it is appropriate to use, as a basis for comparison, a domestic price that is fixed by the government.”⁹⁷

64. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* also rejected an alternative “benchmark” which relied on world market prices.

“The alternative ‘benchmark’ which the Panel relied upon to determine whether CEM prices involve ‘payments’ was the terms and conditions on which alternative supplies are available to processors on world markets, through IREP.⁹⁸ In reviewing this benchmark, we recall that, in these proceedings, the standard used to determine whether there are ‘payments’ under Article 9.1(c) must be based on the proper value of the milk to the producer, in order to determine whether the producer foregoes a portion of this value. If a producer wishes to sell milk for export processing, it is obvious that the price of the milk to the processor must be competitive with world market prices. If it is not, the processor will not buy the milk, as it will not be able to produce a final product that is competitive in export markets. Accordingly, the range of world market prices determines the price which the producer can charge for milk destined for export markets.⁹⁹ World market prices do, therefore, provide one possible measure of the value of the milk to the producer.

However, world market prices do not provide a valid basis for determining whether there are ‘payments’, under Article 9.1(c) of the *Agreement on Agriculture*, for, it remains possible that the reason CEM can be sold at prices competitive with world market prices is precisely because sales of CEM involve subsidies that make it competitive. Thus, a comparison between CEM prices and world market prices gives no indication on the cru-

cial question, namely, whether Canadian export production has been given an advantage. Furthermore, if the basis for comparison were world market prices, it would be possible for WTO Members to subsidize domestic inputs for export processing, while taking care to maintain the price of these inputs to the processors at a level which equalled or marginally exceeded world market prices. There would then be no ‘payments’ under Article 9.1(c) of the *Agreement on Agriculture* and WTO Members could easily defeat the export subsidy commitments that they have undertaken in Article 3 of the *Agreement on Agriculture*.¹⁰⁰

We do not, therefore, accept that world market prices are an appropriate basis for determining whether sales of CEM by producers involve ‘payments’ under Article 9.1(c) of the *Agreement on Agriculture*.¹⁰¹

65. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that a number of possible measures for assessing the value of milk existed:

“We turn now to determine the appropriate standard for assessing whether sales of CEM by producers involve ‘payments’ under Article 9.1(c) of the *Agreement on Agriculture*. We reiterate that the standard must be objective and based on the value of the milk to the producer.

Although the proceeds from sales at domestic or world market prices represent two possible measures of the value of milk to the producer, we do not see these as the

⁹⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para.81

⁹⁸ (*footnote original*) Panel Report, paras. 6.22 ff. See, *supra*, para. 67. We note that, in examining the terms and conditions on which IREP is available, the Panel focused exclusively on the requirements to obtain a discretionary permit and to pay an administrative fee. In assessing whether alternative sources of supply are available on more favourable terms, we consider that panels should take account of all the factors which affect the relative “attractiveness” in the marketplace of the different goods or services. The primary consideration must be price, while the importance of administrative formalities will depend on their nature and characteristics. For instance, if an import permit were granted to importers as a matter of course, in the context of straightforward import procedures, and if import fees were only administrative charges to cover expenses, these formalities would be unlikely, on their own, to mean that imports were available on less favourable terms and conditions.

⁹⁹ (*footnote original*) New Zealand acknowledged, before the Panel, that the price of CEM “will be essentially world market prices”. (New Zealand’s first submission to the Panel, para. 4.05) Canada also argued that the processor offers producers a price for CEM that is based on world market conditions. (Canada’s first submission to the Panel, para. 37; Canada’s second submission to the Panel, para. 13; Canada’s oral statement before the Panel, paras. 21, 30, 49 and 51; Canada’s appellant’s submission, para. 39 and footnote 32 thereto)

¹⁰⁰ (*footnote original*) We note that none of the participants in these proceedings argued that world market prices are the appropriate benchmark for determining whether supplies of CEM involve “payments” within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. See also, *supra*, footnote 43.

¹⁰¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)* paras. 83–85.

only possible measures of this value. For any economic operator, the production of goods or services involves an investment of economic resources. In the case of a milk producer, production requires an investment in fixed assets, such as land, cattle and milking facilities, and an outlay to meet variable costs, such as labour, animal feed and health-care, power and administration. These fixed and variable costs are the total amount which the producer must spend in order to produce the milk and the total amount it must recoup, in the long-term, to avoid making losses. To the extent that the producer charges prices that do not recoup the total cost of production, over time, it sustains a loss which must be financed from some other source, possibly 'by virtue of governmental action'."¹⁰²

66. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* considered that the average total cost of production benchmark should be an industry-wide average:

"We believe that the standard for determining the existence of 'payments', under Article 9.1(c), should reflect the fact that the obligation at issue is an international obligation imposed on Canada. The question is not whether one or more individual milk producers, efficient or not, are selling CEM at a price above or below their individual costs of production. The issue is whether Canada, on a national basis, has respected its WTO obligations and, in particular, its commitment levels. It, therefore, seems to us that the benchmark should be a single, industry-wide cost of production figure, rather than an indefinite number of cost of production figures for each individual producer. The industry-wide figure enables cost of production data for producers, as a whole, to be aggregated into a single, national standard that can be used to assess Canada's compliance with its international obligations.

By contrast, if the benchmark were to operate at the level of each individual producer, there would be a proliferation of standards, requiring individual-level inquiry and application of Article 9.1(c), as if the obligations under the *Agreement on Agriculture* involved rights and obligations of individual producers, rather than WTO Members."¹⁰³

67. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* agreed with the Panel that certain imputed costs and selling costs should be included in the cost of production benchmark:

"We, therefore, find that the COP standard for determining whether 'payments' exist, under Article 9.1(c) of the *Agreement on Agriculture*, includes all monetary and non-monetary economic costs of production, such as the costs of family labour and management, and of owner's equity.

...

Accordingly, we find that any transport, marketing, and administrative costs are to be included in the COP standard applied under Article 9.1(c), as are any costs of acquiring and retaining quota."¹⁰⁴

(b) "financed by virtue of governmental action"

(i) *Meaning of governmental action*

68. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered the meaning of the term "governmental action" under Article 9.1(c):

"We recall that, in the original proceedings, the role of the government in managing the supply of milk for export was manifest. We stated that:

'[G]overnmental action' is not simply involved; it is, in fact, *indispensable* to enable the supply of milk to processors for export, and hence the transfer of resources, to take place. In the regulatory framework, 'government agencies' stand so completely between the producers of the milk and the processors or the exporters that we have no doubt that the transfer of resources takes place 'by virtue of governmental action'.¹⁰⁵ (emphasis added)

Although the phrase "financed by virtue of governmental action" must be understood as a whole, it is useful to consider separately the meaning of the different parts of this phrase. Taking the words 'governmental action' first, we observe that the text of Article 9.1(c) does not place any qualifications on the types of 'governmental action' which may be relevant under Article 9.1(c). In the original proceedings, we stated that '[t]he essence of 'government' is . . . that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority.'¹⁰⁶ In our opinion the word 'action' embraces the full-range of these activities, including governmental action regulating the supply and price of milk in the domestic market."¹⁰⁷

(ii) *Meaning of "financed"*

69. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered the meaning of this term under Article 9.1(c):

"[I]t will not be sufficient simply to demonstrate that a payment occurs as a consequence of governmental action because the word 'financed', in Article 9.1(c), must also be given meaning.

¹⁰² Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 86–87.

¹⁰³ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 95–96.

¹⁰⁴ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 110 and 116.

¹⁰⁵ (footnote original) Appellate Body Report, *Canada – Dairy*, *supra*, footnote 2, para. 120.

¹⁰⁶ (footnote original) *Ibid.*, para. 97.

¹⁰⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 111 and 112

The word ‘financed’ might be given a rather specific meaning such that it would be confined to the financing of ‘payments’ in monetary form or to the funding of ‘payments’ from government resources. However, we have already recalled that ‘payments’, under Article 9.1(c), include payments-in-kind, so the word ‘financed’ needs to cover both the financing of monetary payments and payments-in-kind.¹⁰⁸ In addition, Article 9.1(c) explicitly excludes a reading of the word ‘financed’ whereby payments must be funded from government resources, as the provision states that payments can be financed by virtue of governmental action ‘whether or not a charge on the public account is involved’. Thus, under Article 9.1(c), it is not necessary that the economic resources constituting the ‘payment’ actually be paid by the government or even that they be paid from government resources. Accordingly, although the words ‘by virtue of’ render governmental action essential, Article 9.1(c) contemplates that payments may be financed by virtue of governmental action even though significant aspects of the financing might not involve government.”¹⁰⁹

(iii) *Link between governmental action and the financing of payments*

70. When examining the link required between governmental action and the financing of payments under Article 9.1(c), the Panel on *Canada – Dairy (Article 21.5 – New Zealand and US)* considered that governmental action should be “indispensable” to the financing of payments, and “establish[es] the conditions which ensure that the payment . . . takes place.”¹¹⁰ Further, the Panel indicated that for the “by virtue of” test of Article 9.1(c) to be met “it must be established that a payment would not be financed . . . but for governmental action.”¹¹¹ This “but for” standard would be met if the following two requirements were established:

“[T]hat governmental action, *de jure* or *de facto*: (i) prevents Canadian milk producers from selling more milk on the regulated domestic market, at a higher price, than to the extent of the quota allocated to them; and (ii) obliges Canadian milk processors to export all milk contracted as lower priced commercial export milk, and, accordingly, penalizes the diversion by processors of milk contracted as commercial export milk to the domestic market. As explained below,¹¹² only if both those requirements were to be met, governmental action could be said to be indispensable for the transfer of resources to take place: the lower priced commercial export milk would not have been available to Canadian processors for export *but for* these governmental actions, taken together.”¹¹³

71. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* confirmed that mere governmental action would not be sufficient for a finding that an export subsidy existed under Article 9.1(c) and expanded on the meaning of the words “by virtue of”:

“The words ‘by virtue of’ indicate that there must be a demonstrable link between the *governmental action* at issue and the *financing* of the payments, whereby the payments are, in some way, financed as a result of, or as a consequence of, the governmental action.”¹¹⁴ (emphasis added)

72. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that establishing such a link would be more difficult in cases involving payments-in-kind.

“[T]he link between governmental action and the financing of payments will be more difficult to establish, as an evidentiary matter, when the payment is in the form of a payment-in-kind rather than in monetary form, and all the more so when the payment-in-kind is made, not by the government, but by an independent economic operator.”¹¹⁵

73. Further, the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* indicated that it disagreed with the Panel’s findings that governmental action had “oblige[d]” or “drive[n]” producers to sell commercial export milk (“CEM”).¹¹⁶ However, the Appellate Body did not make any further findings on the meaning of “financed by governmental action” at that stage of the proceedings.

74. In *Canada – Dairy (Article 21.5 – New Zealand and US II)* the Appellate Body considered the meaning of “financed by government action” in light of the ordinary meaning of the word “financing” but, on the other hand, the fact that Article 9.1(c) expressly states that “payments” need not involve “a charge on the public account”. It summed up as follows:

“Accordingly, even if government does not fund the payments itself, it must play a sufficiently important part in the process by which a private party funds ‘payments’, such that the requisite nexus exists between ‘governmental action’ and ‘financing’.”¹¹⁷

¹⁰⁸ (footnote original) *Supra*, para. 71.

¹⁰⁹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 114.

¹¹⁰ Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.38, 6.40 and 6.44.

¹¹¹ Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.39.

¹¹² (footnote original) See paragraphs 6.43–6.48 below [of the Report].

¹¹³ Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 6.42. The Panel found that these requirements were satisfied – a finding which led Canada to appeal.

¹¹⁴ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113.

¹¹⁵ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113.

¹¹⁶ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 116–117.

¹¹⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 133.

75. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* considered the fact of the dispute and agreed with the Panel that a significant percentage of producers were likely to finance sales of commercial export milk (“CEM”) at below the costs of production as a result of participation in the domestic market and, further, that payments made through the supply of CEM at below the costs of production were financed by virtue of “governmental action” within the meaning of Article 9.1(c) of the *Agreement on Agriculture*:

“It falls now to consider the role of the Canadian government in financing payments made on the sale of CEM. We have agreed with the Panel that a significant percentage of producers are likely to finance sales of CEM at below the costs of production as a result of participation in the domestic market. Canadian ‘governmental action’ controls virtually every aspect of domestic milk supply and management. [footnote omitted] In particular, government agencies fix the price of domestic milk that renders it highly remunerative to producers. Government action also controls the supply of domestic milk through quota, thereby protecting the administered price. The imposition by government of financial penalties on processors that divert CEM into the domestic market is another element of governmental control over the supply of milk. Further, the degree of government control over the domestic market is emphasized by the fact that government pools, allocates, and distributes revenues to producers from all domestic sales. Finally, governmental action also protects the domestic market from import competition through tariffs. [footnote omitted]

In our view, the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. In turn, it is due to this price that a significant proportion of producers covers their fixed costs in the domestic market and, as a result, has the resources profitably to sell export milk at prices that are below the costs of production.”¹¹⁸

76. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* dismissed an objection that this reasoning brings “cross-subsidization” under Article 9.1(c) of the *Agreement on Agriculture*:

“We have explained that the text of Article 9.1(c) applies to any ‘governmental action’ which ‘finances’ export ‘payments’. The text does not exclude from the scope of the provision any particular governmental action, such as regulation of domestic markets, to the extent that this action may become an instrument for granting export subsidies. Nor does the text exclude any particular form of financing, such as ‘cross-subsidization’. Moreover, the text focuses on the consequences of governmental action (‘by virtue of which’) and not the intent of government. Thus, the provision applies to governmental

action that finances export payments, even if this result is not intended. As stated in our Report in the first Article 21.5 proceedings, this reading of Article 9.1(c) serves to preserve the legal ‘distinction between the domestic support and export subsidies disciplines of the *Agreement on Agriculture*’.¹¹⁹ Subsidies may be granted in both the domestic and export markets, provided that the disciplines imposed by the Agreement on the levels of subsidization are respected. If governmental action in support of the domestic market could be applied to subsidize export sales, without respecting the commitments Members made to limit the level of export subsidies, the value of these commitments would be undermined. Article 9.1(c) addresses this possibility by bringing, in some circumstances, governmental action in the domestic market within the scope of the ‘export subsidies’ disciplines of Article 3.3.”¹²⁰

77. The Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)* considered that the “payments” at issue were not financed “by virtue of” another form of governmental action in the dispute, which was an exemption for processors from paying the higher domestic price for milk when they purchased commercial export milk:

“We do not believe that this action influences the ‘financing’ of payments by the producer. Certainly, this action explains why the processor of CEM is not required to pay the higher domestic price for CEM. However, the mere fact that the processor is not obliged to buy CEM at the domestic price does not demonstrate a link between this exemption and the financing of payments by the producer on the sale of CEM. The exemption is, in short, not linked to the mechanism by which the producer funds the payments.”¹²¹

4. Article 9.1(d)

(a) “costs of marketing”

78. In *US – FSC*, the measure at issue created a reduction of income tax liability for certain United States’ corporations, provided, *inter alia*, that these corporations incurred a certain portion of their marketing expenses abroad. The Panel found that the United States’ measure constituted a subsidy to “reduce the costs of marketing exports”, within the meaning of paragraph 1(d).¹²² The Appellate Body disagreed and held, *inter alia*, that “income tax liability under the FSC measure arises only when goods are actually sold for

¹¹⁸ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 144–145.

¹¹⁹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 90.

¹²⁰ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 148.

¹²¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 149.

¹²² Panel Report on *US – FSC*, para. 7.155.

export, that is, *when they have been the subject of successful marketing*. Such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them”.¹²³ (Emphasis original) The Appellate Body ultimately concluded that “if income tax liability arising from export sales can be viewed as among the ‘costs of marketing exports’, then so too can virtually any other cost incurred by a business engaged in exporting”:

“We turn, first, to the word ‘marketing’ in Article 9.1(d), which is at the heart of the phrase ‘to reduce the costs of *marketing* exports’ in Article 9.1(d). Taken alone, that word can have, as the Panel indicated, a range of meanings. The Panel noted the *Webster’s Dictionary* meaning, according to which ‘marketing’ is the ‘aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing and supplying market information’. . . . *The New Shorter Oxford Dictionary* provides a similar meaning: ‘The action, business, or process of promoting and selling a product . . .’. However, we must look beyond dictionary meanings, because, as we have said before, ‘dictionary meanings leave many interpretive questions open.’

The text of Article 9.1(d) lists ‘handling, upgrading and other processing costs, and the costs of international transport and freight’ as examples of ‘costs of marketing’. The text also states that ‘export promotion and advisory services’ are covered by Article 9.1(d), provided that they are not ‘widely available’. These are not examples of just *any* ‘cost of doing business’ that ‘effectively reduce[s] the cost of marketing’ products. Rather, they are specific types of costs that are incurred *as part of* and *during* the process of selling a product. They differ from general business costs, such as administrative overhead and debt financing costs, which are not specific to the process of putting a product on the market, and which are, therefore, related to the marketing of exports only in the broadest sense.

...

Income tax liability under the FSC measure arises only when goods are actually sold for export, that is, *when they have been the subject of successful marketing*. Such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them. Furthermore, at the time goods are sold, the costs associated with putting them on the market – costs such as handling, promotion and distribution costs – have already been incurred and the amount of these costs is not altered by the income tax, the amount of which is calculated by reference to the sale price of the goods. In our view, if income tax liability arising from export sales can be viewed as among the ‘costs of marketing exports’, then so too can virtually any other cost incurred by a business engaged in exporting.”¹²⁴

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

Prevention of Circumvention of Export Subsidy Commitments

1. Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.
2. Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.
3. Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.
4. Members donors of international food aid shall ensure:
 - (a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
 - (b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO “Principles of Surplus Disposal and Consultative Obligations”, including, where appropriate, the system of Usual Marketing Requirements (UMRs); and
 - (c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.”

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Article 10.1

(a) Export subsidy commitments

79. In *US – FSC*, the Appellate Body interpreted the term “export subsidy commitments” to have “a wider reach [than reduction commitments] that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products”:

¹²³ Appellate Body Report on *US – FSC*, para. 131.

¹²⁴ Appellate Body Report on *US – FSC*, paras. 129–131.

"The word 'commitments' generally connotes 'engagements' or 'obligations'. Thus, the term 'export subsidy commitments' refers to commitments or obligations relating to export subsidies assumed by Members under provisions of the *Agreement on Agriculture*, in particular, under Articles 3, 8 and 9 of that Agreement.

...

We also find support for this interpretation of the term 'export subsidy commitments' in Article 10 itself, which draws a distinction, in sub-paragraphs 1 and 3, between 'export subsidy commitments' and '*reduction commitment levels*'. In our view, the terms 'export subsidy commitments' and 'reduction commitments' have different meanings. '*Reduction commitments*' is a narrower term than 'export subsidy commitments' and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*. The term 'export subsidy commitments' has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products."¹²⁵

(b) "applied in a manner which results in, or which threatens to lead to circumvention"

80. In *US – FSC*, the Appellate Body made a number of observations relevant to the interpretation of the phrase "applied in a manner which results in, or which threatens to lead to, circumvention":

"We turn next to whether the subsidies under the FSC measure are 'applied in a manner which *results in*, or which *threatens to lead to*, *circumvention* of export subsidy commitments'. (emphasis added) The verb 'circumvent' means, *inter alia*, 'find a way round, evade . . .'. Article 10.1 is designed to prevent Members from circumventing or 'evading' their 'export subsidy commitments'. This may arise in many different ways. We note, moreover, that, under Article 10.1, it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'. It suffices that 'export subsidies' are 'applied in a manner which . . . *threatens to lead to circumvention* of export subsidy commitments'.

...

Article 10.1 prevents the application of export subsidies which '*results in*, or which *threatens to lead to*, *circumvention*' of that prohibition. Members would certainly have 'found a way round', a way to 'evade', this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1.

...

Given that the nature of the 'export subsidy commitment' differs as between scheduled and unscheduled products, we believe that what constitutes 'circumvention' of those commitments, under Article 10.1, may also differ.

As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies. However, as we have seen, the FSC measure allows for the provision of an unlimited amount of FSC subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. In our view, Members would have found 'a way round', a way to 'evade', their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1."¹²⁶

81. The Panel on *US – FSC (Article 21.5 – EC)* indicated that the Act concerned contained subsidies contingent on export performance under Article 1(e) of the *Agreement on Agriculture*. The United States was found to have acted inconsistently with Article 10.1 for "applying the export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threaten[ed] to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture*":

"Turning to the issue of whether the export subsidies are 'applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments' within the meaning of Article 10.1 of the *Agreement on Agriculture*, we derive guidance from the approach of the Appellate Body in the original dispute and consider the structure and other characteristics of the measure.¹²⁷ We recall that the term 'export subsidy commitments', defining the obligations that are to be protected under Article 10.1 of the *Agreement on Agriculture*, '*. . . covers commitments and obligations relating to both scheduled and unscheduled agricultural products*'.¹²⁸

We note that the Act creates a legal entitlement for recipients to receive export subsidies, not listed in Article 9.1¹²⁹, with respect to both scheduled and unscheduled

¹²⁵ Appellate Body Report on *US – FSC*, paras. 144 and 147.

¹²⁶ Appellate Body Report on *US – FSC*, paras. 148–152. This was confirmed by the Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.117–8.122.

¹²⁷ (*footnote original*) Original Appellate Body Report, *supra*, note 1, para. 149.

¹²⁸ (*footnote original*) Original Appellate Body Report, *supra*, note 1, paras. 144–147.

¹²⁹ (*footnote original*) See *supra*, note 219.

agricultural products. Upon fulfilment by the taxpayer of the conditions stipulated in the Act, the United States government must provide the tax exclusion. As there is no limitation on the amount of extraterritorial income, and thus on the amount of qualifying foreign trade income, that may be claimed in respect of eligible transactions, the amount of export subsidies is unqualified.¹³⁰

Thus, with respect to *unscheduled* agricultural products, we believe that the Act involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, 'threatens to lead to circumvention' of that 'export subsidy commitment' in Article 3.3.

With respect to *scheduled* agricultural products, we observe that the measure allows for the provision of an unlimited amount of subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies even after the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. Thus, we find that the Act is applied in a manner that, at the very least, threatens to lead to circumvention of the export subsidy commitments made by the United States, under the first clause of Article 3.3, with respect to scheduled agricultural products.¹³¹

We note that, in these proceedings, the United States does not contest that, if the measure gives rise to subsidies contingent upon export performance under the *Agreement on Agriculture*, then these subsidies would violate its obligations under Articles 10.1 and 8 of the *Agreement on Agriculture*.

We therefore conclude that the United States has acted inconsistently with its obligations under Article 10.1 of the *Agreement on Agriculture* by applying the export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threatens to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture*. Furthermore, by acting inconsistently with Article 10.1, the United States has acted inconsistently with its obligation under Article 8 of the *Agreement on Agriculture* 'not to provide export subsidies otherwise than in conformity with this Agreement . . .'.¹³²

2. Article 10.2

82. At its meeting of 18 October 2000, the General Council agreed to instruct the Committee on Agriculture to include an item on the implementation of Article 10.2 of the *Agreement on Agriculture* in the agenda of the regular meetings of the Committee on Agriculture.¹³³

83. At its meeting of 18 October 2000, the General Council also stated that:

"[I]n pursuing their work on export credits in accordance with Article 10.2, Members will of course take into

account the provisions of paragraph 4 of the Marrakesh Decision on net food-importing countries, in which Ministers had agreed that any agreement on export credits should ensure appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries.¹³⁴"

84. At the Doha WTO Ministerial, Members approved the following recommendations, which had been submitted to the Committee on Agriculture for their consideration:

"a) That the focus of the work in the regular Committee meetings would be on the implementation of Article 10.2 and the disciplines foreseen therein, whereas the Special Session negotiations would focus on the proposals tabled or to be tabled on export credit practices;

b) that, without prejudice to further work to be undertaken in the regular meetings of the Committee as provided for in subparagraph (l) above, in the event that a Sector Understanding on agricultural export credits is concluded at the OEC, the Committee would, as envisaged in the report of the Committee on Agriculture to the Singapore WTO Ministerial (G/L/131, paragraph 11), consider how any such understanding could be multilateralized within the framework of the Agreement on Agriculture and how the provisions of paragraph 4 of the Marrakesh NFIDC Decision have been taken into account; and

c) that the Committee on Agriculture should submit a report to the General Council on this subject following its regular September 2002 meeting.¹³⁵"

85. Pursuant to the above implementation agenda, the Committee in its regular meetings under the provisions of Article 18.6 while considering the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes, took into account the provisions of paragraph 4 of the NFIDC Decision.¹³⁶

86. With respect to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the "NFIDC Decision"), see Section XXIX below.

¹³⁰ (*footnote original*) See also original Appellate Body Report, *supra*, note 1, para. 149.

¹³¹ (*footnote original*) Original Appellate Body Report, *supra*, note 1, para. 152.

¹³² Panel Report on *US – FSC (Article 21.5 – EC)*, paras. 8.117–8.122.

¹³³ WT/GC/M/59, para. 20.

¹³⁴ WT/GC/M/59, para. 21.

¹³⁵ WT/MIN(01)/17, para. 2.3. The text of the recommendations is contained in document G/AG/11, paras. 1–4.

¹³⁶ G/L/719, para.4 (i).

3. Article 10.3

- (a) Export credits, export credit guarantees and insurance programmes

87. With respect to the different treatment of developing Members in respect of agricultural export credits, export credit guarantees or insurance programmes, see paragraph 103 below.

- (b) Burden of proof

88. In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body explained that Article 10.3 of the *Agreement on Agriculture* provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10 of the *Agreement on Agriculture*. Article 10.3 partially reverses the usual rules on burden of proof as follows:

“Under the usual rules on burden of proof, the complaining Member would bear the burden of proving both parts of the claim. However, Article 10.3 of the *Agreement on Agriculture* partially alters the usual rules. The provision cleaves the complaining Member’s claim in two, allocating to different parties the burden of proof with respect to the two parts of the claim we have described.

Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member’s quantity commitment level.

If the complaining Member succeeds in proving the quantitative part of the claim, and the responding Member contests the export subsidization aspect of the claim, then, under Article 10.3, the responding Member ‘*must establish* that no export subsidy . . . has been granted’ in respect of the excess quantity exported.” (emphasis added)

89. With respect to the export subsidization part of the claim, the complaining Member, therefore, is relieved of its burden, under the usual rules, to establish a *prima facie* case of export subsidization of the excess quantity, provided that this Member has established the quantitative part of the claim.”¹³⁷

4. Article 10.4

90. With respect to international food aid, see Article 16 and paragraphs 3(i) and (ii) of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (the “NFIDC Decision”). Section XVII below and paragraph 131 below.

91. The Chairman of the General Council referred a proposal by the African Group to the Committee on

Agriculture for its consideration.¹³⁸ On 14 July 2003 he submitted a report to the General Council on the status of the proposal and the progress made with regards to it.¹³⁹ In the proposal it was suggested that developed country Members undertake in their schedule of commitments to make contributions towards a revolving fund for normal levels of food imports, providing food aid in fully grant form, and maintaining food aid levels consistently with recommendations and rules under the Food Aid Convention.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11 *Incorporated Products*

In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

No jurisprudence or decision of a competent WTO body.

PART VI

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12

“Disciplines on Export Prohibitions and Restrictions

1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:

- (a) the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing Members’ food security;
- (b) before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question. The

¹³⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 71–73 and 75.

¹³⁸ TN/CTD/W/3/Rev.2.

¹³⁹ G/AG/17 and G/AG/17/Corr.1.

Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.

2. The provisions of this Article shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned."

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Notification requirements

92. With respect to notification requirements concerning export prohibitions and restrictions, see paragraphs 116–118 below.

PART VII

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13
Due restraint

During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

- (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:
 - (i) non-actionable subsidies for purposes of countervailing duties⁴;

*(footnote original)*⁴ "Countervailing duties" where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

- (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
- (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994;
- (b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within de minimis levels and in conformity with paragraph 2 of Article 6, shall be:

- (i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations;
- (ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; and
- (iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year;
- (c) export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member's Schedule, shall be:
 - (i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; and
 - (ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14
Sanitary and Phytosanitary Measures

Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

XVI. ARTICLE 15**A. TEXT OF ARTICLE 15****Article 15***Special and Differential Treatment*

1. In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

2. Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

93. At the Doha Ministerial Conference, a recommendation was adopted that “[u]rges Members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns”.¹⁴⁰

94. With respect to the notification obligation for developing countries, see paragraph 118 below.

95. As regards the green box, see Annex 2, in Section XXIV below.

XVII. ARTICLE 16**A. TEXT OF ARTICLE 16****Article 16***Least-Developed and Net Food-Importing Developing Countries*

1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.¹⁴¹

2. The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16**1. Article 16.1****(a) The Singapore Ministerial Conference**

96. In the light of the Committee’s discussions on the follow-up to the Marrakesh Ministerial Decision on

Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC Decision), the Committee on Agriculture submitted the following recommendations for consideration by the Singapore Ministerial Conference, which were approved by Ministers:

“(i) that, in anticipation of the expiry of the current Food Aid Convention in June 1998 and in preparation for the renegotiation of the Food Aid Convention, action be initiated in 1997 within the framework of the Food Aid Convention, under arrangements for participation by all interested countries and by relevant international organizations as appropriate, to develop recommendations with a view towards establishing a level of food aid commitments, covering as wide a range of donors and donable foodstuffs as possible, which is sufficient to meet the legitimate needs of developing countries during the reform programme. These recommendations should include guidelines to ensure that an increasing proportion of food aid is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the current Food Aid Convention, as well as means to improve the effectiveness and positive impact of food aid.”¹⁴²

(ii) that developed country WTO Members continue to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;

(iii) that the provisions of paragraph 4 of the Marrakesh Ministerial Decision, whereby Ministers agreed to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries, be taken fully into account in the agreement to be negotiated on agricultural export credits;

(iv) that WTO Members, in their individual capacity as members of relevant international financial institutions, take appropriate steps to encourage the institutions concerned, through their respective governing bodies, to further consider the scope for establishing new facilities or enhancing existing facilities for developing countries experiencing Uruguay Round-related difficulties in

¹⁴⁰ WT/MIN(01)/17, para. 2.1.

¹⁴¹ The Decision adopted by the Ministerial Conference at Marrakesh is referenced in Section XXIX of this Chapter.

¹⁴² The Food Aid Convention 1999 was adopted under the auspices of the United Nations on 24 March 1999. It provisionally entered into force on 1 July 1999 for an initial duration of three years. At that stage it was agreed to extend the Convention by one year and it was subsequently further extended to 30 June 2005 (Footnote not in the original document.)

financing normal levels of commercial imports of basic foodstuffs."¹⁴³

(b) The Doha Ministerial Conference

97. The Committee's recommendations in the area of food aid in the context of the Marrakesh NFIDC Decision that were approved by the Doha Ministerial Conference provide as follows:

"(a) that early action be taken within the framework of the Food Aid Convention 1999 (which unless extended, with or without a decision regarding its renegotiation, would expire on 30 June 2002) and of the UN World Food Programme by donors of food aid to review their food aid contributions with a view to better identifying and meeting the food aid needs of least-developed and WTO net food-importing developing countries;

"(b) WTO Members which are donors of food aid shall, within the framework of their food aid policies, statutes, programmes and commitments, take appropriate measures aimed at ensuring: (i) that to the maximum extent possible their levels of food aid to developing countries are maintained during periods in which trends in world market prices of basic foodstuffs have been increasing; and (ii) that all food aid to least developed countries is provided in fully grant form and, to the maximum extent possible, to WTO net food-importing developing countries as well."¹⁴⁴

98. The Committee's recommendations in the area of technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure approved by the Doha Ministerial Conference provide:

"(a) that developed country WTO Members should continue to give full and favourable consideration in the context of their aid programmes to requests for the provision of technical and financial assistance by least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;

(b) that, in support of the priority accorded by least-developed and net food-importing developing countries to the development of their agricultural productivity and infrastructure, the WTO General Council call upon relevant international development organisations, including the World Bank, the FAO, IFAD, the UNDP and the Regional Development Banks to enhance their provision of, and access to, technical and financial assistance to least-developed and net food-importing developing countries, on terms and conditions conducive to the better use of such facilities and resources, in order to improve agricultural productivity and infrastructure in these countries under existing facilities and programmes, as well as under such facilities and programmes as may be introduced."¹⁴⁵

99. The Committee's recommendations in the area of financing difficulties of imports of basic foodstuffs in

the context of the Marrakesh NFIDC Decision that were approved by the Doha Ministerial Conference state:

"(a) that the provisions of paragraph 4 of the Marrakesh Ministerial Decision, which provide for differential treatment in favour of least-developed and WTO net food-importing developing countries, shall be taken fully into account in any agreement to be negotiated on disciplines on agricultural export credits pursuant to Article 10.2 of the Agreement on Agriculture;

(b) that an inter-agency panel of financial and commodity experts be established, with the requested participation of the World Bank, the IMF, the FAO, the International Grains Council and the UNCTAD, to explore ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programs and facilities to assist with short term difficulties in financing normal levels of commercial imports of basic foodstuffs, as well as the concept and feasibility of the proposal for the establishment of a revolving fund in G/AG/W/49 and Add.1 and Corr.1. The detailed terms of reference, drawing on the Marrakesh NFIDC Decision, should be submitted by the Vice-Chairman of the WTO Committee on Agriculture, following consultations with Members, to the General Council for approval by not later than 31 December 2001. The inter-agency panel shall submit its recommendations to the General Council by not later than 30 June 2002."

100. In light of the above recommendation in the area of financing difficulties of imports of basic foodstuffs in the context of the Marrakesh NFIDC Decision an Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs was established and detailed terms of reference of the Panel were approved by the General Council.¹⁴⁶

(c) List of least-developed and net food-importing developing countries

101. At its meeting of 21 November 1995, the Committee on Agriculture adopted a decision relating to the establishment of a list of WTO net food-importing developing countries, setting out the criteria for the inclusion.¹⁴⁷

¹⁴³ G/L/125, adopted by the Singapore Ministerial Conference, WT/MIN(96)/DEC, para. 13.

¹⁴⁴ G/AG/11, Section B-I

¹⁴⁵ G/AG/11, Section B-II.

¹⁴⁶ G/AG/12.

¹⁴⁷ G/AG/3. The decision settled on two criteria for the selection of the Members which became beneficiaries of the measures provided for in the decision:

"a) Least developed countries as recognised by the Economic and Social Council of the United Nations."

Under the first criterion, 48 least-developed countries defined as such by the United Nations are automatically contained in the list. Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo (formerly

102. The decision to establish this list was taken on the understanding that:

“[B]eing listed would not as such confer automatic benefits since, under the mechanisms covered by the Marrakesh Ministerial Decision, donors and the institutions concerned would have a role to play.”¹⁴⁸

(d) **Differential treatment within the framework of an agreement on agricultural export credits**

103. In 1997, the Singapore Ministerial Conference decided as follows:

“[T]he provisions of paragraph 4 of the Marrakesh Ministerial Decision, whereby Ministers agreed to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries, be taken fully into account in the agreement to be negotiated on agricultural export credits.”¹⁴⁹

2. Article 16.2

(a) **Notification requirements**

104. For notification requirements and formats concerning the follow-up to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, see paragraphs 116–118 below.

(b) **Opportunities for consultation**

105. Paragraph 18 of the Organization of Work and Working Procedures of the Committee on Agriculture¹⁵⁰ states:

“There shall be an opportunity at any regular meeting of the Committee to raise any matter relating to the Decision on Measures concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.”¹⁵¹

(c) **Effectiveness**

106. At its meeting on 15 December 2000, the General Council decided that:

“The Committee on Agriculture shall examine possible means of improving the effectiveness of the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries and report to the General Council at the second regular meeting of the Council in 2001.”¹⁵²

107. Pursuant to this mandate, the Committee on Agriculture submitted seven recommendations that were adopted by the Doha Ministerial Conference.¹⁵³

The recommendations concerned: (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuff; and (iv) review of follow-up. See Section XXIX below.

108. In its report submitted to the General Council on 4 July 2003, the Committee on Agriculture stated that it would continue to explore options and solutions within the framework of the Marrakesh NFIDC Decision to address short-term difficulties of LDCs and WTO NFIDCs in financing commercial imports of basic foodstuffs.¹⁵⁴ Pursuant to this the Committee further considered a pending proposal by the WTO Africa Group regarding the NFIDC Decision that was referred to the Committee by the Chairman of the General Council in the context of the review of all special and differential treatment provisions by the Committee on Trade and Development in Special Session.¹⁵⁵

109. In the report of 4 July 2003 the Committee on Agriculture, while examining the possible means of improving the effectiveness of the implementation of paragraph 5 of the Marrakesh NFIDC Decision, forwarded the following recommendations for approval by the General Council:

“(a) that in the context of the current review of the Poverty Reduction and Growth Facility and the Compensatory Financing Facility of the IMF, WTO Members, in their capacity as members of the IMF, consider the concerns by LDCs and WTO NFIDCs concerning short-term difficulties in financing commercial imports of basic foodstuffs; and

Zaire), Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Haiti, Kiribati, Lao People’s Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, Sudan, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia.

“(b) Any developing country Member of the WTO which was a net importer of basic foodstuffs in any three years of the most recent five-year period for which data are available and which notifies the Committee of its decision to be listed as a Net Food-Importing Developing Country for the purpose of the decision”

The list currently includes the following countries: Barbados, Botswana, Côte d’Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan, Kenya, Mauritius, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela. . G/AG/5/Rev. 7.

¹⁴⁸ G/AG/R/4, para. 17.

¹⁴⁹ G/L/125. No such agreement has been reached as of 30 June 2001.

¹⁵⁰ With respect to the adoption of the document, see para. 114 of this Chapter.

¹⁵¹ G/AG/1, para. 18.

¹⁵² WT/L/384, para. 1.2.

¹⁵³ WT/MIN(01)/17, para. 2.2; G/AG/11.

¹⁵⁴ G/AG/16, para.4

¹⁵⁵ TN/CTD/W/3/Rev.2, para.52

(b) that the General Council invite the World Bank and other relevant international organizations to report on the feasibility and effectiveness of commodity price risk management instruments for use by LDCs and WTO NFIDCs as part of strategies to address short-term difficulties in financing commercial imports of basic foodstuffs, in particular during phases of rising world market prices.

(c) that, building on the work already undertaken, including the WTO roundtable of 19 May 2003, the Committee will continue to explore, as a matter of priority and on the basis of proposals submitted by Members, options and solutions within the framework of the Marrakesh NFIDC Decision to address short-term difficulties of LDCs and WTO NFIDCs in financing commercial imports of basic foodstuffs.¹⁵⁶

110. The annual monitoring exercise on the follow-up to the NFIDC Decision as a whole was undertaken at the November meeting of the Committee, on the basis, *inter alia*, of Table NF:1 notifications by donor Members as well as contributions by the observer organizations.¹⁵⁷

XVIII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17

Committee on Agriculture:

A Committee on Agriculture is hereby established.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. Committee on Agriculture

(a) Terms of reference

111. At its meeting on 31 January 1995 the General Council adopted the following terms of reference for the Committee on Agriculture:

"The Committee shall oversee the implementation of the Agreement on Agriculture. The Committee shall afford members the opportunity of consulting on any matter relating to the implementation of the provisions of the Agreement."¹⁵⁸

(b) Rules of procedure

112. At its meeting of 22 May 1996, the Council for Trade in Goods adopted the rules of procedure for the Committee on Agriculture.¹⁵⁹

(c) Activities

113. With respect to the initiation of the further negotiations on agriculture in February 2000, see paragraph 125 below.

XIX. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18

Review of the Implementation of Commitments

1. Progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture.

2. The review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined, as well as on the basis of such documentation as the Secretariat may be requested to prepare in order to facilitate the review process.

3. In addition to the notifications to be submitted under paragraph 2, any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly. This notification shall contain details of the new or modified measure and its conformity with the agreed criteria as set out either in Article 6 or in Annex 2.

4. In the review process Members shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments.

5. Members agree to consult annually in the Committee on Agriculture with respect to their participation in the normal growth of world trade in agricultural products within the framework of the commitments on export subsidies under this Agreement.

6. The review process shall provide an opportunity for Members to raise any matter relevant to the implementation of commitments under the reform programme as set out in this Agreement.

7. Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member."

¹⁵⁶ G/AG/16, para.19

¹⁵⁷ G/L/719, para.7.

¹⁵⁸ These terms of reference are those agreed by the Sub-Committee on Institutional, Procedural and Legal Matters of the Preparatory Committee for the World Trade Organization at its meeting on 7 October 1994 (PC/IPL/1), WT/L/43 (17 February 1995).

¹⁵⁹ G/C/M/10, section 1(i). The text of the adopted rules of procedure can be found in G/L/142.

B. INTERPRETATION AND APPLICATION OF
ARTICLE 18

1. Article 18.2

(a) Review procedure

(i) General

114. At its first meeting on 27–28 March 1995, the Committee on Agriculture adopted the Organization of Work and Working Procedures.¹⁶⁰ The Committee decided, *inter alia*, that it:

“Shall meet at regular intervals to review progress in the implementation of the Uruguay Round reform programme under Article 18:1 and 2 of the Agreement (the ‘review process’) and generally to carry out such other tasks as are provided for in the Agreement or which may be required to be dealt with.”¹⁶¹

(ii) Transitional Review Mechanism under
Paragraph 18 of the Protocol of Accession of the
People’s Republic of China

115. In accordance with the mandate of paragraph 2 of the Organization of Work and Working Procedures adopted by the Committee on Agriculture, the Committee was also to periodically review China’s progress with regard to its commitments under the Agreement of Agriculture, as stated in the Transitional Review Mechanism of the Protocol of the Accession of the People’s Republic of China.¹⁶² At its regular meeting held on 23 September 2004¹⁶³ the Committee on Agriculture held its third annual Transitional Review under the Protocol of the Accession of the People’s Republic of China, and submitted a report to the Council of Trade in Goods on China’s transitional review.¹⁶⁴

(b) Notification requirements

(i) General

116. At its meeting on 8 June 1995, the Committee on Agriculture adopted a document setting out the requirements and formats for notifications under Article 18:2 and other relevant provisions of the *Agreement on Agriculture*.¹⁶⁵ The document covers five areas: market access¹⁶⁶, domestic support¹⁶⁷, export subsidies¹⁶⁸, export prohibitions and restrictions¹⁶⁹, and the follow-up to the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.¹⁷⁰ In 1995, the Committee also adopted a list of “significant exporters”. Those Members with significant exporters status are required to notify annually their total exports in respect of the products identified on the list.¹⁷¹

117. In its report of 19 November 2004 to the General Council on the regular meetings of the Committee on

Agriculture, the status of Member notifications issued for 1999–2003 as well as the outstanding notifications for the implementing years 1995–1998 were laid out.¹⁷²

(ii) Developing countries

118. In the context of the General Council’s consideration of implementation-related issues and concerns, the General Council decided, *inter alia*:¹⁷³

“Members shall ensure that their tariff rate quotas regimes (TRQs) are administered in a transparent, equitable and non-discriminatory manner. In the context, they shall ensure that the notifications they provide to the Committee on Agriculture contain all the relevant information including details on guidelines and procedures on the allotment of TRQs. Members administering TRQs shall submit addenda to their notifications to the Committee on Agriculture (Table MA:1) by the time of the second regular meeting of the Committee in 2001.” The understanding was that this decision should not place undue new burdens on developing countries (WT/GC/M/62, paragraph 14, refers).¹⁷⁴

2. Article 18.5

(a) Annual consultations

119. According to the Committee’s Organization of Work and Working Procedures¹⁷⁵, these consultations are to be undertaken at the November meetings of the Committee.¹⁷⁶ In practice, these annual consultations have been based on annually updated statistical background notes provided by the Secretariat.¹⁷⁷

120. Data is made available on not only those members who have made export subsidy reduction commitments¹⁷⁸ with respect to a particular product, but also Members that have been identified in the list of

¹⁶⁰ G/AG/R/1, para. 4. The text of the adopted document can be found in G/AG/1.

¹⁶¹ G/AG/1, para. 2.

¹⁶² WT/L/432, para. 18.

¹⁶³ Summary Report by the Secretariat of the September 2003 meeting: G/AG/R/36.

¹⁶⁴ G/AG/19.

¹⁶⁵ G/AG/R/2, para. 2. The text of the adopted document can be found in G/AG/2.

¹⁶⁶ G/AG/2, pp. 2–11.

¹⁶⁷ G/AG/2, pp. 12–23.

¹⁶⁸ G/AG/2, pp. 24–30.

¹⁶⁹ G/AG/2, pp. 31–32.

¹⁷⁰ G/AG/2, pp. 33–34.

¹⁷¹ G/AG/2/Add.1.

¹⁷² G/L/719.

¹⁷³ Document G/AG/11.

¹⁷⁴ WT/MIN(01)/17, para. 2.4.

¹⁷⁵ With respect to the adoption of the document, see para. 114 of this Chapter.

¹⁷⁶ G/AG/1, para. 17.

¹⁷⁷ G/AG/W/32 and Revisions. A revised note was issued by the Secretariat in November 2003. (G/AG/W/32/Rev.6 and Rev.7)

¹⁷⁸ G/AG/2/Add.1

“significant exporters” for the purpose of the Committee’s notification requirements on export subsidy commitments. Those Members and Observers have also been included who have emerged as major exporters for a particular product during the period covered.

3. Article 18.6

121. In respect of the review process envisaged under Article 18.6, the Organization of Work and Working Procedures of the Committee¹⁷⁹ states, *inter alia*:

“A Member raising a matter relevant to the implementation commitments under Article 18:6, may request the Member to which the matter in question relates, through the Chairperson of the Committee, to provide in writing specific information, or an explanation of the relevant facts or circumstances, regarding the matter that has been raised. The role of the Chairperson shall be to ensure that there are reasonable grounds for the request and that as far as possible duplication and unduly burdensome requests are avoided. The information or explanation thus requested should normally be provided to the Committee by the Member to which the request is addressed within 30 days.”¹⁸⁰

4. Article 18.7

(a) Counter notifications

122. The Organization of Work and Working Procedures¹⁸¹ states, *inter alia*, that “counter notifications, shall be considered by the Committee at the earliest opportunity.”¹⁸²

XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19

Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

123. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Agreement on Agriculture* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>EC – Poultry</i>	WT/DS69	Articles 4 and 5(1)(b)
2 <i>India – Quantitative Restrictions</i>	WT/DS90	Article 4.2
3 <i>Canada – Dairy</i>	WT/DS103, WT/DS113	Articles 1(e), 9.1(a), 9.1(c), 3.3, 8 and 10
4 <i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	WT/DS103, WT/DS113	Articles 3.3, 8, 9.1(c) and 10.1
5 <i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	WT/DS103, WT/DS113	Articles 3.3, 8, 9.1(c), 10.1 and 10.3
6 <i>US – FSC</i>	WT/DS108	Articles 3, 3.8, 9.1 and 10.1
7 <i>US – FSC (Article 21.5 – EC)</i>	WT/DS108	Articles 3.3, 8 and 10.1
8 <i>Korea – Various Measures on Beef</i>	WT/DS161, WT/DS169	Articles 3, 4.2, 6, 7 and Annex 3
9 <i>Chile – Price Band System</i>	WT/DS207	Article 4.2 and Footnote 1

PART XII

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20

Continuation of the Reform Process

Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:

- (a) the experience to that date from implementing the reduction commitments;

- (b) the effects of the reduction commitments on world trade in agriculture;

- (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and

- (d) what further commitments are necessary to achieve the above mentioned long-term objectives.”

¹⁷⁹ With respect to the adoption of the document, see para. 114 of this Chapter.

¹⁸⁰ G/AG/1, para. 12.

¹⁸¹ See para. 114 of this Chapter.

¹⁸² G/AG/1, para. 11.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

1. **Decision of the Singapore Ministerial Conference**

124. The Singapore Ministerial Conference decided as follows:

"Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the WTO Agreement and decisions adopted at Marrakesh. As part of these Agreements and decisions we agreed to a number of provisions calling for future negotiations on Agriculture, . . . We agree to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the Built-in Agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. We agree that: the time frames established in the Agreements will be respected in each case."¹⁸³

2. **Decision to launch negotiations on agriculture**

125. At its meeting of 7 and 8 February 2000, the General Council decided to launch a new negotiation round on agriculture, stating as follows:

"[U]nder Article 20 of the Agreement on Agriculture, Members had agreed that negotiations for continuing the reform process would be initiated one year before the end of the implementation period, i.e. 1 January 2000. [. . .] However, a number of procedural matters remained to be settled before the work could start in practice. In this regard, and in the light of wide and intensive consultations with and among Members on the structure of the negotiations, [the Chairman] proposed that the negotiations be conducted in the Committee on Agriculture meeting in Special Sessions. Progress in the negotiations would be reported directly to the General Council on a regular basis."¹⁸⁴

ment shall apply subject to the provisions of this Agreement.

2. The Annexes to this Agreement are hereby made an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

126. In *EC – Bananas III*, the Panel rejected the European Communities argument that Articles 4.1 and 21.1 of the *Agreement on Agriculture* provided a justification for an inconsistency of the European Communities import scheme for bananas with Article XIII of *GATT 1994*.¹⁸⁵ The Appellate Body agreed with the Panel, stating:

"The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:

...

Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.

...

In our view, Article 4.1 does more than merely indicate where market access concessions and commitments for agricultural products are to be found. Article 4.1 acknowledges that significant, new market access concessions, in the form of new bindings and reductions of tariffs as well as other market access commitments (i.e. those made as a result of the tariffication process), were made as a result of the Uruguay Round negotiations on agriculture and included in Members' GATT 1994 Schedules. These concessions are fundamental to the agricultural reform process that is a fundamental objective of the *Agreement on Agriculture*.¹⁸⁶

PART XIII

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21
Final Provisions

1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agree-

¹⁸³ WT/MIN(96)/DEC, para. 19.

¹⁸⁴ WT/GC/M/53, para. 12.

¹⁸⁵ Panel Report on *EC – Bananas III*, para. 7.127.

¹⁸⁶ Appellate Body Report on *EC – Bananas III*, paras. 155–156.

XXIII. ANNEX 1**A. TEXT OF ANNEX 1****Annex 1**
Product Coverage

1. This Agreement shall cover the following products:

- (i) HS Chapters 1 to 24 less fish and fish products, plus*
- (ii) HS Code 2905.43 (mannitol)
 HS Code 2905.44 (sorbitol)
 HS Heading 33.01 (essential oils)
 HS Headings 35.01 to 35.05 (albuminoidal substances, modified starches, glues)
 HS Code 3809.10 (finishing agents)
 HS Code 3823.60 (sorbitol n.e.p.)
 HS Headings 41.01 to 41.03 (hides and skins)
 HS Heading 43.01 (raw furskins)
 HS Headings 50.01 to 50.03 (raw silk and silk waste)
 HS Headings 51.01 to 51.03 (wool and animal hair)
 HS Headings 52.01 to 52.03 (raw cotton, waste and cotton carded or combed)
 HS Heading 53.01 (raw flax)
 HS Heading 53.02 (raw hemp)

2. The foregoing shall not limit the product coverage of the Agreement on the Application of Sanitary and Phytosanitary Measures.

*The product descriptions in round brackets are not necessarily exhaustive

B. INTERPRETATION AND APPLICATION OF ANNEX 1

No jurisprudence or decision of a competent WTO body.

XXIV. ANNEX 2**A. TEXT OF ANNEX 2****Annex 2**
Domestic Support: The Basis for Exemption from the Reduction Commitments

1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,

(b) the support in question shall not have the effect of providing price support to producers;

plus policy-specific criteria and conditions as set out below.

Government Service Programmes**2. General services**

Policies in this category involve expenditures (or revenue foregone) in relation to programmes which provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. Such programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 above and policy-specific conditions where set out below:

(a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products;

(b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication;

(c) training services, including both general and specialist training facilities;

(d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers;

(e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes;

(f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and

(g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall

exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.

3. Public stockholding for food security purposes⁵

(footnote original) ⁵ For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme.

The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

4. Domestic food aid⁶

(footnote original) ^{5 & 6} For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.

Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.

Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

5. Direct payments to producers

Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individ-

ual types of direct payment as set out in paragraphs 6 through 13 below. Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.

6. Decoupled income support

- (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.
- (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.
- (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
- (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.
- (e) No production shall be required in order to receive such payments.

7. Government financial participation in income insurance and income safety-net programmes

- (a) Eligibility for such payments shall be determined by an income loss, taking into account only income derived from agriculture, which exceeds 30 per cent of average gross income or the equivalent in net income terms (excluding any payments from the same or similar schemes) in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry. Any producer meeting this condition shall be eligible to receive the payments.
- (b) The amount of such payments shall compensate for less than 70 per cent of the producer's income loss in the year the producer becomes eligible to receive this assistance.
- (c) The amount of any such payments shall relate solely to income; it shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production; or to the factors of production employed.

- (d) Where a producer receives in the same year payments under this paragraph and under paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100 per cent of the producer's total loss.
8. Payments (made either directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters
- (a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 per cent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry.
- (b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question.
- (c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.
- (d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b) above.
- (e) Where a producer receives in the same year payments under this paragraph and under paragraph 7 (income insurance and income safety – net programmes), the total of such payments shall be less than 100 per cent of the producer's total loss.
9. Structural adjustment assistance provided through producer retirement programmes
- (a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to facilitate the retirement of persons engaged in marketable agricultural production, or their movement to non-agricultural activities.
- (b) Payments shall be conditional upon the total and permanent retirement of the recipients from marketable agricultural production.
10. Structural adjustment assistance provided through resource retirement programmes
- (a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to remove land or other resources, including livestock, from marketable agricultural production.
- (b) Payments shall be conditional upon the retirement of land from marketable agricultural production for a minimum of three years, and in the case of livestock on its slaughter or definitive permanent disposal.
- (c) Payments shall not require or specify any alternative use for such land or other resources which involves the production of marketable agricultural products.
- (d) Payments shall not be related to either the type or quantity of production or to the prices, domestic or international, applying to production undertaken using the land or other resources remaining in production.
11. Structural adjustment assistance provided through investment aids
- (a) Eligibility for such payments shall be determined by reference to clearly-defined criteria in government programmes designed to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Eligibility for such programmes may also be based on a clearly-defined government programme for the reprivatization of agricultural land.
- (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than as provided for under criterion (e) below.
- (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
- (d) The payments shall be given only for the period of time necessary for the realization of the investment in respect of which they are provided.
- (e) The payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product.
- (f) The payments shall be limited to the amount required to compensate for the structural disadvantage.
12. Payments under environmental programmes
- (a) Eligibility for such payments shall be determined as part of a clearly-defined government

environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.

- (b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.

13. Payments under regional assistance programmes

- (a) Eligibility for such payments shall be limited to producers in disadvantaged regions. Each such region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in law or regulation and indicating that the region's difficulties arise out of more than temporary circumstances.
- (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including live-stock units) undertaken by the producer in any year after the base period other than to reduce that production.
- (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
- (d) Payments shall be available only to producers in eligible regions, but generally available to all producers within such regions.
- (e) Where related to production factors, payments shall be made at a degressive rate above a threshold level of the factor concerned.
- (f) The payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area.

B. INTERPRETATION AND APPLICATION OF ANNEX 2

No jurisprudence or decision of a competent WTO body.

XXV. ANNEX 3

A. TEXT OF ANNEX 3

Annex 3

Domestic Support: Calculation of Aggregate Measurement of Support

1. Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct pay-

ments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies"). Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.

2. Subsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents.

3. Support at both the national and sub-national level shall be included.

4. Specific agricultural levies or fees paid by producers shall be deducted from the AMS.

5. The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support.

6. For each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms.

7. The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

8. Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.

9. The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

10. Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.

11. The fixed reference price shall be based on the years 1986 to 1988 and shall generally be the actual price used for determining payment rates.

12. Non-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays.

13. Other non-exempt measures, including input subsidies and other measures such as marketing-cost

reduction measures: the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service.

B. INTERPRETATION AND APPLICATION OF ANNEX 3

127. In *Korea – Various Measures on Beef*, the Panel and the Appellate Body addressed Korea's argument that its method for calculation of domestic support was justifiable because it was based upon "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", although it was not consistent with the methodology set out in Annex 3 to the *Agreement on Agriculture*. See paragraphs 3–5 above.

128. Further, in *Korea – Various Measures on Beef*, the Appellate Body agreed with the Panel that in determining its market price support for beef, Korea had used the quantity of cattle actually purchased, in contravention of paragraph 8 of Annex 3. The Appellate Body stated:

"We share the Panel's view that the words 'production eligible to receive the applied administered price' in paragraph 8 of Annex 3 have a different meaning in ordinary usage from 'production actually purchased'. The ordinary meaning of 'eligible' is 'fit or entitled to be chosen'.¹⁸⁷ Thus, 'production eligible' refers to production that is 'fit or entitled' to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit 'eligible' production. Production actually purchased may often be less than eligible production."¹⁸⁸

XXVI. ANNEX 4

A. TEXT OF ANNEX 4

Annex 4

Domestic Support: Calculation of Equivalent Measurement of Support

1. Subject to the provisions of Article 6, equivalent measurements of support shall be calculated in respect of all basic agricultural products where market price support as defined in Annex 3 exists but for which calculation of this component of the AMS is not practicable. For such products the base level for implementation of the domestic support reduction commitments shall consist of a market price support component expressed in terms of equivalent measurements of support under paragraph 2 below, as well as any non-exempt direct pay-

ments and other non-exempt support, which shall be evaluated as provided for under paragraph 3 below. Support at both national and sub-national level shall be included.

2. The equivalent measurements of support provided for in paragraph 1 shall be calculated on a product-specific basis for all basic agricultural products as close as practicable to the point of first sale receiving market price support and for which the calculation of the market price support component of the AMS is not practicable. For those basic agricultural products, equivalent measurements of market price support shall be made using the applied administered price and the quantity of production eligible to receive that price or, where this is not practicable, on budgetary outlays used to maintain the producer price.

3. Where basic agricultural products falling under paragraph 1 are the subject of non-exempt direct payments or any other product-specific subsidy not exempted from the reduction commitment, the basis for equivalent measurements of support concerning these measures shall be calculations as for the corresponding AMS components (specified in paragraphs 10 through 13 of Annex 3).

4. Equivalent measurements of support shall be calculated on the amount of subsidy as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products. Specific agricultural levies or fees paid by producers shall reduce the equivalent measurements of support by a corresponding amount.

B. INTERPRETATION AND APPLICATION OF ANNEX 4

No jurisprudence or decision of a competent WTO body.

XXVII. ANNEX 5

A. TEXT OF ANNEX 5

Annex 5

Special Treatment with Respect to Paragraph 2 of Article 4

Section A

1. The provisions of paragraph 2 of Article 4 shall not apply with effect from the entry into force of the WTO Agreement to any primary agricultural product and its worked and/or prepared products ("designated products") in respect of which the following conditions are

¹⁸⁷ (*footnote original*) *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 438.

¹⁸⁸ Appellate Body Report on *Korea – Various Measures on Beef*, para. 120.

complied with (hereinafter referred to as "special treatment"):

- (a) imports of the designated products comprised less than 3 per cent of corresponding domestic consumption in the base period 1986–1988 ("the base period");
- (b) no export subsidies have been provided since the beginning of the base period for the designated products;
- (c) effective production-restricting measures are applied to the primary agricultural product;
- (d) such products are designated with the symbol "ST-Annex 5" in Section I-B of Part I of a Member's Schedule annexed to the Marrakesh Protocol, as being subject to special treatment reflecting factors of non-trade concerns, such as food security and environmental protection; and
- (e) minimum access opportunities in respect of the designated products correspond, as specified in Section I-B of Part I of the Schedule of the Member concerned, to 4 per cent of base period domestic consumption of the designated products from the beginning of the first year of the implementation period and, thereafter, are increased by 0.8 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period.

2. At the beginning of any year of the implementation period a Member may cease to apply special treatment in respect of the designated products by complying with the provisions of paragraph 6. In such a case, the Member concerned shall maintain the minimum access opportunities already in effect at such time and increase the minimum access opportunities by 0.4 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period. Thereafter, the level of minimum access opportunities resulting from this formula in the final year of the implementation period shall be maintained in the Schedule of the Member concerned.

3. Any negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 1 after the end of the implementation period shall be completed within the time-frame of the implementation period itself as a part of the negotiations set out in Article 20 of this Agreement, taking into account the factors of non-trade concerns.

4. If it is agreed as a result of the negotiation referred to in paragraph 3 that a Member may continue to apply the special treatment, such Member shall confer additional and acceptable concessions as determined in that negotiation.

5. Where the special treatment is not to be continued at the end of the implementation period, the Member concerned shall implement the provisions of paragraph 6. In such a case, after the end of the implementation period the minimum access opportunities for the designated products shall be maintained at the level of 8 per cent of corresponding domestic consumption in the base period in the Schedule of the Member concerned.

6. Border measures other than ordinary customs duties maintained in respect of the designated products shall become subject to the provisions of paragraph 2 of Article 4 with effect from the beginning of the year in which the special treatment ceases to apply. Such products shall be subject to ordinary customs duties, which shall be bound in the Schedule of the Member concerned and applied, from the beginning of the year in which special treatment ceases and thereafter, at such rates as would have been applicable had a reduction of at least 15 per cent been implemented over the implementation period in equal annual instalments. These duties shall be established on the basis of tariff equivalents to be calculated in accordance with the guidelines prescribed in the attachment hereto.

Section B

7. The provisions of paragraph 2 of Article 4 shall also not apply with effect from the entry into force of the WTO Agreement to a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member and in respect of which the following conditions, in addition to those specified in paragraph 1(a) through 1(d), as they apply to the products concerned, are complied with:

- (a) minimum access opportunities in respect of the products concerned, as specified in Section I-B of Part I of the Schedule of the developing country Member concerned, correspond to 1 per cent of base period domestic consumption of the products concerned from the beginning of the first year of the implementation period and are increased in equal annual instalments to 2 per cent of corresponding domestic consumption in the base period at the beginning of the fifth year of the implementation period. From the beginning of the sixth year of the implementation period, minimum access opportunities in respect of the products concerned correspond to 2 per cent of corresponding domestic consumption in the base period and are increased in equal annual instalments to 4 per cent of corresponding domestic consumption in the base period until the beginning of the 10th year. Thereafter, the level of minimum access opportunities resulting from this formula in the 10th year shall be maintained in the Schedule of the developing country Member concerned;

- (b) appropriate market access opportunities have been provided for in other products under this Agreement.
8. Any negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 7 after the end of the 10th year following the beginning of the implementation period shall be initiated and completed within the time-frame of the 10th year itself following the beginning of the implementation period.
9. If it is agreed as a result of the negotiation referred to in paragraph 8 that a Member may continue to apply the special treatment, such Member shall confer additional and acceptable concessions as determined in that negotiation.
10. In the event that special treatment under paragraph 7 is not to be continued beyond the 10th year following the beginning of the implementation period, the products concerned shall be subject to ordinary customs duties, established on the basis of a tariff equivalent to be calculated in accordance with the guidelines prescribed in the attachment hereto, which shall be bound in the Schedule of the Member concerned. In other respects, the provisions of paragraph 6 shall apply as modified by the relevant special and differential treatment accorded to developing country Members under this Agreement.

Attachment to Annex 5

Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex

1. The calculation of the tariff equivalents, whether expressed as ad valorem or specific rates, shall be made using the actual difference between internal and external prices in a transparent manner. Data used shall be for the years 1986 to 1988. Tariff equivalents:
- (a) shall primarily be established at the four-digit level of the HS;
 - (b) shall be established at the six-digit or a more detailed level of the HS wherever appropriate;
 - (c) shall generally be established for worked and/or prepared products by multiplying the specific tariff equivalent(s) for the primary agricultural product(s) by the proportion(s) in value terms or in physical terms as appropriate of the primary agricultural product(s) in the worked and/or prepared products, and take account, where necessary, of any additional elements currently providing protection to industry.
2. External prices shall be, in general, actual average c.i.f. unit values for the importing country. Where average c.i.f. unit values are not available or appropriate, external prices shall be either:

- (a) appropriate average c.i.f. unit values of a near country; or
 - (b) estimated from average f.o.b. unit values of (an) appropriate major exporter(s) adjusted by adding an estimate of insurance, freight and other relevant costs to the importing country.
3. The external prices shall generally be converted to domestic currencies using the annual average market exchange rate for the same period as the price data.
4. The internal price shall generally be a representative wholesale price ruling in the domestic market or an estimate of that price where adequate data is not available.
5. The initial tariff equivalents may be adjusted, where necessary, to take account of differences in quality or variety using an appropriate coefficient.
6. Where a tariff equivalent resulting from these guidelines is negative or lower than the current bound rate, the initial tariff equivalent may be established at the current bound rate or on the basis of national offers for that product.
7. Where an adjustment is made to the level of a tariff equivalent which would have resulted from the above guidelines, the Member concerned shall afford, on request, full opportunities for consultation with a view to negotiating appropriate solutions.

B. INTERPRETATION AND APPLICATION OF ANNEX 5

No jurisprudence or decision of a competent WTO body.

XXVIII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. SCM AGREEMENT

129. The Appellate Body, in *Canada – Dairy* and *US – FSC*, referred to the *SCM Agreement*, in defining the term “subsidy” under the *Agreement on Agriculture*. See paragraph 6 above.¹⁸⁹

130. Also, the Appellate Body, in *US – FSC*, referred to the *SCM Agreement*, in interpreting the concept of export contingency under the *Agreement on Agriculture*. See paragraph 9 above.¹⁹⁰

¹⁸⁹ See also Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 187–196.

¹⁹⁰ See also Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 187–196.

XXIX. DECISION ON MEASURES CONCERNING THE POSSIBLE NEGATIVE EFFECTS OF THE REFORM PROGRAMME ON LEAST-DEVELOPED AND NET FOOD-IMPORTING DEVELOPING COUNTRIES (THE “NFIDC DECISION”)

A. TEXT OF THE DECISION

1. *Ministers recognize* that the progressive implementation of the results of the Uruguay Round as a whole will generate increasing opportunities for trade expansion and economic growth to the benefit of all participants.

2. *Ministers recognize* that during the reform programme leading to greater liberalization of trade in agriculture least-developed and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.

3. *Ministers accordingly agree* to establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries. To this end *Ministers agree*:

- (i) to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme;
- (ii) to adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986;
- (iii) to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure.

4. *Ministers further agree* to ensure that any agreement relating to agricultural export credits makes appropriate provision for differential treatment in favour of least-developed and net food-importing developing countries.

5. *Ministers recognize* that as a result of the Uruguay Round certain developing countries may experience short-term difficulties in financing normal levels of commercial imports and that these countries may be eligible to draw on the resources of international financial institutions under existing facilities, or such facilities as may be established, in the context of adjustment programmes, in order to address such financing difficulties. In this regard Ministers take note of paragraph 37 of the report of the Director-General to the CONTRACTING PARTIES to GATT 1947 on his consultations with the Managing Director of the International Monetary Fund and the President of the World Bank (MTN.GNG/NG14/W/35).

6. The provisions of this Decision will be subject to regular review by the Ministerial Conference, and the follow-up to this Decision shall be monitored, as appropriate, by the Committee on Agriculture.”

B. INTERPRETATION AND APPLICATION OF THE DECISION

1. Paragraph 3

(a) Paragraphs 3(i) and (ii)

131. In accordance with the mandate in paragraphs 3(i) and (ii), the Doha Ministerial Conference adopted the following recommendations, submitted by the Committee on Agriculture¹⁹¹:

“(a) That early action be taken within the framework of the Food Aid Convention 1999 (which unless extended, with or without a decision regarding its renegotiation, would expire on 30 June 2002) and of the UN World Food Programme by donors of food aid to review their food aid contributions with a view to better identifying and meeting the food aid needs of least-developed and WTO net food-importing developing countries;

(b) WTO Members which are donors of food aid shall, within the framework of their food aid policies, statutes, programmes and commitments, take appropriate measures aimed at ensuring: (i) that to the maximum extent possible their levels of food aid to developing countries are maintained during periods in which trends in world market prices of basic foodstuffs have been increasing; and (ii) that all food aid to least developed countries is provided in fully grant form and, to the maximum extent possible to WTO net food-importing developing countries as well.”¹⁹²

(i) *Extension of the Food Aid Convention*

132. With regard to the recommendation in paragraph (a) above, which noted that the Food Aid

¹⁹¹ Document G/AG/11.

¹⁹² WT/MIN(01)/17, para. 2.2.

Convention, 1999, was due to expire on 30 June 2002, the meeting of the Food Aid Committee in December 2002, agreed in principle to a two-year extension of the Convention from 1 July 2003. The further extension of the Convention to 30 June 2005 was decided by the Food Aid Committee at its Session on 23 June 2003.¹⁹³

(b) Paragraph 3(iii)

133. The mandate in paragraph 3(iii) was developed by the following two recommendations on Technical and Financial Assistance in the Context of Aid Programmes to Improve Agricultural Productivity and Infrastructure, adopted at the Doha Ministerial Conference:

- “(a) . . . developed country WTO Members should continue to give full and favourable consideration in the context of their aid programmes to requests for the provision of technical and financial assistance by least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure;
- (b) . . . in support of the priority accorded by least-developed and net food-importing developing countries to the development of their agricultural productivity and infrastructure, the WTO General Council call upon relevant international developed organisations, including the World Bank, the FAO, IFAD, the UNDP and the Regional Development Banks to enhance their provision of, and access to, technical and financial assistance to least-developed and net food-importing developing countries, on terms and conditions conducive to the better use of such facilities and resources, in order to improve agricultural productivity and infrastructure in these countries under existing facilities and programmes, as well as under such facilities and programmes as may be introduced.”¹⁹⁴

2. Paragraph 4

134. In relation to paragraph 4, the Doha Ministerial Conference adopted the following recommendation:

- “(a) that the provision of paragraph 4 of the Marrakesh Ministerial Decision, which provide for differential treatment in favour of least-developed and WTO net food-importing developing countries, shall be taken fully into account in any agreement to be negotiated on disciplines on agricultural export credits pursuant to Article 10.2 of the Agreement on Agriculture;”¹⁹⁵

3. Paragraph 5

(a) The Inter-Agency Panel

135. In relation to paragraph 5 and in order to counter the difficulties in financing normal levels of commercial

imports of basic foodstuff faced by certain developing countries, Members at the Doha Ministerial Conference adopted the recommendation, submitted by the Committee on Agriculture, to establish an Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs (“Inter-Agency Panel”):

- “(b) That an inter-agency panel of financial and commodity experts be established, with the requested participation of the “World Bank, the IMF, the FAO, the International Grains Council and the UNCTAD, to explore ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programs and facilities to assist with short term difficulties in financing normal levels of commercial imports of basic foodstuffs, as well as the concept and feasibility of the proposal for the establishment of a revolving fund in G/AG/W/49 and Add.1 and Corr.1. The detailed terms of reference, drawing on the Marrakesh NFIDC Decision, should be submitted by the Vice-Chairman of the WTO Committee on Agriculture, following consultations with Members, to the General Council for approval by not later than 31 December 2001. The inter-agency panel shall submit its recommendation to the General Council by not later than 30 June 2002.”¹⁹⁶

136. In accordance with the recommendations adopted by the Doha Ministerial Conference, the General Council at its meeting on 19 and 20 December 2001 adopted the following terms of reference for the Inter-Agency Panel within the framework of the NFIDC Decision:¹⁹⁷

- “1. To examine the terms and conditions of existing facilities of the international financial institutions (namely: IMF and the World Bank) to which the least-developed and WTO net food-importing developing countries could have recourse in order to address short-term difficulties in financing normal levels of commercial imports of basic foodstuffs, principally cereals, rice, basic dairy products, pulses, vegetable oils and sugar, during periods of rising world prices for such basic foodstuffs, including, as appropriate, other relevant sources of concessional financing; this examination shall take into account, *inter alia*, such submissions as may be submitted to the Panel by least-developed and WTO net food-importing developing countries, donors and the relevant international financial institutions, by no later than end-March 2002;

¹⁹³ G/AG/16.

¹⁹⁴ WT/MIN(01)/17, para. 2.2. The text of the adopted recommendations can be found in G/AG/11.

¹⁹⁵ WT/MIN(01)/17, para. 2.2. The text of the adopted recommendation can be found in G/AG/11.

¹⁹⁶ WT/MIN(01)/17, para. 2.2. The text of the adopted document can be found in G/AG/11.

¹⁹⁷ WT/GC/70, (para. j).

2. To examine the concept and feasibility of the proposal for the establishment of a revolving fund in documents G/AG/W/49 and Add.1 and Corr.1, together with any further elaboration of those proposals as may be submitted to the Panel by the sponsoring Members concerned before the end of March 2002;

3. In the light of its review and examination under paragraphs (1) and (2) above and having regard to the Marrakesh NFIDC Decision, to make such recommendations for the consideration of the WTO General Council as the Panel considers appropriate regarding: ways and means for improving access by least-developed and WTO net food-importing developing countries to multilateral programmes and facilities to assist with short-term difficulties in financing normal levels of commercial imports of basic foodstuffs;

4. In carrying out its task the Panel may consult with such bodies or institutions as it considers appropriate;

5. The Panel shall submit its report and recommendations to the WTO General Council by no later than 30 June 2002.¹⁹⁸

137. The Inter-Agency Panel submitted its report to the General Council on 28 June 2002.¹⁹⁹ In its Report, the Inter-Agency Panel made four recommendations:

“[C]oncerning ways and means for improving access by LDCs and NFIDCs to multilateral programme and facilities to assist with short-term difficulties in financing normal levels of commercial imports of basic foodstuffs:

- (a) that in the context of the impending review of the CFF of the IMF, consideration be given by member governments to
 - (i) extending the product coverage of the facility to cover all basic foodstuffs,
 - (ii) clarifying access in the context of an existing arrangement with the IMF,
 - (iii) providing a greater degree of automaticity without requiring an IMF – supported programme,
 - (iv) reviewing the procedures and timeliness of disbursements, as well as encouraging governments to come forward with purchase requests;
- (b) that in the light of the limited potential usefulness of an ex-post revolving fund to support food

imports in time of need, the feasibility of an ex-ante financing mechanism aimed at food importers be explored;

- (c) that the terms of reference of the Diagnostic Trade Integration Studies to be undertaken in the context of the Integrated Framework include, as appropriate and if requested by the beneficiary country, the items of
 - (i) food security implications of trade development strategies,
 - (ii) availability of, and access to, adequate financing, in particular by the private sector, to support food imports;
- (d) that strategies of commodity price risk management from the perspective of developing country food importers be addressed by the Commodity Price Risk Management Group of the World Bank.²⁰⁰

138. At its meeting on 15 October 2002 the General Council approved these four recommendations, with the amendments proposed by the Committee on Agriculture:

“[W]ith regard to the recommendations in Paragraphs 168 (a), (c) and (d), that the General Council authorize him, as Chairman [of the General Council], to write to the IMF, World Bank and the Integrated Framework Agencies requesting them to review the Panel report as it related to the issue within their competence. Finally, with regard to the recommendation in Paragraph 168 (b), he proposed that the General Council approve to the recommendation of the Committee on Agriculture that the question on feasibility of an ex-ante financing mechanism aimed at food importers be pursued by Committee, on the understanding that a proposal regarding the establishment of an ex-ante financing mechanism would be submitted by the WTO net food-importing developing countries, and follow-up report concerning the discussion of the proposal be submitted to the General Council following the regular meeting of the Committee in November.”²⁰¹

¹⁹⁸ G/AG/12 and WT/GC/M/72, paragraphs 61–63.

¹⁹⁹ G/AG/13/WT/GC/62.

²⁰⁰ G/AG/13, para. 168.

²⁰¹ WT/GC/M/76, paras. 63 and 64.

Agreement on Sanitary and Phytosanitary Measures

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)¹;

(footnote original) ¹ In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. “international standards, guidelines and recommendations”

1. In 1995, the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention provided the SPS Committee with lists of international standards they had adopted.¹

2. The precautionary principle

(a) Status in international law

2. With respect to the “precautionary principle” invoked by the European Communities in support of its claim in *EC – Hormones* that it had complied with Article 5.1 of the *SPS Agreement*, the Appellate Body declined to take a position on the status of the precautionary principle in international law:

“The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.”²

(b) Relationship with the SPS Agreement

3. As regards the relationship between the “precautionary principle” and the *SPS Agreement*, the Appellate Body noted the following four elements, one of which concerns the Preamble to the *SPS Agreement*:

¹ G/SPS/W/18 and Corr.1 (Codex); G/SPS/W/21 (OIE) and G/SPS/W/23 (IPPC). See also G/SPS/W/107/Rev.1, G/SPS/GEN/177, G/SPS/GEN/185, G/SPS/GEN/266, G/SPS/GEN/271, G/SPS/GEN/282 and G/SPS/GEN/327.

² Appellate Body Report on *EC – Hormones*, para. 123.

"First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement . . . It is reflected also in the sixth paragraph of the preamble . . . These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations . . . Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*".³

4. See also paragraph 22 below.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1 *General Provisions*

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
2. For the purposes of this Agreement, the definitions provided in Annex A⁴ shall apply.
3. The annexes are an integral part of this Agreement.
4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1

(a) Scope of the SPS Agreement

(i) General

5. The Panel on *EC – Hormones* identified two elements in order for a measure to fall under the *SPS Agreement*:

"According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade".⁵

(ii) *Applicable to all SPS measures in force*

6. In *EC – Hormones*, in discussing the applicability of the *SPS Agreement* to a measure which was enacted before the entry into force of the Agreement, the Appellate Body held that the *SPS Agreement* would apply to situations or measures that had not ceased to exist, unless the *SPS Agreement* revealed a contrary intention. Furthermore, the Appellate Body noted that certain measures of the *SPS Agreement* "expressly contemplate applicability to SPS measures that already existed on 1 January 1995":

"We addressed the issue of temporal application in our Report in *Brazil – Measures Affecting Desiccated Coconut* and concluded on the basis of Article 28 of the *Vienna Convention* that:

Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both. Furthermore, other provisions of the *SPS Agreement*, such as Articles 2.2, 2.3, 3.3 and 5.6, expressly contemplate applicability to SPS measures that already existed on 1 January 1995."⁶

(b) Article 1.2: Reference to Annex A

7. As regards the interpretation of Annex A, see Section XVI.B below

³ Appellate Body Report on *EC – Hormones*, para. 124.

⁴ See Section XVI.

⁵ Panel Report on *EC – Hormones (Canada)*, para. 8.39; Panel Report on *EC – Hormones (US)*, para. 8.36.

⁶ Appellate Body Report on *EC – Hormones*, para. 128.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.
4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2.2

- (a) “maintained without sufficient scientific evidence”

(i) *General*

8. In *EC – Hormones*, the Appellate Body referred to the requirement of “sufficient scientific evidence” under Article 2.2. as part of the negotiated balance contained in the *SPS Agreement* between the promotion of international trade and the protection of human life and health⁷

(ii) “Sufficient”

Meaning

9. In *Japan – Agricultural Products II*, with respect to the term “sufficient” in Article 2.2, the Appellate Body required an adequate relationship between the SPS measure and the scientific evidence:

“The ordinary meaning of ‘sufficient’ is ‘of a quantity, extent, or scope adequate to a certain purpose or object’. From this, we can conclude that ‘sufficiency’ is a

relational concept. ‘Sufficiency’ requires the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence”.⁸

Context

10. The Appellate Body on *Japan – Agricultural Products II* also stated that “[t]he context of the word ‘sufficient’ or, more generally, the phrase ‘maintained without sufficient scientific evidence’ in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the *SPS Agreement*”.⁹

“Patent insufficiency” standard

11. After an examination of the context of the term “sufficient”, the Appellate Body on *Japan – Agricultural Products II* disagreed with Japan on the notion of a standard of “patent insufficiency”:

“We do not agree with Japan’s proposition that direct application of Article 2.2 of the *SPS Agreement* should be limited to situations in which the scientific evidence is ‘patently’ insufficient, and that the issue raised in this dispute should have been dealt with under Article 5.1 of the *SPS Agreement*. There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the *SPS Agreement*, that requires or sanctions such limitation of the scope of Article 2.2”.¹⁰

(iii) “Scientific evidence”

12. In addition to the meaning of the term “sufficient” under Article 2.2, the Panel on *Japan – Apples* looked into the meaning of “scientific evidence” – i.e. the nature of the evidence that should be considered – and concluded that Article 2.2 excludes not only insufficiently substantiated information, but also a non-demonstrated hypothesis:

“We consider that . . . we must give full meaning to the term ‘scientific’ and conclude that, in the context of Article 2.2, the evidence to be considered should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method. We further note that scientific evidence may include evidence that a particular risk may occur . . . as well as evidence that a particular requirement may reduce or eliminate that risk

Likewise, the use of the term ‘evidence’ must also be given full significance. Negotiators could have used the

⁷ Appellate Body Report on *EC – Hormones*, para. 177. See the discussion on the precautionary principle in *EC – Hormones* in para. 3 above.

⁸ Appellate Body Report on *Japan – Agricultural Products II*, paras. 73.

⁹ Appellate Body Report on *Japan – Agricultural Products II*, paras. 74.

¹⁰ Appellate Body Report on *Japan – Agricultural Products II*, para. 82.

term ‘information’, as in Article 5.7, if they considered that any material could be used. By using the term ‘scientific evidence’, Article 2.2 excludes in essence not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis.

...

[R]equiring ‘scientific evidence’ does not limit the field of scientific evidence available to Members to support their measures. ‘Direct’ or ‘indirect’ evidence may be equally considered. The only difference is not one of scientific quality, but one of probative value within the legal meaning of the term, since it is obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available.”¹¹

(iv) *A rational and objective relationship*

13. The Appellate Body on *Japan – Agricultural Products II* established that Article 2.2 requires a rational or objective relationship between the SPS measure and the scientific evidence:

“[W]e agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.”¹²

(v) *Case-by-case methodology*

14. In *Japan – Agricultural Products II*, the Appellate Body considered that the determination whether there is a rational relationship between the SPS measure and the scientific evidence must be conducted on a case-by-case basis. In this regard, see paragraph 12 above.

15. The Panel on *Japan – Apples* had come up with its own methodology to assess whether a measure was maintained without sufficient scientific evidence. The Panel considered both the risk of transmission of fire blight inherent in mature, symptomless apples and the risk associated with apples other than mature, symptomless apples that might enter Japanese territory as a result of human/technical errors in the sorting of apples or illegal actions.¹³ On appeal, the Appellate Body emphasized that whether a given approach or methodology used to assess ‘sufficient scientific evidence’ within the meaning of Article 2.2 is appropriate should be determined on a case-by-case basis. The Appellate Body upheld the Panel’s methodology as appropriate to the particular circumstances of the case before it:

“We emphasize, following the Appellate Body’s statement in *Japan – Agricultural Products II*, that whether a given approach or methodology is appropriate in order to assess whether a measure is maintained ‘without sufficient scientific evidence’, within the meaning of Article 2.2, depends on the ‘particular circumstances of the case’, and must be ‘determined on a case-by-case basis’.¹⁴ Thus, the approach followed by the Panel in this case – disassembling the sequence of events to identify the risk and comparing it with the measure – does not exhaust the range of methodologies available to determine whether a measure is maintained ‘without sufficient scientific evidence’ within the meaning of Article 2.2. Approaches different from that followed by the Panel in this case could also prove appropriate to evaluate whether a measure is maintained without sufficient scientific evidence within the meaning of Article 2.2. Whether or not a particular approach is appropriate will depend on the ‘particular circumstances of the case’.¹⁵ The methodology adopted by the Panel was appropriate to the particular circumstances of the case before it and, therefore, we see no error in the Panel’s reliance on it.”¹⁶

(vi) *Measure to be proportionate to risk*

16. Based on its conclusion that all the individual requirements contained in the measure should be treated altogether as the phytosanitary measure at issue in the case, the Panel on *Japan – Apples* considered that a measure as a whole should be considered to be maintained ‘without sufficient scientific evidence’ if one or more of its elements are not justified by the relevant scientific evidence addressing the risk at issue. The Appellate Body found that the Panel’s approach was appropriate in the circumstances:

“[W]e concluded, on the basis of the elements before us, that there was *not sufficient scientific evidence* to support the view that apples are likely to serve as a pathway for the entry, establishment or spread of fire blight within Japan. Given the negligible risk identified on the basis of the scientific evidence and the nature of the elements composing the phytosanitary measure at issue, the measure on the face of it is disproportionate to that risk.

More particularly, . . . , we have found that the following requirements are instances of elements of the measure at issue which are most obviously ‘maintained without sufficient scientific evidence’, either as such or when applied in cumulation with others, . . .

¹¹ Panel Report on *Japan – Apples*, paras. 8.92–8.93, 8.98.

¹² Appellate Body Report on *Japan – Agricultural Products II*, para. 84.

¹³ Panel Report on *Japan – Apples*, paras. 8.119–8.121.

¹⁴ (footnote original) Appellate Body Report on *Japan – Agricultural Products II*, para. 84.

¹⁵ (footnote original) Appellate Body Report on *Japan – Agricultural Products II*, para. 84.

¹⁶ Appellate Body Report on *Japan – Apples*, para. 164.

For the reasons mentioned above, we conclude that the phytosanitary measure at issue is clearly disproportionate to the risk identified on the basis of the scientific evidence available. . . .¹⁷

(b) Burden of proof

(i) Presumption of “no relevant studies or report”

17. The Panel on *Japan – Agricultural Products II* had limited its finding of violation of Article 2.2 to only four of the eight products at issue on the grounds that in respect of the other four products, the United States had not adduced sufficient evidence to raise a *prima facie* case. The Appellate Body agreed with the Panel and rejected the United States’ claim that the Panel had imposed on it an erroneous burden of proof:

“[W]e disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely, that there are no relevant studies and reports which support Japan’s varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are no relevant studies or reports. Raising a presumption that there are no relevant studies or reports is not an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide ‘an explanation of the reasons’ for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports. The United States could also have asked the Panel’s experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit any evidence relating to apricots, pears, plums and quince.”¹⁸

18. Applying the same reasoning, the Panel on *Japan – Apples* said that the United States had to raise a presumption that there were no relevant scientific studies or reports to prove that the measure at issue imposed by Japan was not supported by sufficient scientific evidence:

“Japan argues, that, in order for the United States to establish a *prima facie* case under Article 2.2, it has to positively prove the ‘insufficiency’ of scientific evidence. The United States claims that there is simply no scientific evidence supporting the measure at issue. Under these circumstances, and in application of the reasoning of the Appellate Body in *Japan – Agricultural Products II*, we consider that the United States should raise a presump-

tion that there are no *relevant* scientific studies or reports in order to demonstrate that the measure at issue is not supported by sufficient scientific evidence.¹⁹ If Japan submits elements to rebut that presumption, we would have to weigh the evidence before us.”²⁰

(ii) Allocation of burden of proof

19. On the allocation of the burden of proof, the Appellate Body on *Japan – Apples* said that although the complaining party bears the burden of proving its case, the responding party is responsible for proving the case it seeks to make in response:

“In this case, the United States seeks a finding that Japan’s measure is inconsistent with Article 2.2 of the *SPS Agreement*. Therefore, the initial burden lies with the United States to establish a *prima facie* case that the measure is inconsistent with Article 2.2. . . . Following the Appellate Body’s ruling in *EC – Hormones*, if this *prima facie* case is made, it would be for Japan to counter or refute the claim that the measure is ‘maintained without sufficient scientific evidence’.

That said, the Appellate Body’s statement in *EC – Hormones* does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response. In *US – Wool Shirts and Blouses*, the Appellate Body stated

‘. . . the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.’²¹

In this case, the United States made a series of allegations of fact relating to mature, symptomless apples as a possible pathway for fire blight, and sought to substantiate these allegations. Japan sought to counter the case made by the United States . . . Japan was thus responsible for providing proof of the allegations of fact it advanced in relation to apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions. . . .”²²

(iii) Establishing *prima facie* case of inconsistency

20. Regarding the concept of *prima facie*, the Appellate Body further explained in *Japan – Apples* that the complainant could establish a *prima facie* case of

¹⁷ Panel Report on *Japan – Apples*, paras. 8.179, 8.182 and 8.198.

¹⁸ Appellate Body Report on *Japan – Agricultural Products II*, para. 137.

¹⁹ (footnote original) Appellate Body Report on *Japan – Agricultural Products II*, para. 137.

²⁰ Panel Report on *Japan – Apples*, para. 8.106.

²¹ (footnote original) Appellate Body Report on *US – Wool Shirts and Blouses*, p.14, DSR 1997:I, 323, at 335.

²² Appellate Body Report on *Japan – Apples*, paras. 153–156.

inconsistency with Article 2.2 of the *SPS Agreement* even though it confined its arguments to a claim asserted by it:

“Japan . . . submits that, ‘in order to establish a *prima facie* case of insufficient scientific evidence under Article 2.2 of the *SPS Agreement*, the complaining party must establish that there is not sufficient evidence for any of the perceived risks underlying the measure.’ . . . We find no basis for the approach advocated by Japan. . . . In the present case, the Panel appears to have concluded that in order to demonstrate a *prima facie* case that Japan’s measure is maintained without sufficient scientific evidence, it sufficed for the United States to address only the question of whether mature, symptomless apples could serve as a pathway for fire blight.

The Panel’s conclusion seems appropriate to us for the following reasons. First, the claim pursued by the United States was that Japan’s measure is maintained without sufficient scientific evidence to the extent that it applies to mature, symptomless apples exported from the United States to Japan. What is required to demonstrate a *prima facie* case is necessarily influenced by the nature and the scope of the claim pursued by the complainant. A complainant should not be required to prove a claim it does not seek to make. Secondly, the Panel found that mature, symptomless apple fruit is the commodity ‘normally exported’ by the United States to Japan.²³ The Panel indicated that the risk that apples fruit other than mature, symptomless apples may actually be imported into Japan would seem to arise primarily as a result of human or technical error, or illegal actions²⁴, and noted that the experts characterized errors of handling and illegal actions as ‘small’ or ‘debatable’ risks.²⁵ Given the characterization of these risks, in our opinion it was legitimate for the Panel to consider that the United States could demonstrate a *prima facie* case of inconsistency with Article 2.2 of the *SPS Agreement* through argument based solely on mature, symptomless apples. Thirdly, the record contains no evidence to suggest that apples other than mature, symptomless ones have ever been exported to Japan from the United States as a result of errors of handling or illegal actions. . . .”²⁶

21. As regards the burden of proof in general, see Section XXXVI(D) of the Chapter on the *DSU*.

(c) Standard of review

(i) *Panel to take into account the prudence commonly exercised by governments*

22. In *EC – Hormones*, the Appellate Body, while addressing the relationship between the precautionary principle and the *SPS Agreement* in the context of its analysis of whether a measure was maintained without sufficient scientific evidence, noted that the Panel should take into account in its examination the pru-

dence commonly exercised by governments in the event of irreversible risks:

“[A] panel charged with determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned”.²⁷

(ii) *Panel not to conduct own risk assessment*

23. The Panel on *Japan – Agricultural Products II* emphasized that in reviewing whether the measure at issue was being maintained without sufficient scientific evidence, it would not conduct its own risk assessment:

“To determine whether or not the varietal testing requirement is maintained without sufficient scientific evidence . . . we need to refer to the opinions we received from the experts advising the Panel. We recall that these expert opinions are opinions on the evidence submitted by the parties. We are not empowered, nor are the experts advising the Panel, to conduct our own risk assessment”.²⁸

(iii) *Panel to assess relevant allegations of fact*

24. The Appellate Body on *Japan – Apples* also found that the Panel acted within the limits of its investigative authority when the Panel assessed relevant allegations of fact asserted by Japan as the respondent:

“Japan also contends that the Panel did not have the authority to make certain findings of fact²⁹ and, in support of this contention, refers to the Appellate Body’s statement in *Japan – Agricultural Products II*:

²³ (*footnote original*) Panel Report, para. 8.141. The Panel also found that “the importation of immature, infected apples may only occur as a result of a handling error or an illegal action”. (*Ibid.*, footnote 2275 to para. 8.121).

²⁴ (*footnote original*) Panel Report, para. 8.174.

²⁵ (*footnote original*) Panel Report, para. 8.161.

²⁶ Appellate Body Report on *Japan – Apples*, paras. 158–160.

²⁷ Appellate Body Report on *EC – Hormones*, para.124. See also paras. 2–4 above.

²⁸ Panel Report on *Japan – Agricultural Products II*, para. 8.32. For the same statement made in the context of Article 5, see paras. 94–95 below.

²⁹ (*footnote original*) Japan refers to the following findings of the Panel:

[W]e are of the opinion that the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500–meter buffer zone surrounding such orchard is not supported by sufficient scientific evidence; [and]

[W]e are of the opinion that the requirement that export orchards be inspected at least three times yearly (at blossom, fruitlet, and harvest stages) for the presence of fire blight is not supported by sufficient scientific evidence. (footnotes omitted)

(Japan’s appellant’s submission, para. 35, quoting Panel Report, paras. 8.185 and 8.195)

Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.³⁰

We disagree with Japan. We note first that we are not persuaded that the findings of the Panel, identified by Japan in relation to this argument, relate specifically to, or address apples other than mature, symptomless apples, as Japan seems to assume. Also, the Appellate Body's finding in *Japan – Agricultural Products II* does not support Japan's argument that the Panel was barred from making findings of fact in connection with apples other than mature, symptomless apples. Those findings were relevant to the claim pursued by the United States under Article 2.2 of the *SPS Agreement*, and were responsive to relevant allegations of fact advanced by Japan in the context of its rebuttal of the United States' claim. The Panel acted within the limits of its investigative authority because it did nothing more than assess relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts".³¹

(iv) *Panel to take into account views of experts while evaluating scientific evidence*

25. The Appellate Body on *Japan – Apples* held that the Panel was entitled to take into account the views of the experts in assessing whether the United States had established a *prima facie* case, recalling the similar approaches taken in other cases involving the evaluation of scientific evidence:

"In order to assess whether the United States had established a *prima facie* case, the Panel was entitled to take into account the view of the experts. Indeed, in *India – Quantitative Restrictions*, the Appellate Body indicated that it may be useful for a panel to consider the views of the experts it consults in order to determine whether a *prima facie* case has been made.³² Moreover, on several occasions, including disputes involving the evaluation of scientific evidence, the Appellate Body has stated that panels enjoy discretion as the trier of facts³³; they enjoy 'a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence.'³⁴ Requiring panels, in their assessment of the evidence before them, to give precedence to the importing Member's evaluation of scientific evidence and risk is not compatible with this well-established principle."³⁵

(v) *Panel not obliged to give precedence to importing Member's approach to scientific evidence and risk*

26. The Appellate Body on *Japan – Apples* held that a panel was not obliged to give precedence to the import-

ing Member's approach to scientific evidence and risk over the views of the experts when analyzing and assessing scientific evidence to determine whether a complainant established a *prima facie* case under Article 2.2. On appeal, the Appellate Body rejected Japan's argument that the Panel erred in the application of Article 2.2 by focusing on the experts' views rather than according a 'certain degree of discretion' to the importing Member in the manner in which it chooses, weighs, and evaluates scientific evidence:

"Regarding Japan's contention that the Panel should have made its assessment under Article 2.2 in light of Japan's approach to risk and scientific evidence, we recall that, in *EC – Hormones*, the Appellate Body addressed the question of the standard of review that a panel should apply in the assessment of scientific evidence submitted in proceedings under the *SPS Agreement*. It stated that Article 11 of the DSU sets out the applicable standard, requiring panels to make an 'objective assessment of the facts'. It added that, as regards fact-finding by panels and the appreciation of scientific evidence, total deference to the findings of the national authorities would not ensure an objective assessment as required by Article 11 of the DSU.³⁶ In our view, Japan's submission that the Panel was obliged to favour Japan's approach to risk and scientific evidence over the view of experts conflicts with the Appellate Body's articulation of the standard of "objective assessment of fact.

... For these reasons, we reject the contention that, under Article 2.2, a panel is obliged to give precedence to the importing Member's approach to scientific evidence and risk when analyzing and assessing scientific evidence. Consequently, we disagree with Japan that the Panel erred in assessing whether the United States had established a *prima facie* case when it did so from a perspective different from that inherent in Japan's approach to scientific evidence and risk. ..."³⁷

27. As regards the panels' standard of review in general, see Article XI of the Chapter on the *DSU*.

³⁰ Appellate Body Report on *Japan – Agricultural Products II*, para. 129; Japan's appellant's submission, paras. 18 and 44.

³¹ Appellate Body Report on *Japan – Apples*, para. 158.

³² (footnote original) Appellate Body Report on *India – Quantitative Restrictions*, para. 142.

³³ (footnote original) Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report on *EC – Sardines*, para. 229; Appellate Body Report on *Korea – Alcoholic Beverages*, paras. 161–162; Appellate Body Report on *EC – Hormones*, para. 132, and Appellate Body Report on *US – Wheat Gluten*, para. 151. See also, Appellate Body Report on *Australia – Salmon*, paras. 262–267; Appellate Body Report on *Japan – Agricultural Products II*, paras. 140–142; and Appellate Body Report on *Korea – Dairy*, paras. 137–138.

³⁴ (footnote original) Appellate Body Report on *EC – Asbestos*, para. 161.

³⁵ Appellate Body Report on *Japan – Apples*, paras. 166.

³⁶ (footnote original) Appellate Body Report on *EC – Hormones*, para. 117.

³⁷ Appellate Body Report on *Japan – Apples*, paras. 165 & 167.

(d) Relationship with other Articles

(i) Article 1.1

28. As regards applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) Article 4

29. The Panel on *Japan – Apples* rejected Japan's argument that the Panel should consider Article 4 of the *SPS Agreement* in its assessment of Article 2.2:

"[W]e agree that other provisions of the *SPS Agreement* are part of the context of Article 2.2, as recalled by the Appellate Body in *Japan – Agricultural Products II*³⁸. Article 4 deals with the specific question of the recognition of equivalence of measures. Unlike Article 3.3, 5.1 and 5.7, the purpose of Article 4 is clearly different from that of Article 2.2. We also note that the United States did not raise any claim under Article 4 and that this Article is not a defence against violations of other provisions of the *SPS Agreement*. As a result, we see no other reason to consider Japan's arguments regarding Article 4 in our assessment of Article 2.2, other than to the extent that Article 4 might form part of the relevant context in the interpretation of Article 2.2."³⁹

(iii) Article 5

Article 5.1

30. In *EC – Hormones*, the Appellate Body stated that Articles 2.2 and 5.1 should "constantly be read together":

"[T]he Panel considered that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*, which reads as follows: . . .

We agree with this general consideration and would also stress that Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."⁴⁰

31. The Appellate Body on *Japan – Agricultural Products II* also considered it useful in interpreting Article 2.2, and, in particular, the meaning of the word "sufficient", to recall its statement on Article 5.1 in its Report on *EC – Hormones*.⁴¹

32. In *Australia – Salmon*, the Appellate Body concluded that a violation of Article 5.1 also implied an inconsistency with Article 2.2 (see paragraph 128 below):

"[B]y maintaining an import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon, in violation of Article 5.1, Australia has, by implication, also acted inconsistently with Article 2.2 of the *SPS Agreement*."⁴²

Articles 5.4 and 5.6

33. On the relationship between Articles 5.4 to 5.6 and Article 2.2, the Panel on *EC – Hormones*, in a statement not reviewed by the Appellate Body, noted:

"Articles 5.4 to 5.6 may be viewed as specific applications of the basic obligations provided for in Article 2.2 which, *inter alia*, states that 'Members shall ensure that any sanitary or phytosanitary measure is *applied only to the extent necessary to protect* human, animal or plant life or health' (emphasis added) and Article 2.3 which provides that 'Members shall ensure that their sanitary and phytosanitary measures do *not arbitrarily or unjustifiably discriminate between Members* where identical or similar conditions prevail . . .' and that 'Sanitary and phytosanitary measures *shall not be applied in a manner which would constitute a disguised restriction* on international trade' (emphasis added)."⁴³

34. The Panel on *Japan – Apples* emphasized that the requirement not to maintain a measure without sufficient scientific under Article 2.2 should not be confused with the requirement of Article 5.6:

"[W]e should also be careful not to confuse the requirement that a measure is not maintained without sufficient scientific evidence with the requirement of Article 5.6 of the *SPS Agreement* that the measure is 'not more trade-restrictive than required to achieve [Japan's] appropriate level of . . . phytosanitary protection'. In other words, while we might find that some specific requirements of the measure at issue are not supported by sufficient scientific evidence, our findings should be limited to Article 2.2."⁴⁴

Article 5.7

35. The Panel on *Japan – Agricultural Products II* stated that a measure consistent with Article 5.7 cannot be found inconsistent with Article 2.2:

"[B]efore we can find . . . whether or not Article 2.2 is violated in this dispute – we recall that Article 2.2 provides that "Members shall ensure that any . . . phytosanitary measure . . . is not maintained without sufficient scientific evidence, *except as provided for in paragraph 7 of Article 5*" (emphasis added). We note that Japan invokes Article 5.7 in support of its varietal testing requirement. We therefore need to examine next whether the varietal testing requirement is a measure meeting the requirements in Article 5.7. If the varietal

³⁸ (footnote original) Appellate Body Report in *Japan – Agricultural Products II*, para. 74.

³⁹ Panel Report on *Japan – Apples*, para. 8.107.

⁴⁰ Appellate Body Report on *EC – Hormones*, para. 180.

⁴¹ (footnote original) *European Communities – Hormones, supra*, footnote 12, para. 194.

⁴² Appellate Body Report on *Australia – Salmon*, para. 138.

⁴³ Panel Report on *EC – Hormones (Canada)*, para. 8.99; Panel Report on *EC – Hormones (US)*, para. 8.96.

⁴⁴ Panel Report on *Japan – Apples*, para. 8.78.

testing requirement meets these requirements, we cannot find that it violates Article 2.2.”⁴⁵

36. In *Japan – Agricultural Products II*, the Appellate Body addressed the relationship between the requirement of sufficient scientific evidence under Article 2.2 and Article 5.7 and considered that Article 5.7 operates as a qualified exemption from the obligation under Article 2.2:

“[I]t is clear that Article 5.7 of the *SPS Agreement*, to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures ‘[i]n cases where relevant scientific evidence is insufficient’ and certain other requirements are fulfilled. Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless.”⁴⁶

37. The Panel on *Japan – Apples* also followed the approach by the Panel on *Japan – Agricultural Products II* and refrained from making final findings with respect to the consistency of the measure at issue with Article 2.2 until the Panel had completed its analysis under Article 5.7. The Panel further stated that the only situation where it would not need to address Article 5.7 after the examination of the Article 2.2 claim would be if the measure was found to be “not maintained without sufficient scientific evidence” within the meaning of Article 2.2:

“[W]e believe it appropriate to follow, in this case too, the approach of the panel in *Japan – Agricultural Products II*. There is only one situation where it may not be necessary to address Article 5.7. This is if we find that the measure or measures as a whole is/are ‘not maintained without sufficient scientific evidence’ within the meaning of Article 2.2. If we were to find, however, that part or all of the measure or measures at issue is/are maintained without sufficient scientific evidence, we would suspend our final conclusion on the consistency of the measure(s) at issue with that provision until we have completed our examination under Article 5.7 of the *SPS Agreement*.”⁴⁷

2. Article 2.3

(a) Elements of violation

38. The Panel on *Australia – Salmon (Article 21.5 – Canada)* identified three elements necessary to find a violation of Article 2.3:

“[T]hree elements, cumulative in nature, are required for a violation of this provision:

- (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
- (2) the discrimination is arbitrary or unjustifiable; and
- (3) identical or similar conditions prevail in the territory of the Members compared.”⁴⁸

(b) Scope of discrimination

39. In *Australia – Salmon (Article 21.5 – Canada)*, while the Panel found no violation of Article 2.3⁴⁹, it also stated that Article 2.3 prohibits not only discrimination between similar products, but also between different products:

“[W]e are of the view that discrimination in the sense of Article 2.3, first sentence, may also include discrimination between *different* products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids”.⁵⁰

(c) Relationship with other Articles

(i) Article 1.1

40. On the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) Article 5.5

41. In *EC – Hormones* the Appellate Body noted the close relationship between Articles 2.3 and 5.5:

“Article 5.5 must be read in context. An important part of that context is Article 2.3 of the *SPS Agreement*, . . . When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3.”⁵¹

42. In the context of examining the European Communities’ measure at issue in the light of Article 5.5, the Appellate Body on *EC – Hormones* made the following statement with respect to Article 2.3:

⁴⁵ Panel Report on *Japan – Agricultural Products II*, para. 8.48; Panel Report on *Japan – Apples*, para. 8.200.

⁴⁶ Appellate Body Report on *Japan – Agricultural Products II*, para. 80.

⁴⁷ Panel Report on *Japan – Agricultural Products II*, para. 8.4.

⁴⁸ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

⁴⁹ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.113–7–114.

⁵⁰ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.112.

⁵¹ Appellate Body Report on *EC – Hormones*, para. 212.

"It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the *SPS Agreement*".⁵²

43. The Appellate Body on *EC – Hormones* further discussed the relationship between Articles 2.3 and 5.5 with respect to the Panel's decision to examine the claim under Articles 3 and 5 that under Article 2:

"We recall the reading that we have given above to Articles 2 and 5 . . . and that similarly Article 2.3 informs Article 5.5 – but believe that further analysis of their relationship should await another case."⁵³

44. The Panel on *Australia – Salmon*, in a finding upheld by the Appellate Body⁵⁴, held that a violation of Article 5.5 implied a violation of Article 2.3:

"Indeed, even though Article 5.5 deals with arbitrary or unjustifiable *distinctions in levels of protection* imposed by one WTO Member for different situations and Article 2.3 addresses, rather, sanitary measures which (1) arbitrary or unjustifiably *discriminate between* WTO Members or (2) are applied in a manner which would constitute a *disguised restriction* on trade; the third element under Article 5.5 also requires that the *measure* in dispute results in discrimination or a disguised restriction on trade. We conclude, therefore, that if we were to find that all three elements under Article 5.5 – including, in particular, the third element – are fulfilled and that, therefore, the more specific Article 5.5 is violated, such finding can be presumed to imply a violation of the more general Article 2.3. We do recognize, at the same time, that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5."⁵⁵

45. In *Australia – Salmon*, the Appellate Body elaborated on the relationship between Articles 2.3 and 5.5 and considered that a finding of violation of Article 5.5 necessarily implies a violation of Article 2.3:

"We recall that the third – and decisive – element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in 'discrimination or a disguised restriction on international trade'. Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination 'between Members, including their own territory and that of others Members' within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure consti-

tutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5."⁵⁶

3. Relationship with other Articles

(a) Articles 3 and 5

46. In *EC – Hormones*, with respect to the Panel's decision to examine a claim under Articles 3 and 5 before a claim under Article 2⁵⁷, the Appellate Body indicated a preference for beginning the analysis with Article 2:

"We are, of course, surprised by the fact that the Panel did not begin its analysis of this whole case by focusing on Article 2 that is captioned 'Basic Rights and Obligations', an approach that appears logically attractive."⁵⁸

47. In *Australia – Salmon*, where Articles 2, 3 and 5 were at issue, the Panel decided to commence its analysis under Article 5, because (1) Canada, the complaining party, focused initially on this provision with respect to its claims and (2) the provisions under Article 5 "provide for more specific and detailed rights and obligations" than Article 2. The Appellate Body did not address this issue:

"[E]ven if we were to start our examination of this dispute under Article 3, we would in any event be referred to and thus still need to address Articles 2 and 5. To conduct our examination of this case in the most efficient manner, we shall, therefore, first address Articles 2 and 5 . . . Since in this particular case, (1) Canada itself first presents its claims under Article 5, before addressing those under Article 2, and (2) the provisions invoked by Canada under Article 5 (i.e., Articles 5.1, 5.2, 5.5 and 5.6) all provide for more specific and detailed rights and obligations than the 'Basic Rights and Obligations' set out in rather broad wording in the provisions invoked by Canada under Article 2 (i.e., Articles 2.2 and 2.3), we consider it more appropriate in the circumstances of this dispute to first deal with Canada's claims under Article 5".⁵⁹

48. In *Australia – Salmon (Article 21.5 – Canada)*, Canada alleged the violation of Articles 2, 5, 6 and 8. Similarly to the original Panel, the Article 21.5 Panel started its examination with Article 5.⁶⁰

⁵² Appellate Body Report on *EC – Hormones*, para. 240.

⁵³ Appellate Body Report on *EC – Hormones*, para. 250. See also para. 180, cited in para. 30 above.

⁵⁴ Appellate Body Report on *Australia – Salmon*, para. 178.

⁵⁵ Panel Report on *Australia – Salmon*, para. 8.109.

⁵⁶ Appellate Body Report on *Australia – Salmon*, para. 252.

⁵⁷ Panel Report on *EC – Hormones (Canada)*, paras. 8.41–8.43 and 8.254; Panel Report on *EC – Hormones (US)*, paras. 8.45–8.47 and 8.251.

⁵⁸ Appellate Body Report on *EC – Hormones*, para. 250.

⁵⁹ Panel Report on *Australia – Salmon*, paras. 8.47–8.48.

⁶⁰ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.38.

(b) Articles 5, 6, 7 and 8

49. In *Japan – Agricultural Products II*, where claims were made under Articles 2, 5, 7 and 8, the Panel began its examination with Article 2. The Appellate Body did not address this issue.⁶¹

50. See also paragraph 48 above.

IV. ARTICLE 3**A. TEXT OF ARTICLE 3**

Article 3
Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.² Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

(footnote original) ² For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic

review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the “Committee”) shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3**1. General****(a) Object and purpose**

51. In *EC – Hormones*, the Appellate Body held that the object and purpose of Article 3 was to promote the harmonization of national SPS measures:

“In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both ‘necessary to protect’ human life or health and ‘based on scientific principles’, and without requiring them to change their appropriate level of protection.”⁶²

2. Article 3.1**(a) “base[d] . . . on”**

52. The Appellate Body on *EC – Hormones* while examining the meaning of the term “based on” as used in this Article, also held that the Panel’s interpretation of the term “based on” was not in accordance with the object and purpose of Article 3, which the Appellate Body held was to harmonize SPS measures in the future:

“In the third place, the object and purpose of Article 3 run counter to the Panel’s interpretation. That purpose, Article 3.1 states, is ‘[t]o harmonize [SPS] measures on as wide a basis as possible . . . It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a goal, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards,

⁶¹ Panel Report on *Japan – Agricultural Products II*, para. 8.16.

⁶² Appellate Body Report on *EC – Hormones*, para. 177.

guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary."⁶³

(b) "international standards, guidelines or recommendations where they exist"

(i) *Panel's mandate*

53. With respect to the phrase "international standards . . . where they exist", the Panel on *EC – Hormones* noted as follows:

"Article 3.1 unambiguously prescribes that ' . . . Members shall base their sanitary . . . measures on international standards . . . where they exist . . . ' (emphasis added). Paragraph 3 of Annex A of the *SPS Agreement* states equally clearly that the international standards mentioned in Article 3:1 are 'for food safety, the standards . . . established by the Codex Alimentarius Commission relating to . . . veterinary drug . . . residues . . . ' (emphasis added). No other conditions are imposed in the *SPS Agreement* on the relevance of international standards for the purposes of Article 3. Therefore, as a panel making a finding on whether or not a Member has an obligation to base its sanitary measure on international standards in accordance with Article 3.1, we only need to determine whether such international standards exist. For these purposes, we need not consider (i) whether the standards reflect *levels* of protection or sanitary *measures* or the *type* of sanitary measure they recommend, or (ii) whether these standards have been adopted by consensus or by a wide or narrow majority, or (iii) whether the period during which they have been discussed or the date of their adoption was before or after the entry into force of the *SPS Agreement*."⁶⁴

(ii) *Relevance of international standards for individual diseases*

54. In *Australia – Salmon*, in the context of animal health, the Panel held that even if no international standards existed for the entire range of fish diseases at issue, this fact did not signify that an international standard applying to only one of the diseases at issue could not be relevant in the case before it:

"Paragraph 3(b) of Annex A to the *SPS Agreement* indicates that the international standards, guidelines or recommendations referred to in Article 3 *for animal health* (the concern at issue in this dispute) are those developed under the auspices of the International Office of Epizootics ('OIE'). Both parties agree that the International Aquatic Animal Health Code adopted by the OIE in 1995 ('OIE Code') provides international guidelines on a disease-by-disease basis. However, they also agree that as of today no relevant OIE guideline exists which deals with salmon on a product specific basis. Moreover, both parties also agree that OIE guidelines do not exist for all of the 24 diseases of concern to Australia. Therefore, even if we were to examine first, if and how many relevant international guidelines exist and second address the question of whether Australia deviates from these guidelines, we would thereafter still need to examine either (1) in the event Australia does deviate from any such guidelines contrary to Article 3, whether the measure in dispute could not be based on Australia's concern for any of the other diseases for which no international guideline exists (*in casu*, under Articles 2 and 5); or (2) in the event Australia's measure is based on and/or conforms to any such guidelines, whether that part of the measure for which no guidelines exist, is consistent with the provisions of the *SPS Agreement* other than Article 3 (*in casu*, Articles 2 and 5). In this respect, we are of the view, however, that the fact that in this case no international guidelines exist for *all* 24 diseases of concern does not mean that an international guideline which applies to only *one* of these diseases cannot be relevant (or, according to the language of Article 3.1, does not 'exist') for the measure at issue."⁶⁵

(iii) *Validity of OIE standards, guidelines and recommendations*

55. The Panel on *Australia – Salmon* held with respect to standards developed by the International Office of Epizootics (OIE) as follows:

"[T]he *SPS Agreement* (paragraph 3(b) of Annex A) explicitly directs us to the OIE and the standards, guidelines and recommendations it develops . . . The fact that the OIE Code is subject to revision or the way it has been adopted in our view does not change its validity for our purposes."⁶⁶

56. With respect to existing international standards, see paragraph 1 above.

⁶³ Appellate Body Report on *EC – Hormones*, para. 165.

⁶⁴ Panel Report on *EC – Hormones (Canada)*, para. 8.72; Panel Report on *EC – Hormones (US)*, para. 8.69.

⁶⁵ Panel Report on *Australia – Salmon*, para. 8.46.

⁶⁶ Panel Report on *Australia – Salmon*, para. 7.11.

(c) Burden of proof

(i) *Exemptions from establishing prima facie inconsistency*

57. In *EC – Hormones*, the Appellate Body disagreed with the Panel which had held that if a measure enacted by a Member does not conform to an international standard, the complaining Member is exempted from making a *prima facie* case of inconsistency of this measure with the *SPS Agreement* or with the *GATT 1994*⁶⁷:

“Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing *relevant* international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the *GATT 1994*.”⁶⁸

(d) Relationship with other paragraphs of Article 3

(i) *Paragraphs 1, 2 and 3*

58. The Panel on *EC – Hormones* identified a relationship of rule and exception between paragraphs 1, 2 and 3 of Article 3. The Appellate Body disagreed:

“It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below, which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the *GATT 1994*. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard.”⁶⁹

59. The Appellate Body on *EC – Hormones* then distinguished the meaning of Articles 3.1, 3.2 and 3.3 in the following terms:

“Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the *GATT 1994*.

Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the

existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the *GATT 1994*.”⁷⁰

Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not ‘based on’ the international standard. The Member’s appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.”⁷¹

3. Article 3.2

(a) “. . . conform to . . .”

(i) *Distinction from “based on”*

60. In *EC – Hormones*, the Appellate Body reversed the Panel’s finding that Article 3.2 “equates measures *based on* international standards with measures which *conform to* such standards”.⁷² The Appellate Body first drew a distinction between the terms “based on” and “conform to” and noted certain requirements for a measure to “conform to” an international standard:

“In the first place, the ordinary meaning of ‘based on’ is quite different from the plain or natural import of ‘conform to’. A thing is commonly said to be ‘based on’ another thing when the former ‘stands’ or is ‘founded’ or ‘built’ upon or ‘is supported by’ the latter. In contrast, much more is required before one thing may be regarded as ‘conform[ing] to’ another: the former must ‘comply with’, ‘yield or show compliance’ with the latter. The reference of ‘conform to’ is to ‘correspondence in form or manner’, to ‘compliance with’ or ‘acquiescence’, to ‘follow[ing] in form or nature’. A measure that ‘conforms to’ and incorporates a Codex standard is, of course, ‘based on’ that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.”⁷³

⁶⁷ Panel Report on *EC – Hormones (United States)* paras. 8.86–8.88; Panel Report on *EC – Hormones (Canada)* paras. 9.81–9.91.

⁶⁸ Appellate Body Report on *EC – Hormones*, para. 171.

⁶⁹ Appellate Body Report on *EC – Hormones*, para. 104.

⁷⁰ (*footnote original*) Appellate Body Report on *EC – Hormones*, para. 171.

⁷¹ Appellate Body Report on *EC – Hormones*, paras. 170–172.

⁷² Panel Report on *EC – Hormones (Canada)*, para. 8.75; Panel Report on *EC – Hormones (US)*, para. 8.72.

⁷³ Appellate Body Report on *EC – Hormones*, para. 163.

(ii) *Distinction as used in different parts of SPS Agreement*

61. The Appellate Body on *EC Hormones*, after distinguishing between the ordinary meaning of “based on” and “conform to”, as referred to in paragraph 60 above, noted that they were used in different provisions of the *SPS Agreement* and rejected the view that such different usage was “merely inadvertent”:

“In the second place, ‘based on’ and ‘conform to’ are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses ‘based on’, while Article 2.4 employs ‘conform to’. Article 3.1 requires the Members to ‘base’ their SPS measures on international standards; however, Article 3.2 speaks of measures which ‘conform to’ international standards. Article 3.3 once again refers to measures ‘based on’ international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was ‘accidental’ in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice.”⁷⁴

(b) *Burden of proof*

(i) *Presumption of consistency*

62. The Appellate Body on *EC – Hormones*, in the context of addressing the burden of proof under the *SPS Agreement*, stated the following with respect to the presumption in Article 3.2:

“The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.”⁷⁵

63. The Appellate Body on *EC – Hormones* also noted that measures pursuant to Article 3.2 enjoy the benefit of a presumption, albeit a rebuttable one.⁷⁶ See also paragraph 59 above.

(c) *Relationship with other paragraphs of Article 3*

64. The Appellate Body on *EC – Hormones* clarified the meaning of Article 3.2 while discussing the rela-

tionship between Article 3.1, 3.2 and 3.3. See paragraph 59 above.

(d) *Relationship with other Articles*

65. The Panel on *Australia – Salmon* referred to Article 3 in the context of its analysis under Article 5.6:

“Given the repeated reference made in the *SPS Agreement* to the relevant international organizations, in this dispute the OIE [International Office of Epizootics], and the recommendations they produce (e.g., Articles 3.1 and 5.1), as well as to the more general objective of harmonization (e.g., Articles 3.4 and the sixth preamble), we consider that appropriate weight should be given to [the] opinion on Option 5 [i.e., evisceration of the fish, proposed by the OIE]”.⁷⁷

4. Article 3.3

(a) *General*

66. In *EC – Hormones*, the Appellate Body held that the “right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an ‘exception’ from a ‘general obligation’ under Article 3.1”.⁷⁸ In this respect, see also the excerpts from the Appellate Body report in paragraph 59 above.

67. The Appellate Body on *EC – Hormones* also found that the right of a Member to define its appropriate level of protection is not an absolute or unqualified right:

“The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 also makes this clear . . .”⁷⁹

68. Regarding the relationship between Article 3.3 and the “precautionary principle”, the Appellate Body on *EC – Hormones* also noted that the precautionary principle is reflected in Article 3.3.⁸⁰ See paragraph 3 above.

(b) *“based on”*

69. On the Panel’s finding that “for a sanitary measure to be *based on* an international standard . . ., that *measure* needs to reflect the same level of sanitary protection as the *standard*” (emphasis original)⁸¹, the Appellate Body on *EC – Hormones* noted as follows:

⁷⁴ Appellate Body Report on *EC – Hormones*, para. 164.

⁷⁵ Appellate Body Report on *EC – Hormones*, para. 102. See also para. 170 of the Appellate Body report and para. 59 above of this Chapter.

⁷⁶ Appellate Body Report on *EC – Hormones* para. 170.

⁷⁷ Panel Report on *Australia – Salmon*, para. 8.180.

⁷⁸ Appellate Body Report on *EC – Hormones*, para. 172.

⁷⁹ Appellate Body Report on *EC – Hormones*, para. 173.

⁸⁰ Appellate Body Report on *EC – Hormones*, para. 124.

⁸¹ Panel Report on *EC – Hormones (Canada)*, para. 8.76; Panel Report on *EC – Hormones (US)*, para. 8.73.

"It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that 'based on', as used in Articles 3.1 and 3.3, means the same thing as 'conform to' as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law. The correctness of the rest of the Panel's intricate interpretation and examination of the consequences of the Panel's litmus test, however, have to be left for another day and another case".⁸²

70. For further interpretation of this term as it appears in Article 3.1, see paragraph 52 above.

(c) Clarification of conditions

71. The Appellate Body on *EC – Hormones*, distinguished between two situations in Article 3.3, but ultimately held that Article 3.3 was not "a model of clarity in drafting and communication" and that the distinction was "more apparent than real":

"Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive 'or' does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures which result in a higher level of protection:

- (a) 'if there is a scientific justification'; or
- (b) 'as a consequence of the level of . . . protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.

It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that 'all measures which result in a [higher] level of . . . protection', that is to say, measures falling within situation (a) as well as those falling within situation (b), be 'not inconsistent with any other provision of [the SPS] Agreement'. 'Any other provision of this Agreement' textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines 'scientific justification' as an 'examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement . . .'. This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.

On balance, we agree with the Panel's finding that although the European Communities has established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant Codex standards, guidelines or recommendations, the European Communities was bound to comply with the requirements established in Article 5.1. We are not unaware that this finding tends to suggest that the distinction made in Article 3.3 between two situations may

have very limited effects and may, to that extent, be more apparent than real. Its involved and layered language actually leaves us with no choice".⁸³

(d) "scientific justification"

(i) *Rational relationship*

72. In *Japan – Agricultural Products II*, with respect to the terms "scientific justification", the Appellate Body noted that:

"[I]n our opinion, there is a 'scientific justification' for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information."⁸⁴

(e) Relationship with other paragraphs of Article 3

73. As regards the relationship between Articles 3.1, 3.2 and 3.3, see paragraph 59 above.

(f) Relationship with other Articles

(i) *Article 1.1*

74. As relates to applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

(ii) *Article 5.1*

75. Based on its analysis of Article 3.3 referenced in paragraph 71 above, the Appellate Body in *EC – Hormones* concluded that "the Panel's finding that the European Communities is required by Article 3.3 to comply with the requirements of Article 5.1 is correct".⁸⁵

5. Article 3.5

76. With respect to the procedures to monitor the process of international harmonization, see section XIII.B.3 below

6. Relationship with other Articles

77. With respect to the relationship between Articles 3 and Articles 2 and 5, see paragraphs 46–47 above.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4 *Equivalence*

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these

⁸² Appellate Body Report on *EC – Hormones*, para. 168.

⁸³ Appellate Body Report on *EC – Hormones*, paras. 173, 175–176.

⁸⁴ Appellate Body Report on *Japan – Agricultural Products II*, para. 79.

⁸⁵ Appellate Body Report on *EC – Hormones*, para. 177.

measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

(a) Decision on equivalence

(i) *General*

78. At its meeting of 26 October 2001, the SPS Committee adopted a Decision on the Implementation of Article 4 ("Decision on Equivalence").⁸⁶ At its meetings of 7–8 November 2002 and 24–25 June 2003, the SPS Committee agreed on clarifications of paragraphs 5, 6 and 7 of the Decision⁸⁷, as foreseen in the Programme for Further Work adopted by the SPS Committee in March 2002.⁸⁸ A further clarification to paragraph 5 was agreed by the Committee at its meeting of 17–18 March 2004.⁸⁹

(ii) *Concept of equivalence*

79. The Preamble of the Decision on Equivalence notes that equivalence requires "acceptance of alternative measures that meet an importing Member's appropriate level of sanitary or phytosanitary protection", but not duplication or "sameness" of measures. Paragraph 1 of the Decision on Equivalence provides:

"1. Equivalence can be accepted for a specific measure or measures related to a certain product or categories of products, or on a systems-wide basis. Members shall, when so requested, seek to accept the equivalence of a measure related to a certain product or category of products. An evaluation of the product-related infrastructure and programmes within which the measure is being applied may also be necessary.⁹⁰ Members may further, where necessary and appropriate, seek more comprehensive and broad-ranging agreements on equivalence. The acceptance of the equivalence of a measure related to a single product may not require the development of a systems-wide equivalence agreement."

(iii) *Explanation of SPS measures taken by importing Member*

80. In order to facilitate the implementation of the provisions of Article 4, the Decision on Equivalence

describes the elements to be included in an explanation of the sanitary and phytosanitary measures taken by an importing Member, when so requested by an exporting Member:

"2. In the context of facilitating the implementation of Article 4, on request of the exporting Member, the importing Member should explain the objective and rationale of the sanitary or phytosanitary measure and identify clearly the risks that the relevant measure is intended to address. The importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure is designed to achieve.⁹¹ The explanation should be accompanied by a copy of the risk assessment on which the sanitary or phytosanitary measure is based or a technical justification based on a relevant international standard, guideline or recommendation. The importing Member should also provide any additional information which may assist the exporting Member to provide an objective demonstration of the equivalence of its own measure."

(iv) *Procedure for the recognition of equivalence*

General

81. The Decision on Equivalence provides for a number of requirements and recommendations regarding the procedure to be followed for the recognition of equivalence:

"3. An importing Member shall respond in a timely manner to any request from an exporting Member for consideration of the equivalence of its measures, normally within a six-month period of time.

4. The exporting Member shall provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member. This information may include, *inter alia*, reference to relevant international standards, or to relevant risk assessments undertaken by the importing Member or by another Member. In addition, the exporting Member shall provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence.

...

⁸⁶ G/SPS/19.

⁸⁷ G/SPS/19/Add.1 and Add.2.

⁸⁸ G/SPS/20.

⁸⁹ G/SPS/19/Add.3.

⁹⁰ Product-related infrastructure and programmes is in reference to testing, inspection and other relevant requirements specific to product safety.

⁹¹ In doing so, Members should take into account the *Guidelines to Further the Practical Implementation of Article 5.5* adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 21–22 June 2000 (document G/SPS/15, dated 18 July 2000).

7. When considering a request for recognition of equivalence, the importing Member should analyze the science-based and technical information provided by the exporting Member on its sanitary or phytosanitary measures with a view to determining whether these measures achieve the level of protection provided by its own relevant sanitary or phytosanitary measures."⁹²

Accelerated procedure

82. Paragraph 5 of the Decision on Equivalence provides that "[t]he importing Member should accelerate its procedure for determining equivalence in respect of those products which it has historically imported from the exporting Member."⁹³

83. In order to clarify paragraph 5 (and paragraph 6) of the Decision on Equivalence, the SPS Committee adopted another Decision at its meeting on 7–8 November 2002 ("the 7–8 November 2002 Decision").⁹⁴ In the latter Decision the SPS Committee notes that the importance of knowledge based on historic trade reasons has been fully recognized by other international organizations and international agencies:

"This information and experience, if directly relevant to the product and measure under consideration, should be taken into account in the recognition of equivalence of measures proposed by the exporting Member. In particular, information already available to the importing Member should not be sought again with respect to procedures to determine the equivalence of measures proposed by the exporting Member."⁹⁵

84. In its 7–8 November 2002 Decision, the SPS Committee requests the Interim Commission on Phytosanitary Measures (ICPM) to take into consideration both the Decision on Equivalence and the Decision clarifying certain aspects of it:

"3. The Committee draws the attention of the Interim Commission on Phytosanitary Measures (ICPM) to the Decision on Equivalence (G/SPS/19), and to the above clarification with respect to Paragraph 5 of the Decision. The Committee requests that the ICPM take into consideration the Decision and this clarification in its future work on judgement of equivalence with regard to sanitary measures to address plant pests and diseases."⁹⁶

Duty not to interrupt or suspend imports

85. Paragraph 6 of the Decision on Equivalence⁹⁷ establishes that "a request by an exporting Member for recognition of the equivalence of its measures with regard to a specific product [by an importing Member] shall not be in itself a reason to disrupt or suspend ongoing imports from that Member of the product in question."⁹⁸

86. The 7–8 November 2002 Decision of the SPS Committee clarifies paragraph 6 of the Decision on Equivalence as follows:

"[S]ince a request for recognition of equivalence does not in itself alter the way in which trade is occurring, there is no justification for disruption or suspension of trade. If an importing Member were to disrupt or suspend trade solely because it had received a request for an equivalence determination, it would be in apparent violation of its obligations under the *SPS Agreement* (e.g. under Article 2)."⁹⁹

87. Also in relation to paragraph 6 of the Decision on Equivalence, the 7–8 November 2002 Decision of the SPS Committee provides, however, that a request for recognition of equivalence does not preclude an importing Member from taking measures necessary to achieve the appropriate level of protection:

"[A] request for recognition of equivalence does not impede the right of an importing Member to take any measure it may decide is necessary to achieve its appropriate level of protection, including in response to an emergency situation. However, if the decision to impose some additional control measure were to coincide with consideration by the same Member of a request for recognition of equivalence, this might lead an exporting Member whose trade is affected to suspect that the two events were linked. To avoid any misinterpretation of this kind, the Committee recommends that the importing Member should give an immediate and comprehensive explanation of the reasons for its action in restricting trade to any other Members affected, and that it should also follow the normal or emergency notification procedures established under the *SPS Agreement*."¹⁰⁰

88. Paragraph 7 of G/SPS/19/Add.1 draws the attention of Office International des Epizooties and ICPM to this further clarification.

(v) *Technical assistance*

89. Paragraph 8 of the Decision on Equivalence provides further that, in line with Article 9 of the *SPS Agreement*, Members shall give full consideration to requests for appropriate technical assistance to facilitate the implementation of Article 4, especially when those requests come from developing countries:

"In accordance with Article 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures, a

⁹² G/SPS/19, paras. 1–4.

⁹³ G/SPS/19, para. 5.

⁹⁴ G/SPS/19/Add.1, paras. 1–4 and 7.

⁹⁵ G/SPS/19/Add.1, para. 2.

⁹⁶ G/SPS/19/Add.1, para. 3.

⁹⁷ See para. 79.

⁹⁸ G/SPS/19, para. 6.

⁹⁹ G/SPS/19/Add.1, para. 5.

¹⁰⁰ G/SPS/19/Add.1, para. 6.

Member shall give full consideration to requests by another Member, especially a developing country Member, for appropriate technical assistance to facilitate the implementation of Article 4. This assistance may, *inter alia*, be to help an exporting Member identify and implement measures which can be recognized as equivalent, or to otherwise enhance market access opportunities. Such assistance may also be with regard to the development and provision of the appropriate science-based and technical information referred to in paragraph 4, above.”¹⁰¹

(vi) *International cooperation outside the WTO*

90. In order to improve international cooperation in this sphere outside the WTO, paragraph 9 of the Decision on Equivalence advises active participation of Members in the ongoing work in the Codex Alimentarius Commission and in any work related to equivalence undertaken by the Office International des Epizooties and in the framework of the International Plant Protection Convention.

91. Paragraph 10 of the Decision on Equivalence outlines a number of actions to be taken by the SPS Committee in this regard:

“10. The Committee on Sanitary and Phytosanitary Measures recognizes the urgency for the development of guidance on the judgement of equivalence and shall formally encourage the Codex Alimentarius Commission to complete its work with regard to equivalence as expeditiously as possible. The Committee on Sanitary and Phytosanitary Measures shall also formally encourage the Office International des Epizooties and the Interim Commission on Phytosanitary Measures to elaborate guidelines, as appropriate, on equivalence of sanitary and phytosanitary measures and equivalence agreements in the animal health and plant protection areas. The Codex Alimentarius Commission, the Office International des Epizooties and the Interim Commission on Phytosanitary Measures shall be invited to keep the Committee on Sanitary and Phytosanitary Measures regularly informed regarding their activities relating to equivalence.”¹⁰²

(vii) *Notification*

92. In accordance with paragraph 12 of the Decision on Equivalence, Members should regularly inform the SPS Committee of their experiences concerning the implementation of Article 4. In particular, the Decision encourages Members to inform the SPS Committee of the successful conclusion of any bilateral equivalence agreement.¹⁰³ As regards the notification procedures, see paragraph 179 below.

(b) *Specific programme for the further implementation of Article 4*

93. Paragraph 13 of the Decision on Equivalence asks the SPS Committee to develop a specific programme to

further the implementation of Article 4, paying particular attention to the problems encountered by developing country Members.¹⁰⁴ At the Doha Ministerial Conference, Members also instructed the SPS Committee to develop the same specific programme.¹⁰⁵ At its meeting of 21 March 2002, the SPS Committee adopted a specific programme for the further implementation of Article 4.¹⁰⁶ The programme established the timetable and the agendas of the meetings for the discussion of the Decision on Equivalence.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each

¹⁰¹ G/SPS/19, para. 8.

¹⁰² G/SPS/19 paras. 9 and 10.

¹⁰³ G/SPS/19, para. 12.

¹⁰⁴ G/SPS/19/para. 13.

¹⁰⁵ WT/MIN(01)/17, para. 3.3.

¹⁰⁶ G/SPS/20.

Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.³

(footnote original)³ For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.¹⁰⁷

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

(a) Standard of review

94. With regards to the role of panels in reviewing whether an SPS measure is based on a risk assessment, the Panels on *EC – Hormones*, in a finding not addressed by the Appellate Body, stated:

“[I]t is for the European Communities to submit evidence before the Panel that its measures are based on a risk assessment; it is not for the Panel itself to conduct its own risk assessment on the basis of scientific evidence gathered by the Panel or submitted by the parties during the Panel proceedings.”¹⁰⁸

95. The Panel on *Australia – Salmon*, in a finding not addressed by the Appellate Body, made a similar statement, holding that it did not attempt to conduct its own risk assessment, but merely examined and evaluated evidence:

“[W]e stress that in examining this case we did not attempt (nor are we, in our view, allowed) to conduct our own risk assessment or to impose any scientific opinion on Australia. We only examined and evaluated the evidence – including the information we received from the experts advising the Panel – and arguments put before us in light of the relevant WTO provisions and, following the rules on burden of proof set out above, based our findings on this evidence and these arguments.”¹⁰⁹

96. The Appellate Body on *Japan – Apples* considered it unnecessary to express its view on the question of whether the conformity of a risk assessment with Article 5.1 should be evaluated solely against the scientific evidence available at the time of the risk assessment, as Japan had failed to establish that the Panel utilized subsequent scientific evidence in evaluating the risk assessment at issue.¹¹⁰

(b) “based on” an assessment of the risks

(i) *Taking into account risk assessment techniques*

97. In *EC – Hormones*, the Panel had held that the European Communities’ measure was in violation of Article 5.1 since “the European Communities did not provide any evidence that the studies . . . or the scientific conclusions reached therein ‘have actually been taken into account by the competent EC institutions either when it enacted those measures (in 1981 and 1988) or at any later point in time’” (emphasis original).¹¹¹ The Appellate Body characterized this “minimum procedural element” as “some subjectivity . . . present in certain individuals” and disagreed with this standard:

“We are bound to note that, as the Panel itself acknowledges, no textual basis exists in Article 5 of the *SPS Agreement* for such a ‘minimum procedural requirement’. The

¹⁰⁷ See also paras. 4 and 5 of Annex 1A.

¹⁰⁸ Panel Report on *EC – Hormones (Canada)*, para. 8.104; Panel Report on *EC – Hormones (US)*, para. 8.101.

¹⁰⁹ Panel Report on *Australia – Salmon*, para. 8.41. A similar statement was made by the Panel on *Japan – Agricultural Products II*, referenced in para. 23 of this Chapter.

¹¹⁰ Appellate Body Report on *Japan – Apples*, para. 215.

¹¹¹ Appellate Body Report on *EC – Hormones*, para. 188.

term ‘based on’, when applied as a ‘minimum procedural requirement’ by the Panel, may be seen to refer to a human action, such as particular human individuals ‘taking into account’ a document described as a risk assessment. Thus, ‘take into account’ is apparently used by the Panel to refer to some subjectivity which, at some time, may be present in particular individuals but that, in the end, may be totally rejected by those individuals. We believe that ‘based on’ is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment. Such a reference is certainly embraced in the ordinary meaning of the words ‘based on’ and, when considered in context and in the light of the object and purpose of Article 5.1 of the *SPS Agreement*, may be seen to be more appropriate than ‘taking into account’. We do not share the Panel’s interpretative construction and believe it is unnecessary and an error of law as well.

Article 5.1 only requires that the SPS measures be ‘based on an assessment, as appropriate for the circumstances . . .’. The ‘minimum procedural requirement’ constructed by the Panel, could well lead to the elimination or disregard of available scientific evidence that rationally supports the SPS measure being examined. This risk of exclusion of available scientific evidence may be particularly significant for the bulk of SPS measures which were put in place before the effective date of the *WTO Agreement* and that have been simply maintained thereafter.”¹¹²

(ii) *Rational relationship between the SPS measure and the risk assessment*

98. The Appellate Body on *EC – Hormones* held that the requirement of Article 5.1 – that an SPS measure be “based on” a risk assessment – was a substantive requirement that “there be a rational relationship between the measure and the risk assessment”:

“We consider that, in principle, the Panels’ approach of examining the scientific conclusions implicit in the SPS measure under consideration and the scientific conclusion yielded by a risk assessment is a useful approach. The relationship between those two sets of conclusions is certainly relevant; they cannot, however, be assigned relevance to the exclusion of everything else. We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be ‘based on’ a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.

We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific

conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the ‘mainstream’ of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. . . . In most cases, responsible and representative governments tend to base their legislative and administrative measures on ‘mainstream’ scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety”¹¹³

(iii) *Determination of relationship on “a case-by-case” basis*

99. The Appellate Body on *EC – Hormones* also noted that determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects.¹¹⁴

(c) “risk assessment”

(i) *General*

100. The Appellate Body on *EC – Hormones*, when addressing the requirements under Article 3.3, also considered the object and purpose of Article 3 and of the *SPS Agreement* as a whole and noted its “belief that compliance with Article 5.1 was intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection . . . The requirements of a risk assessment under Article 5.1, . . . are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.”¹¹⁵

101. In *Australia – Salmon*, the Appellate Body held that the presence of unknown and uncertain elements did not affect the requirements of Articles 5.1, 5.2 and 5.3:

“[T]he existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph

¹¹² Appellate Body Report on *EC – Hormones*, paras. 189–190.

¹¹³ Appellate Body Report on *EC – Hormones*, paras. 193–194.

¹¹⁴ Appellate Body Report on *EC – Hormones*, para. 194.

¹¹⁵ Appellate Body Report on *EC – Hormones*, para. 177.

4 of Annex A, for a risk assessment. We recall that Article 5.2 requires that ‘in the assessment of risk, Members shall take into account available scientific evidence’. We further recall that Article 2, entitled ‘Basic Rights and Obligations’, requires in paragraph 2 that ‘Members shall ensure that any sanitary . . . measure . . . is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.’¹¹⁶

(ii) *Concept of risk assessment versus risk management*

102. The Appellate Body on *EC – Hormones* rejected the distinction between “risk assessment” and “risk management” used by the original Panel in its findings under Article 5.1:

“The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a ‘scientific’ examination of data and factual studies; it is not, in the view of the Panel, a ‘policy’ exercise involving social value judgments made by political bodies.¹¹⁷ The Panel describes the latter as ‘non-scientific’ and as pertaining to ‘risk management’ rather than to ‘risk assessment’.¹¹⁸ We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of ‘risk assessment’ only and that the term ‘risk management’ is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel’s distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.”¹¹⁹

(iii) *Three aspects of risk assessment*

103. In *Australia – Salmon*, the Appellate Body identified three aspects of a risk assessment:

“On the basis of [the] definition [prescribed in the first part of paragraph 4 of Annex A], we consider that, in this case, a risk assessment within the meaning of Article 5.1 must:

- (1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
- (2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
- (3) *evaluate the likelihood* of entry, establishment or spread of these diseases *according to the SPS measures which might be applied.*”¹²⁰

(iv) *Completing the analysis of a risk assessment*

104. The Panel on *Australia – Salmon* found that the Australian heat treatment requirement was not “based on” a risk assessment within the meaning of Article 5.1, because the Final Report (the risk assessment) made “no substantive assessment of the risk or the risk reduction related to the heat requirements in effect imposed by the measure at issue” . . . but stated that there is insufficient data on whether or not heat treatment inactivates the disease agents in dispute.¹²¹ The Appellate Body, reversed this finding¹²² and completed the analysis by examining whether the import prohibition on fresh, chilled and frozen salmon was based on a risk assessment. It found that the 1996 Final Report did not fulfil the requirements needed to constitute a “risk assessment” within the meaning of Article 5.1:¹²³

“Applying our three-pronged test set out in paragraph 128 above, to the 1996 Final Report in order to determine whether that Report meets the requirements of a risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, we note that the Panel found that the 1996 Final Report identifies the diseases whose entry, establishment or spread Australia wants to prevent as well as the potential biological and economic consequences associated with the entry, establishment or spread of such diseases. The Panel, therefore, concluded that ‘the 1996 Final Report meets the first requirement of a risk assessment’.¹²⁴ We agree with the Panel.

With regard to the second requirement for a risk assessment of the type applicable in this case . . . We believe . . . that on the basis of the facts found by the Panel, it could, and should, have come to the conclusion that the 1996 Final Report does not contain the ‘evaluation of the likelihood of entry, establishment or spread’ of the diseases of concern ‘and of the associated potential biological and economic consequences’ as required by paragraph 4 of Annex A of the *SPS Agreement*. As we have already emphasized, *some* evaluation of the likelihood is not enough.¹²⁵

. . . We turn now to the third requirement of a risk assessment . . . We agree with the Panel that the measures

¹¹⁶ Appellate Body Report on *Australia – Salmon*, para. 130.

¹¹⁷ (footnote original) Panel Report on *EC – Hormones (US)*, para. 8.94; and Panel Report on *EC – Hormones (Canada)*, para. 8.97.

¹¹⁸ (footnote original) Panel Report on *EC – Hormones (US)*, para. 8.95; and Panel Report on *EC – Hormones (Canada)*, para. 8.98.

¹¹⁹ Appellate Body Report on *EC – Hormones*, para. 181.

¹²⁰ Appellate Body Report on *Australia – Salmon*, para. 121. In *Japan – Agricultural Products II*, the Appellate Body endorsed the aforesaid three-pronged test, para. 112. This test was also used by the Panel in *Australia – Salmon (Article 21.5 – Canada)*, para. 7.41.

¹²¹ Panel Report on *Australia – Salmon*, para. 8.98.

¹²² Appellate Body Report on *Australia – Salmon*, para. 104.

¹²³ Appellate Body Report on *Australia – Salmon*, para. 136.

¹²⁴ (footnote original) Panel Report, para. 8.73.

¹²⁵ (footnote original) *Supra.*, para. 124.

which might be applied are those which reduce the risks of concern, and are referred to in the 1996 Final Report as risk reduction factors . . . On the basis of its factual findings, the Panel should have come to the conclusion that the 1996 Final Report does not fulfil the third requirement for the type of risk assessment applicable in this case, i.e., it does not contain the required evaluation of the likelihood of entry, establishment or spread of the diseases of concern according to the SPS measures which might be applied. We recall that, contrary to the Panel, we consider that *some* evaluation of the likelihood is not enough.¹²⁶

We conclude, on the basis of the factual findings made by the Panel and the requirements for a risk assessment as set forth above, that the 1996 Final Report meets neither the second nor the third requirement for the type of risk assessment applicable in this case, and, therefore, that the 1996 Final Report is *not* a proper risk assessment within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A.”¹²⁷

105. Regarding the definition of risk assessment within the meaning of Annex A paragraph 4, see Section XVI.B.2 below.

(v) *Scope of the risk assessment*

Assessment of each individual substance

106. In *EC – Hormones*, the Appellate Body upheld the Panel’s finding that “there was no risk assessment with regard to MGA”¹²⁸, one of the six growth hormones at issue, stating that “[i]n other words, there was an almost complete absence of evidence on MGA in the panel proceedings.”¹²⁹ On this point, the Panels had explained that “one of the basic principles of a risk assessment appears to be that it needs to be carried out for each individual substance.”¹³⁰

Different product categories

107. The Panel on *Australia – Salmon* held that studies on one particular product category could be relevant for a risk assessment in respect of another product category:

“We do, however, agree with Australia that some of the evidence, assessments and conclusions contained in the 1996 Final Report might be relevant for the risk assessment to be carried out (or relied upon) for the other categories of salmon products and that, therefore, a completely new risk assessment for these other categories of salmon products might not be necessary.”¹³¹

(vi) *Studies not sufficiently specific to the case at hand*

108. The Appellate Body on *EC – Hormones* also rejected certain studies submitted by the European Communities as risk assessment for the purpose of

Article 5.1, holding that these studies were general and “not sufficiently specific to the case at hand”:

“[The studies submitted by the respondent] constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake – the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes – as is required by paragraph 4 of Annex A of the *SPS Agreement*. Those general studies, are in other words, relevant but do not appear to be sufficiently specific to the case at hand.”¹³²

(vii) *Who should carry out the risk assessment?*

109. In *EC – Hormones*, the Appellate Body addressed the question of whether a Member should carry out its own risk assessment for a SPS measure:

“Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment . . . The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization.”¹³³

(viii) *Format of the risk assessment*

110. The Panel on *Australia – Salmon* held that a risk assessment need not be an official government report:

“We note that these reports do not form part of Australia’s formal risk assessment nor represent Australia’s official government policy. However, to the extent they constitute relevant available scientific information which was submitted to the Panel, we consider it our task to take this evidence into account. We consider that, for purposes of our examination, the scientific and technical content of these reports and studies is relevant, not their administrative status (i.e., whether they are official government reports or not).

. . . Whether or not this evidence is part of official Australian government policy does not, in our mind, change the scientific weight to be given to it.”¹³⁴

(ix) *Relevance of the timing of publication of risk assessment*

111. With respect to the risk assessment requirement for SPS measures enacted *before* the entry into force of the *SPS Agreement*, the Panel on *EC – Hormones* noted:

¹²⁶ (footnote original) *Supra.*, para 124.

¹²⁷ Appellate Body Report on *Australia – Salmon*, para. 135.

¹²⁸ Appellate Body Report on *EC – Hormones*, para. 201.

¹²⁹ Appellate Body Report on *EC – Hormones*, para. 201.

¹³⁰ Panel Reports on *EC – Hormones (US)*, para. 8.257; *EC – Hormones (Canada)*, para. 8.258.

¹³¹ Panel Report on *Australia – Salmon*, para. 8.58.

¹³² Appellate Body Report on *EC – Hormones*, para. 200.

¹³³ Appellate Body Report on *EC – Hormones*, para. 190.

¹³⁴ Panel Report on *Australia – Salmon*, paras. 8.136–8.137.

"[Article 5.1] does not prevent that with respect to a sanitary measure enacted *before* the entry into force of the *SPS Agreement*, the risk assessment is carried out or invoked *after* the entry into force of that Agreement (and thus *after* the enactment of the sanitary measure in question). However, the fact that a sanitary measure may be enacted *before* the entry into force of the *SPS Agreement* does not mean that, once the *SPS Agreement* entered into force, there is no obligation for the Member in question to base that measure on a risk assessment."¹³⁵

112. The Panel on *Australia – Salmon* while addressing Canada's complaint that Australia's measure was maintained without any form of risk assessment added in this respect:

"Article 5.1 does not qualify – either in terms of application in time or product coverage – the substantive obligation imposed on all WTO Members to base their sanitary measures on a risk assessment.

...

We note Australia's statement that its policy of allowing imports of salmon products heat-treated in accordance with the 1988 Conditions will be reviewed and that for these purposes an import risk analysis is scheduled. It is possible that this risk analysis provides a rational basis for the measure at issue. However, as of today and on the basis of the risk assessment before us, we do not detect such basis."¹³⁶

113. In *Australia – Salmon (Article 21.5 – Canada)*, Canada claimed that the new Australian measures could not be said to be based on a risk assessment, because the 1999 Import Risk Analysis (IRA) (the Australian risk assessment for the amended measure) was only published in its final form on 12 November 1999, i.e. after the publication of the new measures which had occurred on 19 July 1999. The Panel rejected this argument as follows:

"We note that the final form of the 1999 IRA, though only edited and published in book form on 12 November 1999, is still dated July 1999 and that . . . the amendments made in the final 1999 IRA 'do not alter the substance or the conclusions of the report as announced on 19 July'.

On these grounds, we find that the fact that the 1999 IRA was only published in final form subsequent to the date the new sanitary measures were taken, does not, in this case, preclude the measures from being *based on* the 1999 IRA. All substantive elements of the risk assessment we looked at earlier were already included in the draft 1999 IRA of July 1999, i.e. *before* the new measures were taken."¹³⁷

(x) *Identifying the SPS measure*

114. The Panel on *Australia – Salmon* defined the sanitary measure enacted by Australia to be an import prohibition on, *inter alia*, fresh, chilled and frozen salmon. The Panel then went on to state that the measure effectively imposed heat treatment "as a sanitary solution to the risk posed by the importation of salmon" and concluded that "these two perspectives [the import prohibition on fresh, chilled and frozen salmon and the heat treatment requirement] are two sides of a single coin: a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported, is that imports of fresh, chilled and frozen salmon are prohibited".¹³⁸ The Appellate Body disagreed with this characterization of the Australian measure:

"In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon.

We also do not share the Panel's view that the import prohibition and the heat-treatment requirement are 'two sides of the same coin'. Smoked salmon and fresh, chilled or frozen salmon are different products and the SPS measures applied to each are not 'two sides of the same coin'. We agree with Australia that it is not a consequence of the requirement that *smoked* salmon be heat-treated that imports of *fresh, chilled or frozen* salmon are prohibited. Imports of fresh, chilled or frozen salmon are prohibited as a direct consequence of the application of QP86A, and this prohibition has not been revoked, but has, in fact, been continuously maintained since 1975. We likewise do not share the Panel's view that the 1996 Requirements apply to fresh, chilled or frozen salmon. These requirements clearly apply only to imports of small amounts of smoked salmon."¹³⁹

(xi) *Evaluation of risk in a risk assessment ("Zero risk")*

115. The Panel on *Australia – Salmon* held that "a risk assessment, on which to base an import prohibition in accordance with Article 5.1, cannot be premised on the concept of 'zero risk'. Otherwise, all import prohibitions would be based on a risk assessment since there is a risk

¹³⁵ Panel Report on *EC – Hormones (Canada)*, para. 8.102; Panel Report on *EC – Hormones (US)*, para. 8.99.

¹³⁶ Panel Report on *Australia – Salmon*, paras. 8.56 and 8.100.

¹³⁷ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.76–7.77.

¹³⁸ Panel Report on *Australia – Salmon*, para. 8.95.

¹³⁹ Appellate Body Report on *Australia – Salmon*, paras. 103–104.

(i.e., a *possibility* of an adverse event occurring), however remote, associated with most (if not all) imports”.¹⁴⁰ On appeal, the Appellate Body emphasized the distinction between risk assessment under Article 5.1 and the determination, by a Member, of its own appropriate level of protection:

“[I]t is important to distinguish – perhaps more carefully than the Panel did – between the evaluation of ‘risk’ in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in *European Communities – Hormones*, the ‘risk’ evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is ‘not the kind of risk which, under Article 5.1, is to be assessed.’ This does not mean, however, that a Member cannot determine its own appropriate level of protection to be ‘zero risk’.”¹⁴¹

(xii) *No threshold level of risk required*

116. In *EC – Hormones*, the Appellate Body addressed the European Communities’ appeal that the original Panel was “in effect requiring a Member carrying out a risk assessment to quantify the potential for adverse effects on human health”.¹⁴² The Appellate Body elaborated on the term “scientifically identified risk” that the Panel had employed and the notion of ‘theoretical uncertainty’ in the context of Article 5.1. The Appellate Body indicated that Article 5.1 does not address theoretical uncertainty: that is to say, ‘uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects:

“It is not clear in what sense the Panel uses the term ‘scientifically identified risk’. The Panel also frequently uses the term ‘identifiable risk’¹⁴³, and does not define this term either. The Panel might arguably have used the terms ‘scientifically identified risk’ and ‘identifiable risk’ simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists? In one part of its Reports, the Panel opposes a requirement of an ‘identifiable risk’ to the uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects.¹⁴⁴ We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed. In another part of its Reports, however, the Panel appeared to be using the term ‘scientifically identified risk’ to prescribe implicitly that a certain *magnitude* or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1.¹⁴⁵ To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*. A panel is authorized only to determine whether a given SPS measure is ‘based on’ a

risk assessment. As will be elaborated below, this means that a panel has to determine whether an SPS measure is sufficiently supported or reasonably warranted by the risk assessment.”¹⁴⁶

117. In *Japan – Apples*, the Appellate Body agreed with the Panel that “scientific prudence” displayed by the experts in this case did not relate to the “theoretical uncertainty” that is inherent in the scientific method:

“The comments of the Panel in response to the argument of the United States on ‘theoretical risk’ should be viewed in their appropriate context. . . . We understand that the ‘scientific prudence’ displayed by the experts in this case related to risks that might arise from radical changes in Japan’s current system of phytosanitary controls, taking into account Japan’s island environment and climate. The scientific prudence displayed by the experts did not relate to the ‘theoretical uncertainty’ that is inherent in the scientific method and which stems from the intrinsic limits of experiments, methodologies, or instruments deployed by scientists to explain a given phenomenon. Therefore, we agree with the Panel that the scientific prudence displayed by the experts should not be ‘completely assimilated’ to the ‘theoretical uncertainty’ that the Appellate Body discussed in *EC – Hormones* as being beyond the purview of risks to be addressed by measures subject to the *SPS Agreement* . . .”¹⁴⁷

(d) “as appropriate to the circumstances”

(i) *Flexibility*

118. When addressing the applicability of the *SPS Agreement* to measures adopted before the entry into force of the *WTO Agreement* the Appellate Body on *EC – Hormones* noted that the phrase “as appropriate to the circumstances” provides for a certain degree of flexibility:

“We are aware that the applicability, as from 1 January 1995, of the requirement that an SPS measure be based on a risk assessment to the many SPS measures already in existence on that date, may impose burdens on Members. It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes

¹⁴⁰ Panel Report on *Australia – Salmon*, para. 8.81.

¹⁴¹ Appellate Body Report on *Australia – Salmon*, para. 125.

¹⁴² Appellate Body Report on *EC – Hormones*, para. 185.

¹⁴³ In the footnote to this sentence, the Appellate Body cited Panel Reports on *EC – Hormones (US)*, paras. 8.124, 8.134, 8.136, 8.151, 8.153, 8.161, and 8.162; *EC – Hormones (Canada)*, paras. 8.127, 8.137, 8.139, 8.154, 8.156, 8.164, and 8.165.

¹⁴⁴ In the footnote to this sentence, the Appellate Body cited Panel Reports on *EC – Hormones (US)*, paras. 8.152–8.153; *EC – Hormones (Canada)*, paras. 8.155–8.156.

¹⁴⁵ (*footnote original*) US Panel Report, footnote 331; Canada Panel Report, footnote 437.

¹⁴⁶ Appellate Body Report on *EC – Hormones*, para. 186.

¹⁴⁷ Appellate Body Report on *Japan – Apples*, para. 241.

clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1.”¹⁴⁸

119. The Panel on *Australia – Salmon* held that the phrase “as appropriate to the circumstances” created the possibility “to assess the risk, on a case-by-case basis, in terms of product, origin and destination, including, in particular, country-specific situations”:

“Following Article 5.1, a risk assessment needs to be ‘appropriate to the circumstances’. Answering a Panel question in this respect, Canada is of the view that the circumstances thus referred to are the source of the risk (e.g., an animal pathogen or a chemical contaminant) and the subject of the risk (i.e., whether it is to human, animal or plant life or health). For Australia, the phrase ‘as appropriate to the circumstances’ confers a right and obligation on WTO Members to assess the risk, on a case by case basis, in terms of product, origin and destination, including, in particular, country specific situations. We agree that both interpretations may be covered by the term ‘as appropriate to the circumstances’. In our view, also the OIE risk assessment techniques as well as the scientific opinions we gathered, may shed light on what is a risk assessment ‘appropriate to the circumstances’.”¹⁴⁹

(ii) *Does not waive duty of risk assessment*

120. The Panel on *Australia – Salmon* held that the phrase “as appropriate to the circumstances” did not alleviate the duty to base a measure on a risk assessment:

“As to the product coverage of Article 5.1, the reference contained in Article 5.1 to base sanitary measures on an assessment ‘as appropriate to the circumstances’ cannot, in our view, annul or supersede the substantive obligation resting on Australia to base the sanitary measure in dispute (irrespective of the products that measure may cover) on a risk assessment. We consider that the reference ‘as appropriate to the circumstances’ relates, rather, to the way in which such risk assessment has to be carried out.¹⁵⁰ Only Article 5.7 allows for an exception to the obligation to base sanitary measures on a risk assessment.”¹⁵¹

(e) Taking into account risk assessment techniques

(i) *Mention of scientific studies in preambular sections of the domestic directives*

121. The Appellate Body on *EC – Hormones* disagreed with the Panel’s finding that certain scientific studies were not taken into consideration, *inter alia*, because these studies were not mentioned in the preambles to the relevant European Communities’ directives:

“In the course of demanding evidence that EC authorities actually ‘took into account’ certain scientific studies, the Panel refers to the preambles of the EC Directives here involved. The Panel notes that such preambles did

not mention any of the scientific studies referred to by the European Communities in the panel proceedings. Preambles of legislative or quasi-legislative acts and administrative regulations commonly fulfil requirements of the internal legal orders of WTO Members. Such preambles are certainly not required by the *SPS Agreement*; they are not normally used to demonstrate that a Member has complied with its obligations under international agreements. The absence of any mention of scientific studies in the preliminary sections of the EC Directives does not, therefore, prove anything so far as the present case is concerned.”¹⁵²

(f) Relationship with other paragraphs of Article 5

(i) *Article 5.2*

122. For discussion on the risk factors to be taken into account, see Section VI.B.2(a) below.

(ii) *Article 5.5*

123. On the relationship between Articles 5.1 and 5.5, the Panel on *Australia – Salmon* stated that “the obligations contained in Article 5.1 (risk assessment) and Article 5.5 are complementary, not mutually exclusive. We consider, therefore, that a WTO Member cannot justify the inconsistency with one Article on the ground that such inconsistency avoids an additional inconsistency with another Article.”¹⁵³

(g) Relationship with other Articles

(i) *Article 1.1*

124. As relates to the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 5 above.

2. Article 5.2

(a) Risk factors to be taken into account

(i) *Risk ascertainable by scientific and non scientific processes*

125. With respect to the risk factors to be examined in the context of a risk assessment, the Appellate Body on *EC – Hormones* agreed with the Panel’s emphasis of the scientific nature of risk assessment, but added a qualification on the nature of the “risk”:

“The listing in Article 5.2 begins with ‘available scientific evidence’; this, however, is only the beginning. We note in this connection that the Panel states that, for purposes

¹⁴⁸ Appellate Body Report on *EC – Hormones*, para. 129.

¹⁴⁹ Panel Report on *Australia – Salmon*, para. 8.71.

¹⁵⁰ (*footnote original*) See further in para. 8.70.

¹⁵¹ Panel Report on *Australia – Salmon*, para. 8.57.

¹⁵² Appellate Body Report on *EC – Hormones*, para. 191.

¹⁵³ Panel Report on *Australia – Salmon*, para. 8.126.

of the EC measures in dispute, a risk assessment required by Article 5.1 is 'a *scientific* process aimed at establishing the *scientific* basis for the sanitary measure a Member intends to take'.¹⁵⁴ To the extent that the Panel intended to refer to a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions, the Panel's statement is unexceptionable. However, to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5.1, all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5.2 such as 'relevant processes and production methods' and 'relevant inspection, sampling and testing methods' are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."¹⁵⁵

(ii) *Risks arising from control of compliance with certain requirements*

126. Having held that "risk assessment" did not only refer to the risk ascertainable in a science laboratory operating under strictly controlled conditions, the Appellate Body on *EC – Hormones* considered that, for instance, risks arising from difficulties of control of compliance with certain requirements could be taken into account in the context of a risk assessment:

"It should be recalled that Article 5.2 states that in the assessment of risks, Members shall take into account, in addition to 'available scientific evidence', 'relevant processes and production methods; [and] relevant inspection, sampling and testing methods'. We note also that Article 8 requires Members to 'observe the provisions of Annex C in the operation of control, inspection and approval procedures . . .'. The footnote in Annex C states that 'control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification'. We consider that this language is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice."¹⁵⁶

(iii) *Risks arising from abuse of controlled substances not to be excluded on an a priori basis*

127. The Appellate Body on *EC – Hormones* added a caveat to its finding referred to in paragraphs 126 above. It held that risks arising from the potential abuse of controlled substances in practice need not necessarily be taken into account in each and every case; it explained that its findings in paragraphs 126 above were to be interpreted as meaning that such types of risk should not be excluded *a priori*:

"[T]he *SPS Agreement* requires assessment of the potential for adverse effects on human health arising from the presence of contaminants and toxins in food. We consider that the object and purpose of the *SPS Agreement* justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be. We do not mean to suggest that risks arising from potential abuse in the administration of controlled substances and from control problems need to be, or should be, evaluated by risk assessors in each and every case. When and if risks of these types do in fact arise, risk assessors may examine and evaluate them. Clearly, the necessity or propriety of examination and evaluation of such risks would have to be addressed on a case-by-case basis. What, in our view is a fundamental legal error is to exclude, on an *a priori* basis, any such risks from the scope of application of Articles 5.1 and 5.2."¹⁵⁷

(b) Relationship with other Articles

(i) *Articles 2.2 and 5.1*

128. In *Australia – Salmon*, the Appellate Body agreed¹⁵⁸ with the finding of the Panel, whereby the Panel held that a violation of Article 5.1 or 5.2 would imply a violation of the more general provision of Article 2.2:

"Articles 5.1 and 5.2 – in the words of the Appellate Body in *EC – Hormones* when dealing with the relationship between Articles 2.3 and 5.5 – 'may be seen to be marking out and elaborating a particular route leading to the same destination set out in' Article 2.2. Indeed, in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such finding can be presumed to imply a violation of the more general provisions of Article 2.2. We do recog-

¹⁵⁴ (*footnote original*) Panel Reports on *EC – Hormones (US)*, para. 8.107 and *EC – Hormones (Canada)*, para. 8.110.

¹⁵⁵ Appellate Body Report on *EC – Hormones*, para. 187.

¹⁵⁶ Appellate Body Report on *EC – Hormones*, para. 205.

¹⁵⁷ Appellate Body Report on *EC – Hormones*, para. 206.

¹⁵⁸ Appellate Body Report on *Australia – Salmon*, para. 138.

nize, at the same time, that given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2.”¹⁵⁹

3. Article 5.3

129. In assessing risk and determining the measure to be applied, the Appellate Body on *Australia – Salmon* noted that the presence of unknown and uncertain elements does not affect the requirements under Article 5.3. See paragraph 101 above.

4. Article 5.4

(a) General

130. The Panel on *EC – Hormones*, in a finding not reviewed by the Appellate Body, held that Article 5.4 was of an hortatory nature:

“Guided by the wording of Article 5.4, in particular the words ‘should’ (not ‘shall’) and ‘objective’, we consider that this provision of the *SPS Agreement* does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the *SPS Agreement*.”¹⁶⁰

(b) Relationship with other paragraphs of Article 5

131. In *Australia – Salmon*, the Appellate Body determined that the *SPS Agreement* contains an implicit obligation that WTO Members determine their appropriate level of protection.¹⁶¹ See paragraph 151 below.

5. Article 5.5

(a) Standard of review

132. While examining whether Australia imposed different levels of protection in respect of “different situations” in the sense of Article 5.5, the Panel addressed an argument made by Australia, the responding party, that for a situation to be so compared, a risk assessment in respect of it would need to have been carried out. The Panel emphasized that it could not conduct its own risk assessment, but rather had to weigh the evidence before it:

“We cannot conduct our own risk assessment. Nor do we attempt to do so in this report. The fact that one of the experts advising the Panel stated that ‘if you are trying to say which [of two products] is the most risky, then you need to know something about and possibly do a full assessment for [the other] product’ and that ‘it would be sensible to assess that which you have prioritized initially to have the highest risk first, but until you have done the risk assessment, you actually cannot be sure you have got that right’, does not change our position. Nor do we disagree with these statements. Indeed, for a scientist to say

with scientific certainty that one product represents a higher risk than the other, there may be a need to have two, more or less, complete sets of data, including two risk assessments. And even on that basis a scientist would probably not be able to state with absolute certainty that one product is riskier than the other. Our mandate is different. We are not asked to make a scientific risk comparison nor to state with scientific certainty that one product is riskier than the other. We can only weigh the evidence put before us and, on the basis of the rules of burden of proof we adopted, including the use of factual presumptions, decide whether sufficient evidence is before us – evidence which has not been rebutted – in order to state that it can be presumed that one product is riskier than the other.”¹⁶²

(b) Cumulative elements of Article 5.5

133. In *EC – Hormones*, the Appellate Body considered the three elements of Article 5.5 and held that these elements were cumulative in nature. It emphasized in particular, that the third element, should be demonstrated positively and independently of the second element:

“The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those *levels of protection* exhibit arbitrary or unjustifiable differences (“distinctions” in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the *measure* embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade. . . .

We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, both the second and third elements must be found. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade. The presence of the second element – the arbitrary or unjustifiable character of differences in *levels of protection* considered by a Member as appropriate in differing situations – may in practical effect operate as a ‘warning’ signal that the implementing *measure* in its application *might* be a discriminatory measure or *might*

¹⁵⁹ Panel Report on *Australia – Salmon*, para. 8.52.

¹⁶⁰ Panel Report on *EC – Hormones (Canada)*, para. 8.169; Panel Report on *EC – Hormones (US)*, para. 8.166.

¹⁶¹ Appellate Body Report on *Australia – Salmon*, paras. 205–207.

¹⁶² Panel Report on *Australia – Salmon*, para. 8.126.

be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade.”¹⁶³

(c) “appropriate level of protection”

(i) *Legal status of the first part of Article 5.5*

134. In *EC – Hormones*, with respect to the first part of Article 5.5, the Appellate Body held that the statement of the goal of consistency did not establish a legal obligation of consistency of appropriate levels of protection. Rather, only certain types of inconsistencies were to be avoided:

“The objective of Article 5.5 is formulated as the ‘achieving [of] consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection’. Clearly, the desired consistency is defined as a goal to be achieved in the future. To assist in the realization of that objective, the Committee on Sanitary and Phytosanitary Measures is to develop *guidelines for the practical implementation of Article 5.5*, bearing in mind, among other things, that ordinarily, people do not voluntarily expose themselves to health risks. Thus, we agree with the Panel’s view that the statement of that goal [consistency] does not establish a *legal obligation* of consistency of appropriate levels of protection. We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.”¹⁶⁴

(ii) *“distinctions in the levels of protection in different situations”*

Different situations

135. The Panel on *EC – Hormones* found that the “different situations” that can be compared under Article 5.5 were situations “where the same substance or the same adverse health effect is involved”.¹⁶⁵ On appeal, the Appellate Body stated:

“Clearly, comparison of *several* levels of sanitary protection deemed appropriate by a Member is necessary if a panel’s inquiry under Article 5.5 is to proceed at all. The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness.”¹⁶⁶

Comparable situations

136. In *Australia – Salmon*, the Appellate Body held that comparable situations under Article 5.5 were those where either the same or a similar disease, or where the same biological and economic consequences were involved:

“Situations which involve a risk of entry, establishment or spread of the same or a similar disease have some common elements sufficient to render them comparable under Article 5.5. Likewise, situations with a risk of the same or similar associated potential biological and economic consequences also have some common elements sufficient to render them comparable under Article 5.5. We, therefore, consider that for ‘different’ situations to be comparable under Article 5.5, there is no need for both the disease *and* the biological and economic consequences to be the same or similar.”¹⁶⁷

Level of protection as reflected in SPS Measures

137. The Panel on *Australia – Salmon*, addressed the question of how to ascertain the level of sanitary protection chosen by a Member. The Panel found that this level of sanitary protection will be reflected in the sanitary measure itself, but noted that “imposing the same sanitary measure for different situations does not necessarily result in the same level of protection”.¹⁶⁸ The Appellate Body did not disagree with these statements in particular, but reversed the Panel’s related findings, because it disagreed with the statement by the Panel that “the level of protection implied or reflected in a sanitary *measure* or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be appropriate by that Member.”¹⁶⁹

138. In response to Australia’s argument that a “situation” cannot be compared under Article 5.5 if no risk assessment has been made in respect of it, the Panel on *Australia – Salmon*, in a finding not reviewed by the Appellate Body, found that since Australia had a sanitary regime to address situations in respect of which no risk assessment existed, a level of protection existed:

“[W]e consider that even though Australia has not yet conducted import risk analyses for the other products compared under Article 5.5, Australia does, nevertheless, have a level of protection it considers to be appropriate for these other products. Australia currently has a sanitary regime, imposing specific sanitary measures or refraining from such regulation, for these other prod-

¹⁶³ Appellate Body Report on *EC – Hormones*, paras. 214–215.

¹⁶⁴ Appellate Body Report on *EC – Hormones*, para. 213.

¹⁶⁵ Panel Report on *EC – Hormones (Canada)*, para. 8.179; Panel Report on *EC – Hormones (US)*, para. 8.176.

¹⁶⁶ Appellate Body Report on *EC – Hormones*, para. 217.

¹⁶⁷ Appellate Body Report on *Australia – Salmon*, para. 146.

¹⁶⁸ Panel Report on *Australia – Salmon*, paras. 8.123–8.124.

¹⁶⁹ Appellate Body Report on *Australia – Salmon*, para. 196.

ucts. This sanitary regime (whether or not specific measures are enacted) reflects a level of protection. To have a specific level of protection, there is no need to first complete a risk assessment . . . Article 5.5 directs us to compare for different situations the related levels of protection as they are currently considered to be appropriate by Australia and this whether or not the sanitary measures enacted to achieve that level are based on a risk assessment. Of course, such comparison would be easier and more accurate if for both situations an appropriate risk assessment were available. However, according to Article 5.5 and our mandate set out in Article 11 of the DSU (to make an 'objective assessment of the matter before [us], including an objective assessment of the facts of the case'), we are called upon in this case to make this comparison and to do so on the basis of the evidence before us."¹⁷⁰

(iii) *"Arbitrary or unjustifiable" distinctions in levels of protection*

139. The Panel on *EC – Hormones* found arbitrary or unjustifiable distinction in the level of protection in the European Communities' regulation in that while the European Communities prohibited added natural hormones with respect to beef, it did not attempt to limit naturally occurring hormones.¹⁷¹ The Appellate Body disagreed:

"We do not share the Panel's conclusions that the above differences in levels of protection in respect of added hormones in treated meat and in respect of naturally-occurring hormones in food, are merely arbitrary and unjustifiable. We consider there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods. In respect of the latter, the European Communities simply takes no regulatory action; to require it to prohibit totally the production and consumption of such foods or to limit the residues of naturally-occurring hormones in food, entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity."¹⁷²

(iv) *Distinctions which "result in discrimination or a disguised restriction on international trade"*

Factors that result in a disguised restriction on international trade

140. The Panel on *Australia – Salmon* found three "warning signals" and three "other factors more substantial in nature" with respect to the issue of whether there was a disguised restriction on trade arising from the distinct levels of protection existing in Australia. The three warning signals that the Panel indicated were: (1) "the arbitrary character of the differences in levels of protection"¹⁷³; (2) "the rather substantial difference in

levels of protection"¹⁷⁴; and (3) its earlier "two findings of inconsistency (with both Article 5.1 and 2.2)" which make it "seem that the measure at issue constitutes an import prohibition, i.e., a restriction on international trade, 'disguised' as a sanitary measure".¹⁷⁵ The three "other factors" were: (1) Australia was applying two different implementing measures to products which represented the same risk, leading to discrimination between salmon, on the one hand, and herring used as bait and live ornamental finfish on the other; (2) the change in conclusions in a preliminary report and in the final report one year later; and (3) the fact that Australia was imposing a very strict measure upon importation of salmon, but not similarly strict standards for the internal movement of salmon products within Australia. The Appellate Body agreed with the Panel with respect to the first two warning signals. On the first warning signal it added that "the Panel considered the arbitrary or unjustifiable character of differences in levels of protection as a 'warning signal' for, and not as 'evidence' of, a disguised restriction on international trade".¹⁷⁶ The Appellate Body was also in agreement with the Panel that the rather substantial difference in levels of protection should be treated as a separate (second) warning signal.¹⁷⁷ The Appellate Body also approved of the third "warning factor". However, while it also agreed with the Panel on the second and third of the "other factors", the Appellate Body held, with respect to the first of these "other factors":

"We believe that the first 'additional factor' should indeed be excluded from the examination of the third element of Article 5.5. All 'arbitrary or unjustifiable distinctions' in levels of protection will lead logically to discrimination between products, whether the products are the same (e.g., discrimination between imports of salmon from different countries or between imported salmon and domestic salmon) or different (e.g., salmon versus herring used as bait and live ornamental finfish). The first 'additional factor' is therefore not different from the first warning signal, and should not be taken into account as a *separate* factor in the determination of

¹⁷⁰ Panel Report on *Australia – Salmon*, paras. 8.125–8.126.

¹⁷¹ Panel Report on *EC – Hormones (Canada)*, para. 8.193; Panel Report on *EC – Hormones (US)*, para. 8.190.

¹⁷² Appellate Body Report on *EC – Hormones*, para. 221. When comparing the levels of protection for hormones used for growth promotion purposes and hormones used for therapeutic and zootechnical purposes – a comparison not further pursued by the panels – the Appellate Body, referring to the differences in frequency and scale of the two treatments and the strict mode of administration of the latter treatment, found that the distinction in levels of protection "is not, in itself, 'arbitrary or unjustifiable.'" (see paras. 222–225 of the Report).

¹⁷³ Panel Report on *Australia – Salmon*, para. 8.149.

¹⁷⁴ Panel Report on *Australia – Salmon*, para. 8.150.

¹⁷⁵ Panel Report on *Australia – Salmon*, para. 8.151.

¹⁷⁶ Appellate Body Report on *Australia – Salmon*, para. 162.

¹⁷⁷ Appellate Body Report on *Australia – Salmon*, para. 164.

whether an SPS measure results in a ‘disguised restriction on international trade’.”¹⁷⁸

Applicability of GATT Articles III and XX jurisprudence

141. The Panel on *EC – Hormones* considered pertinent, in its analysis of the terms “discrimination” and “disguised restriction on international trade”, the Appellate Body’s jurisprudence under Articles III and XX of the *GATT 1994*. The Appellate Body disagreed with this finding:

“We agree with the Panel’s view that ‘all three elements [of Article 5.5] need to be distinguished and addressed separately’.¹⁷⁹ We also recall our interpretation that Article 5.5 and, in particular, the terms ‘discrimination or a disguised restriction on international trade’, have to be read in the context of the basic obligations contained in Article 2.3, which requires that ‘sanitary . . . measures shall not be applied in a manner which would constitute a disguised restriction on international trade’. (emphasis added)

However, we disagree with the Panel on two points. First, in view of the structural differences between the standards of the *chapeau* of Article XX of the *GATT 1994* and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in our Report in *United States – Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*. Secondly, in our view, it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan – Alcoholic Beverages* about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the *GATT 1994*, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, “result in discrimination or a disguised restriction on international trade.”¹⁸⁰

142. The Appellate Body on *EC Hormones* explained its reluctance to apply its jurisprudence under Article III:2 of the *GATT 1994* to Article 5.5 of the *SPS Agreement* by noting that while there was a “clear and linear relationship” between a tax differential and protection given to domestic products, no such clear relationship existed between differentials of levels of protection of human health and protection given to domestic products:

“The differential involved in *Japan – Alcoholic Beverages* was a tax differential, which is very different from a differential in levels of protection. Unlike a differential in levels of protection, a tax differential is always expressed in quantitative terms and a significant tax differential in favour of domestic products will inevitably affect the competitiveness of imported products and thus afford protection to domestic products. There is a clear and linear relationship between a tax differential and the pro-

tection afforded to domestic products. There is, however, no such relationship between a differential in levels of human health protection and discrimination or disguised restriction on trade.”¹⁸¹

Differences in levels of protection for comparable situations not sufficient

143. After making its findings referenced in paragraphs 141–142 above, the Appellate Body on *EC – Hormones* reversed the Panel’s finding that the EC measure in question constituted “discrimination or a disguised restriction on international trade”. The Appellate Body held with respect to the difference in levels of protection for certain comparable situations:

“[T]he degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure or measures embodying one or more of those different levels of protection. Thus, we do not think that the difference between a ‘no residues’ level and ‘unlimited residues’ level is, together with a finding of an arbitrary or unjustifiable difference, sufficient to demonstrate that the third, and most important, requirement of Article 5.5 has been met . . . Evidently, the answer to the question whether arbitrary or unjustifiable differences or distinctions in levels of protection established by a Member do in fact result in discrimination or a disguised restriction on international trade must be sought in the circumstances of each individual case.”¹⁸²

(d) “guidelines to further practical implementation . . .”

144. At its meeting of 21–22 June 2000, the SPS Committee adopted the Guidelines to Further the Practical Implementation of Article 5.5.¹⁸³ These guidelines address the objective of achieving consistency in the application of the concept of the appropriate level of protection.¹⁸⁴

(e) Relationship with other paragraphs of Article 5

145. On the relationship between Articles 5.1 and 5.5, see paragraph 123 above.

¹⁷⁸ Appellate Body Report on *Australia – Salmon*, para. 169.

¹⁷⁹ The Appellate Body cited Panel Reports on *EC – Hormones (US)*, para. 8.184; and *EC – Hormones (Canada)*, para. 8.187.

¹⁸⁰ Appellate Body Report on *EC – Hormones*, paras. 238 and 239.

¹⁸¹ Appellate Body Report on *EC – Hormones*, fn. 251.

¹⁸² Appellate Body Report on *EC – Hormones*, para. 240.

¹⁸³ G/SPS/R/19, Section VII. The text of the adopted Guidelines can be found in G/SPS/15.

¹⁸⁴ G/SPS/15.

(f) Relationship with other Articles

(i) Article 1.1

146. As relates to applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

6. Article 5.6

(a) Cumulative elements

147. In *Australia – Salmon*, with respect to the structure of Article 5.6, the Appellate Body identified three separate elements and found that these elements applied cumulatively:

“We agree with the Panel that Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

- (1) is reasonably available taking into account technical and economic feasibility;
- (2) achieves the Member’s appropriate level of sanitary or phytosanitary protection; and
- (3) is significantly less restrictive to trade than the SPS measure contested.

These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, or if the alternative measure does not achieve the Member’s appropriate level of sanitary or phytosanitary protection, or if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.”¹⁸⁵

148. In *Japan – Agricultural Products II*, the Appellate Body confirmed the finding referenced in paragraph 147 above:¹⁸⁶

(b) “achieves the appropriate level of . . . protection”

(i) Determining “appropriate level of . . . protection” as a “prerogative” of the Member concerned

149. The Appellate Body on *Australia – Salmon* emphasized that determining the appropriate level of protection is the prerogative of the Member concerned:

“We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection

for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A . . . is a prerogative of the Member concerned and not of a panel or of the Appellate Body.”¹⁸⁷

150. In *Japan – Agricultural Products II*, the Panel emphasized that it was up to Japan to determine its appropriate level of protection:

“Both parties agree that it is up to Japan to determine its appropriate level of phytosanitary protection with respect to codling moth. We agree since the *SPS Agreement* (in paragraph 5 of Annex A) defines the ‘appropriate level of . . . phytosanitary protection’ as ‘[t]he level of protection deemed appropriate by the Member establishing a . . . phytosanitary measure to protect . . . plant life or health within its territory’¹⁸⁸, *in casu*, the level deemed appropriate by Japan.”¹⁸⁹

(ii) Implied or explicit level of protection

General

151. In *Australia – Salmon*, the question arose whether a WTO Member is obliged to determine, positively, its appropriate level of protection. While the Panel had held that no such obligation existed¹⁹⁰, the Appellate Body determined that such an obligation exists under the *SPS Agreement*, albeit only implicitly. However, it also held that where a Member fails to determine its appropriate level of protection, this level of protection can be established by a panel on the basis of existing relevant SPS measures:

“We recognize that the *SPS Agreement* does not contain an explicit provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the *SPS Agreement*, in particular, in paragraph 3 of Annex B, Article 4.1, Article 5.4 and Article 5.6 of the *SPS Agreement* . . .

We thus believe that the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement*, such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire

¹⁸⁵ Appellate Body Report on *Australia – Salmon*, para. 194.

¹⁸⁶ Appellate Body Report on *Japan – Agricultural Products II*, para. 95.

¹⁸⁷ Appellate Body Report on *Australia – Salmon*, para. 199.

¹⁸⁸ (footnote original) Emphasis added.

¹⁸⁹ Panel Report on *Japan – Agricultural Products II*, para. 8.81.

¹⁹⁰ Panel Report on *Australia – Salmon*, para. 8.107.

Articles or paragraphs of Articles of this Agreement and allow Members to escape from their obligations under this Agreement.

... we believe that in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.¹⁹¹

Statement by Member

152. In *Australia – Salmon*, the Panel had found that “the level of protection implied or reflected in a sanitary measure or regime imposed by a WTO Member can be presumed to be at least as high as the level of protection considered to be appropriate by that Member.”¹⁹² The Appellate Body disagreed with this statement, in particular because Australia had explicitly stated that its level of protection was different from the one reflected in its measure. The Appellate Body stressed that an explicit statement by a Member about its level of protection could not be questioned by a Panel or the Appellate Body. See paragraph 149 above.

As reflected by SPS measure

153. The Appellate Body on *Australia – Salmon*, also emphasized the differences between the “appropriate level of protection” and the SPS measure:

“The ‘appropriate level of protection’ established by a Member and the ‘SPS measure’ have to be clearly distinguished.¹⁹³ They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective.

It can be deduced from the provisions of the *SPS Agreement* that the determination by a Member of the ‘appropriate level of protection’ logically precedes the establishment or decision on maintenance of an ‘SPS measure’.

... The words of Article 5.6, in particular the terms ‘when establishing or maintaining sanitary . . . protection’, demonstrate that the determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure

would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case.”¹⁹⁴

(c) “significantly less restrictive to trade”

154. In *Australia – Salmon*, the Panel examined whether the measure at issue met the requirement of an alternative measure which is “significantly less restrictive to trade”.¹⁹⁵ The Panel found:

“Canada argues that all four alternative options set out in the 1996 Final Report are significantly less trade restrictive. In its request for access to the Australian market, Canada examined in particular headless, eviscerated product and advocated that these products could be safely imported. We recall that the measure imposed by Australia (in effect, certain heat treatment requirements) prohibits the importation into Australia of fresh, chilled or frozen salmon, including the salmon products further examined. All four alternative options outlined above would allow imports of the salmon products further examined, albeit under specific conditions (e.g., the salmon products would have to be retail-ready fillets, eviscerated, headless or gilled, etc. . .). We consider that even imposing the most stringent of these specific conditions would still be significantly less restrictive to trade than an outright prohibition. As opposed to any of the other conditions, heat treatment actually changes the nature of the product and limits its use. Heat-treated salmon can obviously no longer be consumed as fresh salmon. Eviscerated, headless or filleted salmon, on the other hand, can either be consumed as fresh salmon or cooked salmon.¹⁹⁶ We consider, therefore, that Canada has raised a presumption that all four alternatives outlined in the 1996 Final Report are ‘significantly less restrictive to trade’ than the measure in dispute and that Australia has not rebutted this presumption.”¹⁹⁷

¹⁹¹ Appellate Body Report on *Australia – Salmon*, paras. 205–207.

¹⁹² Panel Report on *Australia – Salmon*, para. 8.173

¹⁹³ (*footnote original*) That the level of protection and the SPS measure applied have to be clearly distinguished results already from our Report in *European Communities – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 214.

¹⁹⁴ Appellate Body Report on *Australia – Salmon*, paras. 200–201, 203.

¹⁹⁵ Panel Reports on *Australia – Salmon*, para. 8.182; *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.150–7.153; and *Japan – Agricultural Products II*, paras. 8.79, 8.89, 8.95–8.96 and 8.103–8.104.

¹⁹⁶ (*footnote original*) Out of a total of 66,234 tonnes of Canadian salmon exports in 1996, 50,838 tonnes were fresh and frozen salmon; the rest was canned salmon. As opposed to canned or heat-treated salmon, Canada submits that “recent trends indicate consumer preference for fresh and frozen salmon” (Canada, First Submission, para. 31). Australia seems to recognize this when it states that: “For [Australian] farmed Atlantic salmon [the main salmon species commercialized in Australia] supply to both the domestic and export market is predominantly of whole fresh fish” (Australia, Second Submission, para. 58).

¹⁹⁷ Panel Report on *Australia – Salmon*, para. 8.182.

(d) “taking into account technical and economic feasibility”

155. The Panel on *Australia – Salmon* found that there existed alternatives to the Australian measure, as evidenced by the Australian report at issue, and found that nothing implied that any of these four alternatives would be technically or economically unfeasible.¹⁹⁸ The Appellate Body reversed this finding, because it had earlier found that the Panel had examined the wrong measure.¹⁹⁹

(ii) “Reasonably available”

156. The Panel on *Australia – Salmon (Article 21.5 – Canada)*, while examining one of the four alternatives proposed by Canada, stated with respect to whether a measure was “reasonably available” within the meaning of footnote 3 in Article 5.6:

“[S]ince one can assume that current Australian requirements are ‘reasonably available taking into account technical and economic feasibility’, also a regime without the consumer-ready requirements [the current Australian requirements] . . . would be so. Given that inspection and control to release from quarantine only product that meets the consumer-ready requirements would no longer be necessary, a regime without the consumer ready requirements would be even more reasonably available in the sense of Article 5.6.”²⁰⁰

157. With regard to the phrase “achieves [the Member’s] appropriate level of . . . protection” under Article 5.6, see Section VI.B.6(b) above.

(iii) *Burden of proof*

158. In *Japan – Agricultural Products II*, concerning the issue of the burden of proof, the Appellate Body reversed the Panel’s findings on Article 5.6, holding that the Panel could not have made the finding at issue, because the United States as the complaining party had not made a relevant claim and, *a fortiori*, had not established a *prima facie* case. The Appellate Body then stressed that the investigative authority of a panel did not stretch so far as to “make the case for a complaining party”:

“Pursuant to the rules on burden of proof set out above, we consider that it was for the United States [complainant] to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the ‘determination of sorption levels’ is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the ‘determination of sorption

levels’ is an alternative measure within the meaning of Article 5.6.”²⁰¹

(iv) *Relationship with other Articles*Article 1.1

159. On the applicability of the *SPS Agreement* to measures adopted before 1 January 1995 and measures adopted since, see paragraph 6 above.

Article 2.2

160. In *Australia – Salmon*, the Panel noted that “Article 5.6 must be read in context . . . an important part of the context of Article 5 is Article 2. We consider that Article 5.6 should, in particular, be read in light of Article 2.2”.²⁰² The Appellate Body reversed the Panel’s finding because it found that the Panel had examined the wrong measure.²⁰³ The Panel on *Japan – Agricultural Products II* reached the same conclusion on the relationship between Articles 2.2 and 5.6, but the Appellate Body did not address this issue on appeal.²⁰⁴

161. In *Japan – Agricultural Products II*, the Panel noted that its “findings under Article 5.6 would stand even if the measure in dispute were not in violation of Article 2.2”.²⁰⁵ It added that “even if we were to have found that Japan’s measure is maintained with sufficient scientific evidence in accordance with Article 2.2, we would then be called upon to examine whether the measure is consistent with Article 5.6.”²⁰⁶ The Appellate Body did not specifically address this statement on appeal.

7. Article 5.7

(a) General

162. The Appellate Body on *Japan – Agricultural Products II* referred to Article 5.7 as a “qualified exemption”. See paragraph 36 above:

“Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless.”²⁰⁷

¹⁹⁸ Panel Report on *Australia – Salmon*, para. 8.171.

¹⁹⁹ Appellate Body Report on *Australia – Salmon*, para. 204.

²⁰⁰ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.146.

²⁰¹ Appellate Body Report on *Japan – Agricultural Products II*, para. 126.

²⁰² Panel Report on *Australia – Salmon*, para. 8.165.

²⁰³ Appellate Body Report on *Australia – Salmon*, para. 213.

²⁰⁴ Panel Report on *Japan – Agricultural Products II*, para. 8.71.

²⁰⁵ Panel Report on *Japan – Agricultural Products II*, para. 7.4.

²⁰⁶ Panel Report on *Japan – Agricultural Products II*, para. 8.102.

²⁰⁷ Appellate Body Report on *Japan – Agricultural Products II*, para. 80.

(i) *Four cumulative requirements*

163. In *Japan – Agricultural Products II*, the Appellate Body identified four requirements imposed upon a Member having recourse to this provision. The Appellate Body added that these four requirements are cumulative in nature:

“Article 5.7 of the *SPS Agreement* sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:

- (1) imposed in respect of a situation where ‘relevant scientific information is insufficient’; and
- (2) adopted ‘on the basis of available pertinent information’.

Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:

- (1) ‘seek[s] to obtain the additional information necessary for a more objective assessment of risk’; and
- (2) ‘review[s] the . . . measure accordingly within a reasonable period of time’.

These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.”²⁰⁸

(b) “where relevant scientific evidence is insufficient”

(i) *Meaning*

164. Upholding the Panel’s finding that Japan’s phytosanitary measure at issue was not imposed in a situation “where relevant scientific evidence is insufficient”, the Appellate Body on *Japan – Apples* said that “relevant scientific evidence” will be “insufficient” within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*:

“[J]apan’s reliance on the opposition between evidence ‘in general’ and evidence relating to specific aspects of a particular subject matter is misplaced. The first requirement of Article 5.7 is that there must be insufficient scientific evidence. When a panel reviews a measure claimed by a Member to be provisional, that panel must assess whether “relevant scientific evidence is insufficient”. This evaluation must be carried out, not in the abstract, but in the light of a particular inquiry. The notions of ‘relevance’ and ‘insufficiency’ in the introduc-

tory phrase of Article 5.7 imply a relationship between the scientific evidence and something else. Reading this introductory phrase in the broader context of Article 5. of the *SPS Agreement*, which is entitled ‘Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection’, is instructive in ascertaining the nature of the relationship to be established. Article 5.1 sets out a key discipline under Article 5, namely that ‘Members shall ensure that their sanitary or phytosanitary measures are based on an assessment . . . of the risks to human, animal or plant life or health’.²⁰⁹ This discipline informs the other provisions of Article 5, including Article 5.7. We note, as well, that the second sentence of Article 5.7 refers to a ‘more objective assessment of risks’. These contextual elements militate in favour of a link or relationship between the first requirement under Article 5.7 and the obligation to perform a risk assessment under Article 5.1: ‘relevant scientific evidence’ will be ‘insufficient’ within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*. Thus, the question is not whether there is sufficient evidence of a general nature or whether there is sufficient evidence related to a specific aspect of a phytosanitary problem, or a specific risk. The questions is whether the relevant evidence, be it ‘general’ or ‘specific’, in the Panel’s parlance, is sufficient to permit the evaluation of the likelihood of entry, establishment or spread of, in this case, fire blight in Japan.”²¹⁰

165. The Appellate Body on *Japan – Apples* also rejected Japan’s interpretation of Article 5.7 through the concept of ‘scientific uncertainty’, and said that the application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence and these two concepts – ‘insufficiency of scientific evidence’ and ‘scientific uncertainty’ – are not interchangeable:

“Japan challenges the Panel’s statement that Article 5.7 is intended to address only ‘situations where little, or no, reliable evidence was available on the subject matter at issue’²¹¹ because this does not provide for situations of ‘unresolved uncertainty’. Japan draws a distinction between ‘new uncertainty’ and ‘unresolved uncertainty’²¹², arguing that both fall within Article 5.7. According to Japan, ‘new uncertainty’ arises when a new risk is identified; Japan argues that the Panel’s characterization that ‘little, or no, reliable evidence was available

²⁰⁸ Appellate Body Report on *Japan – Agricultural Products II*, para. 89. In this case, the Panel examined whether the measure at issue met with these four requirements. See Panel Report on *Japan – Agricultural Products II*, paras. 8.56–8.57 and 8.60.

²⁰⁹ (footnote original) The risk assessment referred to in Article 5.1 is defined in Annex A of the *SPS Agreement*.

²¹⁰ Appellate Body Report on *Japan – Apples*, para. 179.

²¹¹ (footnote original) Panel Report, para. 8.219.

²¹² (footnote original) Japan’s appellant’s submission, para. 101.

on the subject matter at issue' is relevant to a situation of 'new uncertainty'.²¹³ We understand that Japan defines 'unresolved uncertainty' as uncertainty that the scientific evidence is not able to resolve, despite accumulated scientific evidence.²¹⁴ According to Japan, the risk of transmission of fire blight through apple fruit relates essentially to a situation of 'unresolved uncertainty'.²¹⁵ Thus, Japan maintains that, despite considerable scientific evidence regarding fire blight, there is still uncertainty about certain aspects of transmission of fire blight. Japan contends that the reasoning of the Panel is tantamount to restricting the applicability of Article 5.7 to situations of 'new uncertainty' and to excluding situations of 'unresolved uncertainty'; and that, by doing so, the Panel erred in law.²¹⁶

We disagree with Japan. The application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence. The text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient', not to 'scientific uncertainty'. The two concepts are not interchangeable. Therefore, we are unable to endorse Japan's approach of interpreting Article 5.7 through the prism of 'scientific uncertainty'.²¹⁷

(c) "seek to obtain additional information"

166. In *Japan – Agricultural Products II*, in respect of the third requirement under Article 5.7, the Appellate Body stated that the additional information to be sought must be "germane" to conducting a more objective risk assessment:

"Neither Article 5.7 nor any other provision of the *SPS Agreement* sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to 'seek to obtain' additional information. However, Article 5.7 states that the additional information is to be sought in order to allow the Member to conduct 'a more objective assessment of risk'. Therefore, the information sought must be germane to conducting such a risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied. We note that the Panel found that the information collected by Japan does not 'examine the appropriateness' of the SPS measure at issue and does not address the core issue as to whether 'varietal characteristics cause a divergency in quarantine efficacy'. In the light of this finding, we agree with the Panel that Japan did not seek to obtain the additional information necessary for a more objective risk assessment."²¹⁸

(d) "review . . . within a reasonable period of time"

167. The Appellate Body on *Japan – Agricultural Products II* found that the "reasonable period of time" had to be established on a case-by-case basis:

"In our view, what constitutes a 'reasonable period of time' has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure. In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation 'to review' the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement 'within a reasonable period of time'.²¹⁹

(e) Burden of proof

168. In *Japan – Apples*, concerning Japan's argument in the alternative under Article 5.7, which was made in the event that the Panel rejected Japan's view that "sufficient scientific evidence" exists to maintain the measure within the meaning of Article 2.2, the Panel assigned the burden of proof to Japan. The Panel's assignment of the burden of proof was not appealed.²²⁰

"We understand Japan to be claiming that the phytosanitary measure at issue is justified under Article 5.7 'in the alternative', should the Panel find that the measure is maintained without sufficient scientific evidence within the meaning of Article 2.2. We first note that arguing in the alternative is a well-established judicial practice and arguing a point in the alternative of another point often implies that there may be some contradictions between the two lines of argumentation if they were presented concurrently.

In this instance, we have determined above that Japan's measure is maintained without sufficient scientific evidence within the meaning of Article 2.2, which is the circumstance in which Japan invokes Article 5.7 in the alternative and claims that this provisional measure has been in place since the date of entry into force of the *SPS Agreement* in 1995.

We will therefore now consider whether the measure at issue can be justified as a provisional measure within the meaning of Article 5.7 of the *SPS Agreement*. Before doing so, however, we find it relevant to recall that the burden is on Japan, as the party invoking Article 5.7 to make a prima facie case in support of its position."²²¹

²¹³ (footnote original) *Ibid.*, footnote 76 to para. 98.

²¹⁴ (footnote original) *Ibid.*, para. 98.

²¹⁵ (footnote original) Japan's appellant's submission, paras. 105–110.

²¹⁶ (footnote original) *Ibid.*, para. 110.

²¹⁷ Appellate Body Report on *Japan – Apples*, paras. 183–184.

²¹⁸ Appellate Body Report on *Japan – Agricultural Products II*, para. 92.

²¹⁹ Appellate Body Report on *Japan – Agricultural Products II*, para. 93.

²²⁰ Panel Report on *Japan – Apples*, para. 8.212.

²²¹ Panel Report on *Japan – Apples*, paras. 8.210 – 8.212.

(f) Treatment of the precautionary principle

169. The Appellate Body on *EC – Hormones* noted the following concerning Article 5.7 and the precautionary principle: “[T]he precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle . . .”²²²

(g) Relationship with other Articles

(i) Article 2.2

170. Regarding the relationship between Article 5.7 and Article 2.2, see paragraphs 35–37 above.

8. Article 5.8

(a) General

171. The Panel on *EC – Hormones* allocated the burden of proof to the responding party, where the responding party enacted a measure not based on an international standard. In doing so, the Panel based its finding partially upon Article 5.8. The Appellate Body disagreed and indicated that Article 5.8 is not intended to address the burden of proof problem:

“Article 5.8 of the *SPS Agreement* does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry the burden of proving on a *prima facie* basis that the measure involved is not consistent with the *SPS Agreement*.”²²³

(b) Relationship with other Articles

(i) Article 2.2

172. While discussing the burden of proof under Article 2.2, the Appellate Body on *Japan – Agricultural Products II* made reference to Article 5.8. See paragraph 17 above.

(c) Article 3

173. The Panel on *Australia – Salmon* discussed the relationship between Article 5 on the one hand, and Articles 2 and 3 on the other. See paragraphs 46–48 above.

174. Also, the Appellate Body in *Japan – Agricultural Products II* touched on the relationship of Article 5 with Articles 2.2 and 3.3. See Section III.B.1(a)(ii) above.

VII. ARTICLE 6**A. TEXT OF ARTICLE 6****Article 6***Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

175. In *Australia – Salmon*, Australia argued that the Panel had exceeded its terms of reference by referring to Article 6.1; Australia claimed that the Panel had made an implicit finding of inconsistency of the Australian measure with Article 6, although the Canadian request for the establishment of a panel had not included a claim under Article 6. The Appellate Body rejected the Australian argument:

“Canada’s request for the establishment of a panel did not include a claim of violation of Article 6 of the *SPS Agreement*. The Panel’s terms of reference are determined by Canada’s request for the establishment of a panel. We, therefore, agree with Australia that Article 6

²²² Appellate Body Report on *EC – Hormones*, para. 124.

²²³ Appellate Body Report on *EC – Hormones*, para. 102. This was confirmed by the Panel in *Japan – Apples*, para. 8.41.

of the *SPS Agreement* is not within the terms of reference of the Panel. However, we disagree with Australia that the Panel exceeded its terms of reference in quoting Article 6.1 in a footnote, attached to a paragraph in which the Panel examined a violation of Article 5.5. More precisely, we reject Australia's contention that the Panel, by merely referring to Article 6.1 in a footnote, made an implied finding of inconsistency with Article 6. In our view, the statement of the Panel with regard to Article 6, in footnote 430 of its Report, is similar in character to the statement of the panel in *United States – Shirts and Blouses*, with regard to the powers of the Textile Monitoring Body ('TMB'). India appealed from this statement, but we found it to be 'purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions'.²²⁴ We did not consider that statement to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'. Likewise, we consider that in this case, the Panel's statement in footnote 430 of its Report regarding Article 6.1 of the *SPS Agreement* is a purely gratuitous comment and not 'a legal finding or conclusion'. By making such a comment, the Panel did not exceed its terms of reference."²²⁵

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7 *Transparency*

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.²²⁶

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

176. In *Japan – Agricultural Products II*, the Panel concluded that: "Japan, by not having published the varietal testing requirement, acts inconsistently with its obligations under paragraph 1 of Annex B of the *SPS Agreement* and, for that reason, with its obligations contained in Article 7 of that Agreement."²²⁷ The Appellate Body while examining Japan's appeal on publication requirements under paragraph 1 of Annex B concluded that the varietal testing requirement, as set out in the *Experimental Guide*, is a phytosanitary regulation within the meaning of paragraph 1 of Annex B, and upheld the Panel's finding that Japan had acted inconsistently with this provision and hence with Article 7 of the *SPS Agreement*,²²⁸ see paragraph 225 below.

2. Notification requirements

(a) Recommended notification procedures

177. At its meeting of 29–30 March 1995, the SPS Committee adopted notification procedures recommended by the informal contact group, subject to certain conditions.²²⁹ At its meeting of 29–30 May 1996, the SPS Committee revised the notification procedures to be followed for notifications required under paragraphs 5 and 6 of Annex B.²³⁰ Further, at its meeting of 10–11 March 1999, the SPS Committee again revised the notification procedures.²³¹ The last revision of the notification procedures was carried out by the SPS Committee at its meeting of 2 April 2002.²³²

178. In November 2000, a handbook entitled "How to apply the Transparency Provisions of the *SPS Agreement*" was prepared by the Secretariat.²³³ The Handbook was further revised in September 2002. This handbook, which is available in English, French and Spanish, provides guidance on the establishment and operation of notification authorities and enquiry points. The handbook also covers all three areas of transparency: the publication of regulations, notifications, and responding to enquiries.

179. At its meeting of 26 October 2001, the SPS Committee adopted the following provision relating to the notification of the conclusion of equivalence agreements between Members further to the Decision on Equivalence (see paragraphs 79–92 above):

"The Committee on Sanitary and Phytosanitary Measures shall revise its recommended notification procedures to provide for the notification of the conclusion of agreements between Members which recognize the equivalence of sanitary and phytosanitary measures.²³⁴ Furthermore, the procedures shall reinforce the existing obligation in paragraph 3(d) of Annex B of the Agreement on the Application of Sanitary and Phytosanitary Measures for national Enquiry Points to provide information, upon request, on the participation in any bilateral or multilateral equivalence agreements of the Member concerned."²³⁵

²²⁴ (footnote original) Appellate Body Report on *US – Wool Shirts and Blouses*, p. 17.

²²⁵ Appellate Body Report on *Australia – Salmon*, para. 110.

²²⁶ See Section XVII.

²²⁷ Panel Report on *Japan – Agricultural Products II*, para. 8.116.

²²⁸ Appellate Body Report on *Japan – Agricultural Products II*, para. 108.

²²⁹ G/SPS/R/1, paras. 8–11. The recommended procedures can be found in PC/IPL/6.

²³⁰ G/SPS/R/5, para. 16. The revised procedures can be found in G/SPS/7.

²³¹ G/SPS/7/Rev.1, preamble. The revised procedures can be found in G/SPS/7/Rev.1.

²³² G/SPS/7/Rev.2 and G/SPS/7/Rev.2/Add.1.

²³³ This handbook is publicly available on the WTO website (www.wto.org).

²³⁴ (footnote original) G/SPS/7/Rev.1.

²³⁵ G/SPS/19, para. 11.

(b) “significant effect on trade of other Members”

180. The notification procedures adopted and revised by the SPS Committee define the term “significant effect on trade of other Members” as follows:

“For the purposes of Annex B, paragraphs 5 and 6 in the *SPS Agreement*, the concept of ‘significant effect on trade of other Members’ may refer to the effect on trade:

- of one sanitary or phytosanitary regulation only or of various sanitary or phytosanitary regulations in combination;
- in a specific product, group of products or products in general; and
- between two or more Members (countries).

When assessing whether the sanitary or phytosanitary regulation may have a significant effect on trade, the Member concerned should take into consideration, using relevant information which is available, such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential development of such imports, and difficulties for producers in other Members to comply with the proposed sanitary or phytosanitary regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.”²³⁶

3. Reference to Annex B

181. With respect to Annex B, see Section XVII.B below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C²³⁷ in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.
2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.
2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

²³⁶ G/SPS/7, section 7, as revised.

²³⁷ See Section XVIII.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. General

182. At the Doha Ministerial Conference, Members resolved to “provide, to the extent possible, the financial and technical assistance necessary to enable least-developed countries to respond adequately to the introduction of any new SPS measures which may have significant negative effects on their trade.”²³⁸

183. At the same Ministerial Conference, Members also decided to ensure a level of technical assistance necessary to enable least-developed countries to respond to the special problems they face in implementing the *SPS Agreement*.²³⁹

184. In 2003, the SPS Committee adopted in principle a proposal by Canada to enhance the transparency of special and differential treatment, subject to elaboration of the procedure.²⁴⁰ Following discussions on this elaboration in the Committee meetings in March and June 2004, at the October meeting, the Committee adopted the elaboration.²⁴¹

2. Article 10.2: “phased introduction of new sanitary and phytosanitary measures”

(a) “longer time frame for compliance”

185. At the Doha Ministerial Conference, Members adopted a decision in order to establish a time-frame for the gradual introduction of new sanitary and phytosanitary measures:

“Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase “longer time-frame for compliance” referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to mean normally a period of not less than 6 months. . . .”²⁴²

(b) Impossibility of phased introduction of SPS measures

186. At the same Ministerial Conference, Members adopted a decision that established a process to be applied in cases where the phased introduction of a new measure may not be possible:

“Where the appropriate level of sanitary and phytosanitary protection does not allow scope for the phased introduction of a new measure, but specific problems are identified by a Member, the Member applying the measure shall upon request enter into consultations with the

country with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member’s appropriate level of protection.”²⁴³

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11

Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. General

187. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *SPS Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>Australia – Salmon</i>	WT/DS18	Articles 2, 3 and 5 and Annexes A, B and C
2 <i>EC – Hormones (US)</i>	WT/DS26	Articles 2, 3 and 5
3 <i>EC – Hormones (Canada)</i>	WT/DS48	Articles 2, 3 and 5
4 <i>Japan – Agricultural Products II</i>	WT/DS76	Articles 2, 5, 7 and 8 and Annexes A and B
5 <i>Japan – Apples</i>	WT/DS245	Articles 2, 5, and 7 and Annex B

²³⁸ WT/MIN(01)/17, para. 3.6 (i).

²³⁹ WT/MIN(01)/17, para. 3.6 (ii).

²⁴⁰ G/SPS/W/127.

²⁴¹ G/SPS/33.

²⁴² WT/MIN(01)/17, para. 3.1.

²⁴³ WT/MIN(019)/17, para. 3.1.

2. Article 11.2

(a) Appointment of scientific experts advising the panel

(i) Individual experts

188. In *EC – Hormones*, the Appellate Body agreed with the Panel's decision to hear from individual experts rather than to establish an expert review group:²⁴⁴

"[I]n disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement*, nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate."²⁴⁵

189. As regards, *ad hoc* proceedings for the appointment of individual experts, see paragraph 191 below.

(ii) Expert appointment procedures

General

190. The procedures for the selection of scientific experts were described by the Panel on *EC – Hormones*, paragraphs 6.6–6.7, the Panel on *Australia – Salmon*, paragraphs 6.2–6.3, the Panel on *Japan – Agricultural Products II*, paragraph 6.2 and the Panel on *Australia – Salmon (Article 21.5 – Canada)*, paragraph 6.2.

Ad hoc procedures for individual experts

191. On the procedures followed by the Panel on *EC – Hormones* in appointing experts, the Appellate Body noted the following:

"The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings."²⁴⁶

Parties' nomination of scientific experts

192. In *EC – Hormones*, the Panel gave each party the right to nominate one scientific expert:

"The parties were invited to nominate one expert each, not necessarily from the list provided by the Panel. The Panel then selected three additional individuals from the list taking into account the comments of the parties."²⁴⁷

193. In contrast, in *Australia – Salmon*, the Panel did not give the parties the right to nominate any expert.²⁴⁸ Also in *Japan – Agricultural Products II* and *Australia – Salmon (Article 21.5 – Canada)*, the Panels proceeded in similar fashion.²⁴⁹

(iii) Procedures for obtaining advice from scientific experts

194. The procedures for obtaining advice from scientific experts were described by the Panels on *EC – Hormones*²⁵⁰; *Australia – Salmon*²⁵¹; *Australia – Salmon (Article 21.5 – Canada)*²⁵² *Japan – Agricultural Products II*²⁵³; and *Japan – Apples*.²⁵⁴

(iv) Role of scientific experts

195. In *EC – Hormones*, with respect to the role of scientific experts, the Panel noted as follows:

"It is of particular importance that we made clear to the experts advising the Panel that we were not seeking a consensus position among the experts but wanted to hear all views."²⁵⁵

(b) Standard of review

196. In *Japan – Agricultural Products II*, the Appellate Body stressed that the investigative authority of a panel did not stretch so far as to "make the case for a complaining party":

"... Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party."²⁵⁶

²⁴⁴ Panel Report on *EC – Hormones (Canada)*, para. 8.7. See also the Panel Report on *EC – Hormones (US)*, para. 8.7.

²⁴⁵ Appellate Body Report on *EC – Hormones*, para. 147.

²⁴⁶ Appellate Body Report on *EC – Hormones*, para. 148.

²⁴⁷ Panel Report on *EC – Hormones (US)*, para. 8.8.

²⁴⁸ See Panel Report on *Australia – Salmon*, para. 6.3.

²⁴⁹ See Panel Reports on *Japan – Agricultural Products II*, para. 6.3, and *Australia – Salmon (Article 21.5 – Canada)*, para. 6.2.

²⁵⁰ Panel Report on *EC – Hormone (US)*, paras. 8.8–8.9.

²⁵¹ Panel Report on *Australia – Salmon*, paras. 6.4–6.5.

²⁵² Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 6.3–6.4.

²⁵³ Panel Report on *Japan – Agricultural Products II*, paras. 6.2–6.3.

²⁵⁴ Panel Report on *Japan – Apples*, paras. 6.2–6.4.

²⁵⁵ Panel Report on *EC – Hormones (Canada)*, para. 8.9; Panel Report on *EC – Hormones (US)*, para. 8.9.

²⁵⁶ Appellate Body Report on *Japan – Agricultural Products II*, paras. 126 and 129.

XIII. ARTICLE 12**A. TEXT OF ARTICLE 12****Article 12**
Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.

4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant interna-

tional organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12**1. General**

197. At its meeting of 19–20 March 1997, the SPS Committee agreed that the Rules of Procedure for meetings of the General Council²⁵⁷ shall apply *mutatis mutandis* for its meetings, except as otherwise provided in the Working Procedures.²⁵⁸

2. Article 12.3

198. With reference to paragraph 3, the WTO and the OIE agreed on a cooperation agreement on 4 May 1998.²⁵⁹

199. The list of observers at meetings of the SPS Committee is as follows:

(a) International Intergovernmental Organizations having observer status on a regular basis

- Food and Agriculture Organization (FAO)
- FAO International Plant Protection Convention (IPPC)
- FAO/WHO Joint Codex Alimentarius Commission (Codex)

²⁵⁷ WT/L/161.

²⁵⁸ G/L/170.

²⁵⁹ WT/L/272. This Agreement has been approved by the SPS Committee at its meeting of 1–2 July 1997 (G/SPS/R/8), and subsequently by the Council for Trade in Goods at its meeting of 21 July 1997 (G/C/M/22) and the General Council at its meeting of 22 October 1997 (WT/GC/M/23).

- International Monetary Fund (IMF)*
 - International Organization for Standardization (ISO)
 - International Trade Centre (ITC)
 - Office international des épizooties (OIE)
 - United Nations Conference on Trade and Development (UNCTAD)
 - World Bank*
 - World Health Organization (WHO)
- (b) International Intergovernmental Organizations having observer status on an *ad hoc* basis
- African, Caribbean and Pacific Group of States (ACP Group)
 - European Free Trade Association (EFTA)
 - Inter-American Institute for Agricultural Cooperation (IICA)
 - Organization for Economic Co-operation and Development (OECD)
 - Regional International Organization for Plant Protection and Animal Health (OIRSA)
 - Latin American Economic System (SELA)
- (c) International Intergovernmental Organizations whose request is pending
- Asian and Pacific Coconut Community (APCC)
 - International Vine and Wine Office (OIV)
 - Convention on Biological Diversity (CBD)

200. As regards cooperation in accordance with the Decision on Equivalence, see paragraph 91 above.

3. Article 12.4

201. At its meeting of 15–16 October 1997, the SPS Committee adopted provisional procedures to monitor the use of international standards²⁶⁰, and also agreed to review the operation of the provisional monitoring procedure 18 months after its implementation, with a view to deciding at that time whether to continue with the same procedure, amend it or develop another one.²⁶¹ After agreeing to a number of extensions on the provisional procedure to monitor the use of international standards, at its meeting of 27–28 October 2004, the SPS Committee adopted modifications to the provisional procedure to monitor the use of international standards.²⁶²

4. Article 12.7

202. At its meeting on 15–16 October 1997, the SPS Committee agreed on procedures for conducting the review of the implementation and operation of the *SPS Agreement*.²⁶³

203. At the Doha Ministerial Conference, Members adopted a deadline for reviewing the operation and implementation of the *SPS Agreement*:

“Pursuant to the provisions of Article 12.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years.”²⁶⁴

204. At its meeting of 22–23 June 2004, the Committee decided on the process for the review of the *SPS Agreement*. The review is to be conducted by means of open-ended, informal meetings of the Committee and Members will be invited to identify issues for discussion as part of that process.

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13 *Implementation*

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that

* Observer status in WTO subsidiary bodies provided through the WTO Agreements with the Fund and the World Bank (WT/L/194 and WT/L/195).

²⁶⁰ G/SPS/11. At its meeting of 8 July 1999, the Committee adopted the First Annual Report on the monitoring procedure. G/SPS/13. The Sixth Annual Report on the Procedure to Monitor the Process of International Harmonization was adopted by the Committee in June 2004.

²⁶¹ G/SPS/R/9/Rev.1, para. 21. The text of the procedures can be found in G/SPS/11.

²⁶² G/SPS/11/Rev.1.

²⁶³ G/SPS/R/9/Rev.1, paras. 35–37. The procedures can be found in G/SPS/10.

²⁶⁴ WT/MIN(01)/17, para. 3.4.

they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. Scope of the SPS Agreement

(a) Measures of a provincial government

205. In *Australia – Salmon (Article 21.5 – Canada)*, with respect to a measure taken by a provincial government (Tasmania), the Panel held that in the light of Article 13, measures taken by a non-central government body of Australia fell under the scope of the *SPS Agreement*:

“Article 13 of the *SPS Agreement* provides unambiguously that: (1) ‘Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein’; and (2) ‘Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies’. Reading these two obligations together . . . , we consider that sanitary measures taken by the Government of Tasmania, being an ‘other than central government’ body as recognized by Australia, are subject to the *SPS Agreement* and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations.”²⁶⁵

XV. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. WTO AGREEMENT

1. Article XVI:4

206. In coming to the conclusion referred to in paragraph 6 above, the Appellate Body on *EC – Hormones* also referred to Article XVI:4 of the *WTO Agreement*:

“Finally, we observe, more generally, that Article XVI.4 of the *WTO Agreement* stipulates that:

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

Unlike the GATT 1947, the *WTO Agreement* was accepted definitively by Members, and therefore, there are no longer ‘existing legislation’ exceptions (so-called ‘grandfather rights’)”²⁶⁶

B. TBT AGREEMENT

1. Article 1.5

207. The Panel on *EC – Hormones*, referring to Article 1.5 of the *TBT Agreement*²⁶⁷, stated that “[s]ince the

measures in dispute are sanitary measures, we find that the TBT Agreement is not applicable to this dispute.”²⁶⁸

C. GATT 1994

1. Order of analysis

208. The Panel on *EC – Hormones*, in a finding not reviewed by the Appellate Body decided that both the *SPS Agreement* and the *GATT 1994* applied to the European Communities’ measure at issue, and then addressed the question of which of the two Agreements to examine first:

“The *SPS Agreement* specifically addresses the type of measure in dispute. If we were to examine GATT first, we would in any event need to revert to the *SPS Agreement*: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would then necessarily need to examine the *SPS Agreement*; if, on the other hand, no GATT violation were found, we would still need to examine the consistency of the measure with the *SPS Agreement* since nowhere is consistency with GATT presumed to be consistency with the *SPS Agreement*. For these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the *SPS Agreement*.”²⁶⁹

2. Article III and Article XI

209. In *EC – Hormones*, exercising judicial economy, the Panel stated: “Since we have found that the EC measures in dispute are inconsistent with the requirements of the *SPS Agreement*, we see no need to further examine whether the EC measures in dispute are also inconsistent with Articles III or XI of GATT.”²⁷⁰ Also, in *Australia – Salmon*, the Panel stated: “Since we have found that the measure in dispute is inconsistent with the requirements of the *SPS Agreement*, we see no need to further examine whether it is also inconsistent with Article XI of GATT 1994.”²⁷¹ The Appellate Body did not address either of these two findings.

²⁶⁵ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, para. 7.13.

²⁶⁶ Appellate Body Report on *EC – Hormones* paras. 128–129.

²⁶⁷ Article 1.5 of the *TBT Agreement* provides: “The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.”

²⁶⁸ Panel Report on *EC – Hormones (Canada)*, para. 8.32; Panel Report on *EC – Hormones (US)*, para. 8.29.

²⁶⁹ Panel Report on *EC – Hormones (Canada)*, para. 8.45; Panel Report on *EC – Hormones (US)*, para. 8.42.

²⁷⁰ Panel Report on *EC – Hormones (Canada)*, para. 8.275. The Panel on *EC – Hormones (US)* exercised judicial economy with respect to the US claim under Articles I and III. Panel Report on *EC – Hormones (US)*, para. 8.272.

²⁷¹ Panel Report on *Australia – Salmon*, para. 8.185. With respect to judicial economy in general, see Chapter on *DSU*, paras. Section XXXVI.F.

3. Article XX(b)

210. In *EC – Hormones*, the European Communities submitted that “the ‘substantive’ provisions of the *SPS Agreement* can only be addressed if recourse is made to GATT Article XX(b), *i.e.*, if, and only if, a violation of another provision of GATT is first established”. The Panel, in a finding not addressed by the Appellate Body, rejected this argument, indicating as follows:

“According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade. There are no additional requirements. The *SPS Agreement* contains, in particular, no explicit requirement of a prior violation of a provision of GATT which would govern the applicability of the *SPS Agreement*, as asserted by the European Communities.”²⁷²

211. The Panel on *EC – Hormones* then added, with respect to the relationship between the *SPS Agreement* and Article XX(b) of the *GATT 1994*, that “[m]any provisions of the *SPS Agreement* impose ‘substantive’ obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b)”:

“[W]e find the EC claim that the *SPS Agreement* does not impose ‘substantive’ obligations additional to those already contained in Article XX(b) of GATT not to be persuasive. It is clear that some provisions of the *SPS Agreement* elaborate on provisions already contained in GATT, in particular Article XX(b). The final preambular paragraph of the *SPS Agreement* provides, indeed, that the Members desired ‘to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)’. Examples of such rules are, arguably, some of the obligations contained in Article 2 of the *SPS Agreement*. However, on this basis alone we cannot conclude that the *SPS Agreement* only applies, as Article XX(b) of GATT does, if, and only if, a prior violation of a GATT provision has been established. Many provisions of the *SPS Agreement* impose ‘substantive’ obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b). These obligations are, *inter alia*, imposed to ‘further the use of harmonized sanitary and phytosanitary measures between Members’²⁷³ and to ‘improve the human health, animal health and phytosanitary situation in all Members’.²⁷⁴ They are not imposed, as is the case of the obligations imposed by Article XX(b) of GATT, to justify a violation of another GATT obligation (such as a violation of the non-discrimination obligations of Articles I or III).”²⁷⁵

212. The Panel on *Australia – Salmon* also dealt with the question whether to address first the provisions of the *GATT 1994* or those of the *SPS Agreement*:

“Canada recognizes that the *SPS Agreement* provides for obligations additional to those contained in GATT 1994, but, nevertheless, first addresses its claim under Article XI of GATT 1994. Australia invokes Article 2.4 of the *SPS Agreement*, which presumes GATT consistency for measures found to be in conformity with the *SPS Agreement*, to first address the *SPS Agreement*. We note, moreover, that (1) the *SPS Agreement* specifically addresses the type of measure in dispute, and (2) we will in any case need to examine the *SPS Agreement*, whether or not we find a GATT violation (since GATT consistency is nowhere presumed to constitute consistency with the *SPS Agreement*). In order to conduct our consideration of this dispute in the most efficient manner, we shall, therefore, first address the claims made by Canada under the *SPS Agreement* before addressing those put forward under GATT 1994.”²⁷⁶

XVI. ANNEX A

A. TEXT OF ANNEX A

ANNEX A DEFINITIONS⁴

(footnote original) ⁴ For the purpose of these definitions, “animal” includes fish and wild fauna; “plant” includes forests and wild flora; “pests” include weeds; and “contaminants” include pesticide and veterinary drug residues and extraneous matter.

1. *Sanitary or phytosanitary measure* – Any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

²⁷² Panel Report on *EC – Hormones (Canada)*, para. 8.39; Panel Report on *EC – Hormones (US)*, para. 8.36.

²⁷³ (footnote original) Preambular para. 6 of the *SPS Agreement*.

²⁷⁴ (footnote original) Preambular para. 2 of the *SPS Agreement*.

²⁷⁵ Panel Report on *EC – Hormones (Canada)*, para. 8.41; Panel Report on *EC – Hormones (US)*, para. 8.38.

²⁷⁶ Panel Report on *Australia – Salmon*, para. 8.39.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. *Harmonization* – The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. *International standards, guidelines and recommendations*

- (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
- (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
- (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
- (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. *Risk assessment* – The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5. *Appropriate level of sanitary or phytosanitary protection* – The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the “acceptable level of risk”.

6. *Pest- or disease-free area* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of or all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. *Area of low pest or disease prevalence* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

B. INTERPRETATION AND APPLICATION OF ANNEX A

1. Relationship between paragraph 1(a) and 1(b) of Annex A

213. In *Australia – Salmon*, the Panel examined whether an Australian prohibition on imports of dead salmon was a “sanitary measure” within the meaning of paragraph 1(b) of Annex A of the *SPS Agreement*. While the definition in paragraph 1(a) of Annex A focuses on measures intended to protect animal or plant life or health from risks arising as a result of pests and diseases, paragraph 1(b) speaks of measures intended to protect human or animal life or health from disease-causing organisms contained in food, beverages or feedstuffs. The Panel held:

“In the circumstances at hand, we consider that the definition of a ‘sanitary measure’ in paragraph 1(a) encompasses the coverage sought by Australia under the definition in paragraph 1(b). The definition in paragraph 1(a) deals with risks arising from ‘the entry, establishment or spread of pests, diseases . . . or disease-causing organisms’ in general. In the context of disease-causing organisms, the definition in paragraph 1(b) is limited in the sense that it only addresses risks arising from ‘disease-causing organisms in foods, beverages or feedstuffs’ (hereafter also referred to as food-borne risks). We are of the view that, even though both definitions of a ‘sanitary measure’ invoked by Australia might be applicable to the measure in dispute, the objectives for which that measure is being applied are more appropriately covered by the definition in paragraph 1(a). These objectives have been clearly expressed by Australia on several occasions.”²⁷⁷

²⁷⁷ Panel Report on *Australia – Salmon*, para. 8.34.

214. With respect to the two definitions of risk assessment under paragraph 4, see Section XVI.B.2 below.

2. Paragraph 4: “risk assessment”

(a) General

215. The Panel on *Australia – Salmon (Article 21.5 – Canada)* rejected the interpretation of “risk assessment” put forward by Canada, the complaining party. The Panel held that a requirement that Members assess risk “according to the [sanitary] measures which might be applied” could not be read into the definition of “risk assessment”; rather, the requirement of a linkage between the risk assessment on the one hand, and the final measure and the necessity to use such measure on the other, were to be derived from other provisions of the *SPS Agreement*:

“Canada’s claim . . . raises the question of whether the definition of risk assessment as *such*, requiring Members to assess risk ‘according to the [sanitary] measures which might be applied’, can be construed so as to include the obligation to make the link between the assessment, the measures *finally selected* and the necessity to use these measures in order to achieve the [appropriate level of sanitary or phytosanitary protection]. We find it difficult to read such a requirement into paragraph 4 of Annex A.

In our view, the rights and obligations in respect of these linkages are set out *not* in the definition of risk assessment itself – which logically *precedes* the selection of measures – but, *inter alia*, in the obligation to *base* sanitary measures *on* a risk assessment in Article 5.1 and to ensure that sanitary measures are not more trade-restrictive than required to achieve the [appropriate level of sanitary or phytosanitary protection] in the sense of Article 5.6. To examine these questions of relationship between the risk assessment, the measures selected and the [appropriate level of sanitary or phytosanitary protection] under the definition of risk assessment – as Canada . . . seem[s] to do – would, in our view, run the risk of adding to or diminishing the more specific rights and obligations of Members set out in other SPS obligations, contrary to Article 19.2 of the DSU.

. . . In any event, we prefer to address this question of relationship between the measures selected and the risk assessment under the obligation to *base* measures *on* a risk assessment pursuant to Article 5.1 rather than under the very definition of risk assessment referred to in the same provision.”²⁷⁸

(b) First part of paragraph 4: First definition of risk assessment

(i) Types of risks

216. Referring to the first of the two definitions of “risk assessment” in paragraph 4 of Annex A, the Panel on

Australia – Salmon in a finding with which the Appellate Body later expressly agreed²⁷⁹, considered the two types of risk contained therein:

“Examining the definition of risk assessment applicable to the measure at issue, i.e., the ‘evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences’, we consider, first of all, that the risk thus to be assessed includes (1) the risk of ‘entry, establishment or spread’ of a disease and (2) the risk of the ‘associated potential biological and economic consequences’. When we refer hereafter to the risk related to a disease, this risk thus includes the risk of entry, establishment or spread of that disease as well as the biological and economic consequences associated therewith.

. . .

In this dispute, the measure at issue is intended to protect animal health as a sanitary measure defined in paragraph 1(a) of Annex A and is to be based on a risk assessment in the sense of the first definition in paragraph 4 of Annex A. According to this first definition in paragraph 4, such risk assessment has to take into account risks arising not only from the ‘entry, establishment or spread of a pest or disease’, but also from the ‘associated biological and economic consequences’.”²⁸⁰

(ii) Elements of a “risk assessment”

217. On the three aspects of a risk assessment, see paragraph 103 above.

(iii) Identifying risk on a disease-specific basis

218. The Panel on *Australia – Salmon* stated that where several diseases were involved in the risk assessment, such risk assessment at least had to identify risk on a disease-specific basis. The Panel also referred to the Appellate Body’s findings in *EC – Hormones*:

“[G]iven the definition of risk assessment applicable in this case (the ‘evaluation of the likelihood of entry, establishment or spread of a . . . disease’, in the singular form), a risk assessment for the measure at issue in this dispute at least has to *identify* risk on a disease specific basis, i.e., it has to identify the risk for any given disease of concern separately, not simply address the overall risk related to the combination of all diseases of concern. . . . The experts advising the Panel on this issue confirmed this. In the *EC – Hormones* case as well, both the panels and the Appellate Body required some degree of specificity for a risk assessment – or a study or report allegedly part

²⁷⁸ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.68–7.70.

²⁷⁹ Appellate Body Report on *Australia – Salmon*, para. 120.

²⁸⁰ Panel Report on *Australia – Salmon*, paras. 8.72 and 8.116.

thereof – to be in accordance with the requirements imposed in Article 5.1.”²⁸¹

(iv) “likelihood”

219. In *Australia – Salmon*, the Appellate Body recalled its finding in *EC – Hormones* where it had distinguished between the terms “potential” and “probability”. Finding that the term “likelihood” was synonymous with the term “probability”, the Appellate Body disagreed with the Panel’s finding that a risk assessment required only *some* evaluation of likelihood or probability:

“We note that the first definition in paragraph 4 of Annex A speaks about the evaluation of ‘likelihood.’ In our report in *European Communities – Hormones*, we referred to the dictionary meaning of ‘probability’ as ‘degrees of likelihood’ and ‘a thing that is judged likely to be true’, for the purpose of distinguishing the terms ‘potential’ and ‘probability’. For the present purpose, we refer in the same manner to the ordinary meaning of ‘likelihood’, and we consider that it has the same meaning as ‘probability’. On this basis, as well as on the basis of the definition of ‘risk’ and ‘risk assessment’ developed by the Office international des épizooties (‘OIE’) and the OIE *Guidelines for Risk Assessment*, we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the ‘likelihood’, i.e., the ‘probability’, of entry, establishment or spread of diseases and associated biological and economic consequences as well as the ‘likelihood’, i.e., ‘probability’, of entry, establishment or spread of diseases *according to the SPS measures which might be applied*.”

We note that, although the Panel stated that the definition of a risk assessment for this type of measure requires an ‘evaluation of the likelihood’, for the purpose of satisfying the second and third requirements, it subsequently was hesitant in applying these requirements, by stating or suggesting in paragraphs 8.80, 8.83, 8.89 and 8.91, that *some* evaluation of the likelihood or probability would suffice. We consider this hesitation unfortunate. We do not agree with the Panel that a risk assessment of this type needs only *some* evaluation of the likelihood or probability. The definition of this type of risk assessment in paragraph 4 of Annex A refers to ‘the evaluation of the likelihood’ and not to *some* evaluation of the likelihood. We agree, however, with the Panel’s statements in paragraph 8.80 that the *SPS Agreement* does not require that the evaluation of the likelihood needs to be done quantitatively. The likelihood may be expressed either quantitatively or qualitatively. Furthermore, we recall, as does the Panel, that we stated in *European Communities – Hormones* that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk.”²⁸²

The Panel in *Japan – Apples* recalled the Appellate Body’s finding in *EC – Hormones* that the evaluation of likelihood involves more than a mere identification of ‘possibilities’ and requires an assessment of *probability* of entry, which implies a higher degree or a ‘threshold of potentiality or possibility’. The Panel further added that such probability need not be expressed in quantitative terms, but may be expressed in qualitative terms.”²⁸³

(v) “according to . . . which might be applied”

220. Regarding the requirement to evaluate the likelihood of entry, establishment or spread of the diseases according to the SPS measures which might be applied, the Appellate Body on *Japan – Apples* agreed with the Panel and found that the phrase ‘according to the . . . which might be applied’ implies that a risk assessment should not be limited to an examination of the measure already in place:

“[A]ccording to the Panel, the terms in the definition of ‘risk assessment’ set out in paragraph 4 of Annex A to the *SPS Agreement* – more specifically, the phrase ‘according to the sanitary or phytosanitary measures which might be applied’ – suggest that ‘consideration should be given not just to those specific measures which are currently in application, but at least to a potential range of relevant measures.’”²⁸⁴ . . .

The definition of ‘risk assessment’ in the *SPS Agreement* requires that the evaluation of the entry, establishment or spread of a disease be conducted ‘according to the sanitary or phytosanitary measure which might be applied.’ We agree with the Panel that this phrase ‘refers to the measures *which might* be applied, not merely to the measures which *are being* applied.’²⁸⁵ The phrase ‘which might be applied’ is used in the conditional tense. In this sense, ‘might’ means: ‘were or would be or have been able to, were or would be or have been allowed to, were or would perhaps’.²⁸⁶ We understand this phrase to imply that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing Member. In other words, the evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconditioned views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*.”²⁸⁷

²⁸¹ Panel Report on *Australia – Salmon*, para. 8.74.

²⁸² Appellate Body Report on *Australia – Salmon*, paras. 123–124.

²⁸³ Panel Report on *Japan – Apples*, para. 8.273, referring to Appellate Body Report in *EC – Hormones*, para. 184.

²⁸⁴ (footnote original) Panel Report, para. 8.285.

²⁸⁵ (footnote original) Panel Report, para. 8.283. (original italics)

²⁸⁶ (footnote original) *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1725.

²⁸⁷ Appellate Body Report on *Japan – Apples*, paras. 207–208.

- (vi) “*Evaluation of likelihood of entry, establishment or spread of a pest or disease . . .*”

Risk assessment to be specific about the product at issue

221. In *Japan – Apples*, the Appellate Body upheld the Panel’s finding that Japan’s risk assessment did not evaluate the likelihood of entry, establishment or spread of fire blight because its risk assessment was not specific enough about the product at issue – apple fruit:

“[U]nder the *SPS Agreement*, the obligation to conduct an assessment of ‘risk’ is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a phytosanitary measure.²⁸⁸ The Appellate Body found the risk assessment at issue in *EC – Hormones* not to be ‘sufficiently specific’ even though the scientific articles cited by the importing Member had evaluated the ‘carcinogenic potential of entire categories of hormones, or of the hormones at issue in general.’²⁸⁹ In order to constitute a ‘risk assessment’ as defined in the *SPS Agreement*, the Appellate Body concluded, the risk assessment should have reviewed the carcinogenic potential, not of the relevant hormones in general, but of ‘residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes’.²⁹⁰ Therefore, when discussing the risk to be specified in the risk assessment in *EC – Hormone*, the Appellate Body referred in general to the harm concerned (cancer or genetic damage) as well as to the precise agent that may possibly cause the harm (that is, the specific hormones when used in a specific manner and for specific purposes).

In this case, the Panel found that the conclusion of the 1999 PRA with respect to fire blight was ‘based on an overall assessment of possible modes of contamination, where apple fruit is only one of the possible hosts/vectors considered.’²⁹¹ . . . Given that the measure at issue relates to the risk of transmission of fire blight through apple fruit, in an evaluation of whether the risk assessment is ‘sufficiently specific to the case at hand’²⁹², the nature of the risk addressed by the measure at issue is a factor to be taken into account. In light of these considerations, we are of the view that the Panel properly determined that the 1999 PRA ‘evaluat[ion of] the risks associated with all possible hosts taken together’²⁹³ was not sufficiently specific to qualify as a ‘risk assessment’ under the *SPS Agreement* for the evaluation of the likelihood of entry, establishment or spread of fire blight in Japan through apple fruit.²⁹⁴

- (c) Second part of paragraph 4: Second definition of risk assessment

- (i) General

222. With respect to the second definition of “risk assessment” contained in paragraph 4 of Annex A, the

Appellate Body on *Australia – Salmon* noted that while the first definition speaks of “likelihood”, the second definition speaks of “potential” for adverse effects:

“We note that the first type of risk assessment in paragraph 4 of Annex A is substantially different from the second type of risk assessment contained in the same paragraph. While the second requires only the evaluation of the *potential* for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the *likelihood* of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences. In view of the very different language used in paragraph 4 of Annex A for the two types of risk assessment, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments, as the European Communities seems to suggest when it argues that ‘the object, purpose and context of the *SPS Agreement* indicate that no greater level of probability can have been intended for the first type of risk assessment than for the second type, [as b]oth types can apply both to human life or health and to animal or plant life or health’. (Third participant’s submission of the European Communities, para. 7).”²⁹⁵

- (ii) Methodology of risk assessment

Two-step analysis

223. In *EC – Hormones*, with respect to the methodology for a risk assessment under the second definition of paragraph 4 of Annex A of the *SPS Agreement*, the Panels stated that “in this dispute, a risk assessment carried out in accordance with the *SPS Agreement* should (i) *identify the adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat or meat products*, and (ii) if any such adverse effects exist, *evaluate the potential or probability of occurrence of these effects*.”²⁹⁶ The Appellate Body did not disagree with the Panels’ finding

²⁸⁸ (footnote original) Indeed, we are of the view that, as a general matter, “risk” cannot usually be understood only in terms of the disease or adverse effects that may result. Rather, an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause. For example, the abstract reference to the “risk of cancer” has no significance, in and of itself, under the *SPS Agreement*; but when one refers to the “risk of cancer from smoking cigarettes”, the particular risk is given content.

²⁸⁹ (footnote original) Appellate Body Report, para. 199. (original italics) In other words, the risk assessment proffered by the importing Member in *EC – Hormones* considered the relationship between the broad *grouping* of hormones that were the subject of the measure and cancer.

²⁹⁰ (footnote original) Appellate Body Report, para. 200.

²⁹¹ (footnote original) Panel Report, para. 8.270.

²⁹² (footnote original) Appellate Body Report, para. 7.14.

²⁹³ (footnote original) Panel Report, para. 7.14.

²⁹⁴ Appellate Body Report on *Japan – Apples*, paras. 202–203.

²⁹⁵ Appellate Body Report on *Australia – Salmon*, fn. 69.

²⁹⁶ Panel Report on *EC – Hormones (Canada)*, para. 8.101; Panel Report on *EC – Hormones (US)*, para. 8.98.

but cautioned against equating the terms “potential” and “probability”:

“Although the utility of a two-step analysis may be debated, it does not appear to us to be substantially wrong. What needs to be pointed out at this stage is that the Panel’s use of ‘probability’ as an alternative term for ‘potential’ creates a significant concern. The ordinary meaning of ‘potential’ relates to ‘possibility’ and is different from the ordinary meaning of ‘probability’. ‘Probability’ implies a higher degree or a threshold of potentiality or possibility. It thus appears that here the Panel introduces a quantitative dimension to the notion of risk.”²⁹⁷

Specific attribution of risk

224. While the Appellate Body on *Japan – Apples* agreed with Japan that whether to analyse the risk on the basis of the particular pest or disease, or on the basis of a particular commodity, is a “matter of methodology” that lies within the discretion of the importing Member, it found that the Panel’s reading of *EC – Hormones* did not suggest, as Japan had argued, that there was an obligation to follow any particular methodology in conducting a risk assessment. The Appellate Body further elaborated that Members are free to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attributes a likelihood of entry, establishment or spread of the disease to each agent specifically:

“Japan contends that the “methodology” of the risk assessment is not directly addressed by the *SPS Agreement*. In particular, Japan suggests that, whether to analyze the risk on the basis of the particular pest or disease, or on the basis of a particular commodity, is a ‘matter of methodology’ not directly addressed by the *SPS Agreement*.²⁹⁸ We agree. Contrary to Japan’s submission, however, the Panel’s reading of *EC – Hormones* does not suggest that there is an obligation to follow any particular methodology for conducting a risk assessment. In other words, even though, in a given context, a risk assessment must consider a specific agent or pathway through which contamination might occur, Members are not precluded from organizing their risk assessments along the lines of the disease or pest at issue, or of the commodity to be imported. Thus, Members are free to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attribute a likelihood of entry, establishment or spread of the disease to each agent specifically. Members are also free to follow the other ‘methodology’ identified by Japan and focus on a particular commodity, subject to the same proviso.”²⁹⁹

XVII. ANNEX B

A. TEXT OF ANNEX B

ANNEX B

TRANSPARENCY OF SANITARY AND PHYTOSANITARY REGULATIONS

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

(footnote original) ⁵ Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

- (a) any sanitary or phytosanitary regulations adopted or proposed within its territory;
- (b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;
- (c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;
- (d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals⁶ of the Member concerned.

(footnote original) ⁶ When “nationals” are referred to in this Agreement, the term shall be deemed, in the case of a separate

²⁹⁷ Appellate Body Report on *EC – Hormones*, para. 184.

²⁹⁸ Japan’s appellant’s submission, paras. 127–128.

²⁹⁹ Appellate Body Report on *Japan – Apples*, para. 204.

customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

- (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
- (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
- (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
- (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

- (a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
- (b) provides, upon request, copies of the regulation to other Members;
- (c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in

case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

- (a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or
- (b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

B. INTERPRETATION AND APPLICATION OF ANNEX B

1. Paragraphs 1 and 2: Publication requirements

225. In *Japan – Agricultural Products II*, with reference to the footnote to paragraph 1 of Annex B, the Appellate Body held that the list of instruments contained therein was not exhaustive in nature and referred to the object and purpose of paragraph 1 of Annex B:

“We consider that the list of instruments contained in the footnote to paragraph 1 of Annex B is, as is indicated by the words ‘such as’, not exhaustive in nature. The scope of application of the publication requirement is not limited to ‘laws, decrees or ordinances’, but also includes, in our opinion, other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.

The object and purpose of paragraph 1 of Annex B is ‘to enable interested Members to become acquainted with’ the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.

We note that it is undisputed that the varietal testing requirement is applicable generally. Furthermore, we consider in the light of the actual impact of the varietal testing requirement on exporting countries, as discussed by the Panel in paragraphs 8.112 and 8.113 of the Panel Report, that this instrument is of a character similar to laws, decrees and ordinances, the instruments explicitly referred to in the footnote to paragraph 1 of Annex B.³⁰⁰

2. Paragraph 2: “reasonable interval”

226. At the Doha Ministerial conference, Members decided that the “reasonable interval” in respect of paragraph 2 should normally be understood as a period of not less than six months:

“Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase “reasonable interval” shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed.”³⁰¹

3. Paragraph 3: Enquiry points

227. The Panel on *Australia – Salmon* found that there was no obligation under the *SPS Agreement* for a Member to positively identify its chosen appropriate level of protection. In the context of this finding, the Panel held that paragraph 3 of Annex B did not impose a “substantive obligation on Members to identify or quantify their appropriate level of protection”, but rather merely a “mainly procedural obligation to provide ‘answers to all reasonable questions from all interested Members’”.³⁰² The Appellate Body reversed the Panel’s finding and held that there was such an – albeit implicit – obligation, *inter alia*, in paragraph 3 of Annex B.³⁰³

(a) Paragraph 3(d)

228. In relation to the reinforcement of the transparency obligation of the agreements on equivalence between Members, see paragraph 179 above.

4. Paragraph 5: Conditions for notification requirements

229. The Panel on *Japan – Apples* found that, in determining whether any changes in Members’ SPS measures constitute changes that must be notified under Article 7, the most important factor is “whether the change affects the conditions of market access for the product concerned, that is, would the exported product still be

permitted to enter [the market (Japan in this case)] if they complied with the prescription contained in the previous regulations³⁰⁴” under the chapeau of paragraph 5 of Annex B. The Panel considered that if that was not the case, then they should decide whether the change could be considered to potentially have a *significant* effect on the trade of other Members. In this connection, the Panel further held that the party making an allegation must establish a *prima facie* case by specifying, through sufficient evidence, in what respect any changes in SPS regulations departed from previous ones:

“It is not disputed that the present situation is one where ‘an international standard, guideline or recommendation does not exist [regarding *E. amylovora*] or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation’. Therefore, we must determine whether the changes identified above constitute changes which are required to be notified under Article 7 because, *inter alia*, they ‘may have a significant effect on trade of other Members’ in the context of the chapeau to Paragraph 5 of Annex B.

We consider that the most important factor in this regard is whether the change affects the conditions of market access for the product concerned, that is, would the exported product (apple fruit from the United States in this case) still be permitted to enter Japan if they complied with the prescription contained in the previous regulations.³⁰⁵ If this is not the case, then we must consider whether the change could be considered to potentially have a *significant* effect on trade of other Members. In this regard, it would be relevant to consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time-consuming administrative formalities.

... We recall that, in *EC – Hormones*, the Appellate Body noted that

‘... Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its

³⁰⁰ Appellate Body Report on *Japan – Agricultural Products II*, paras. 105–107.

³⁰¹ WT/MIN(01)/17, para. 3.2.

³⁰² Panel Report on *Australia – Salmon*, para. 7.15.

³⁰³ Appellate Body Report on *Australia – Salmon*, para. 205.

³⁰⁴ (*footnote original*) This approach is in line with the discussion of the concept of “significant effect on trade of other Members” in the notification procedures adopted and revised by the SPS Committee G/SPS/7/Rev.2, para. 7).

³⁰⁵ This approach is in line with the discussion of the concept of “significant effect on trade of other Members” in the notification procedures adopted and revised by the SPS Committee G/SPS/7/Rev.2, para. 7).

own findings and conclusions on the matter under its consideration.’

However, the Appellate Body clarified in *Korea – Dairy* that ‘[B]oth “claims” and “arguments” are distinct from the “evidence” which the complainant or respondent presents to support its assertions of facts and arguments’.³⁰⁶ We note in this regard that the party making an allegation must provide sufficient evidence in support of this allegation, and that a panel should not entertain a claim for which a prima facie case has not been made.³⁰⁷ In the present case, the United States has effectively argued that Japan had substantially changed its fire blight measures since the entry into force of the *SPS Agreement*. However, the United States limited its argumentation to mention that new regulations had been implemented and to attach translations of the regulations to its first written submission. It did not specify in what respect these new regulations departed from the previous ones.

Indeed, either the United States knows in which respect the 1997 texts differ from the ones they replace – in which case it could and should have mentioned it in its submissions – or it does not, in which case it cannot be deemed to have established a prima facie case. In either situation, for the Panel to examine the regulations at issue to identify differences would be equivalent to ‘making a case’ for the United States, something we are not allowed to do. For these reasons we conclude that the United States did not establish a prima facie case in relation to the violation of Article 7 and Annex B of the *SPS Agreement*.³⁰⁸

XVIII. ANNEX C

A. TEXT OF ANNEX C

ANNEX C *CONTROL, INSPECTION AND APPROVAL* *PROCEDURES*⁷

(footnote original)⁷ Control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification.

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

- (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
- (b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documenta-

tion and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

- (c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;
- (d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;
- (e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;
- (f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;
- (g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;
- (h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and
- (i) a procedure exists to review complaints concerning the operation of such procedures and

³⁰⁶ Appellate Body in *Korea – Dairy*, para. 139.

³⁰⁷ (footnote original) Appellate Body Report in *Japan – Agricultural Products II*, para.126.

³⁰⁸ Panel Report on *Japan – Apples*, paras. 8.314–8–318.

to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.

B. INTERPRETATION AND APPLICATION OF ANNEX C

1. Paragraph 1(c)

230. In *Australia – Salmon (Article 21.5 – Canada)*, Canada claimed a violation of paragraph 1(c) of Annex C by Australia. The Panel noted that only “procedures to check and ensure the fulfilment of sanitary or phytosanitary measures” fall under the scope of paragraph 1(c) of Annex C. It also considered that the Australian requirements referred to by Canada were “substantive sanitary measures in their own right” and not “procedures to check and ensure the fulfilment of sanitary or phytosanitary measures”. The Panel thus concluded that no violation of paragraph 1(c) could be found.³⁰⁹

³⁰⁹ Panel Report on *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.154–7.157.

Agreement on Textiles and Clothing

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Recalling that Ministers agreed at Punta del Este that "negotiations in the area of textiles and clothing

shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalization of trade";

Recalling also that in the April 1989 Decision of the Trade Negotiations Committee it was agreed that the process of integration should commence following the conclusion of the Uruguay Round of Multilateral Trade Negotiations and should be progressive in character;

Recalling further that it was agreed that special treatment should be accorded to the least-developed country Members;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

1. This Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994.

2. Members agree to use the provisions of paragraph 18 of Article 2 and paragraph 6(b) of Article 6 in such a way as to permit meaningful increases in access possibilities for small suppliers and the development of commercially significant trading opportunities for new entrants in the field of textiles and clothing trade.¹

(footnote original) ¹ To the extent possible, exports from a least-developed country Member may also benefit from this provision.

3. Members shall have due regard to the situation of those Members which have not accepted the Protocols extending the Arrangement Regarding International Trade in Textiles (referred to in this Agreement as the "MFA") since 1986 and, to the extent possible, shall afford them special treatment in applying the provisions of this Agreement.

4. Members agree that the particular interests of the cotton-producing exporting Members should, in consultation with them, be reflected in the implementation of the provisions of this Agreement.

5. In order to facilitate the integration of the textiles and clothing sector into GATT 1994, Members should allow for continuous autonomous industrial adjustment and increased competition in their markets.

6. Unless otherwise provided in this Agreement, its provisions shall not affect the rights and obligations of

Members under the provisions of the WTO Agreement and the Multilateral Trade Agreements.

7. The textile and clothing products to which this Agreement applies are set out in the Annex.¹

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

1. The Panel on *US – Underwear* examined whether a certain transitional safeguard measure imposed by the United States was consistent with Article 6. In so doing, the Panel referred to Article 1 in explaining the overall purpose of the *Agreement on Textiles and Clothing (ATC)*:

“[T]he overall purpose of the ATC is to integrate the textiles and clothing sector into GATT 1994. Article 1 of the ATC makes this point clear. To this effect, the ATC requires notification of all existing quantitative restrictions (Article 2 of the ATC) and provides that they will have to be terminated by the year 2004 (Article 9 of the ATC).”²

2. Article 1.2

(a) “meaningful increases in access possibilities for small suppliers”

2. See the excerpt from the TMB’s comprehensive report to the Council for Trade in Goods on the implementation of the *ATC* during the first stage of the integration process (the “Implementation Report”), referenced in paragraph 23 below.

(b) Footnote 1 to Article 1

3. In its Implementation Report, the TMB stated:

“[T]he TMB recalls the particular importance of a full and faithful implementation of the provisions of the ATC in favour of least-developed country Members, [...] and invites Members to examine the possibilities for providing, whenever possible, substantially increased market access opportunities for the textile and clothing products of the least-developed country Members. In such cases, the TMB expects that it will be notified accordingly.”³

3. Article 1.4

4. In the Implementation Report, the TMB noted, *inter alia*, that Members have different perceptions on how the interests of cotton-producing exporting Members should be reflected in the implementation of the provisions of the *ATC*. The TMB thus encouraged Members to have consultations in order to clarify implementation issues related to Article 1.4:

“[I]t appears to the TMB that Members have different perceptions on how the particular interests of the

cotton-producing exporting Members should be – and were – reflected in the implementation of the provisions of the *ATC*. The TMB notes in this respect that the Members maintaining restrictions under Article 2 had stated that they were prepared to have consultations on this matter with the Members concerned. The TMB encourages interested Members to enter into consultations with a view to clarifying the issues related to the implementation of Article 1.4. The TMB also recalls in this regard that, should the need arise, the provisions of Article 8.4 are available for this purpose.”⁴

4. Article 1.5

5. The TMB’s Implementation Report contains, *inter alia*, the following statement on the implementation of the integration provisions of the *ATC* with reference to Article 1.5:

“One preoccupation of the TMB is how the implementation of the integration provisions of the *ATC* has ensured the full and faithful implementation of the *ATC* within the time-frames established therein. In the view of the TMB, one of the conditions of such an implementation is a steady progress in terms of structural adjustment and, also, as a result of this, an increased competition in the Members’ markets. This interrelation is recognized by Article 1.5.

...

[T]he TMB does not have information or empirical evidence regarding what has been the progress and accomplishment in terms of increasing the competition and implementing autonomous industrial adjustment. The TMB believes that it would be useful to have a better appreciation of the progress and trends of autonomous industrial adjustment, as foreseen in Article 1.5.”⁵

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

1. All quantitative restrictions within bilateral agreements maintained under Article 4 or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement shall, within 60 days following such entry into force, be notified in detail, including the restraint levels, growth rates and flexibility provisions, by the Members maintaining such restrictions to the Textiles Monitoring Body provided for in Article 8 (referred to in this Agreement as the “TMB”). Members agree that as of the date of entry into force of the WTO

¹ With respect to the Annex, see Section XI. (The list of textile and clothing products is omitted).

² Panel Report on *US – Underwear*, para. 7.19.

³ G/L/179, para. 308.

⁴ G/L/179, para. 316.

⁵ G/L/179, paras. 74 and 77.

Agreement, all such restrictions maintained between GATT 1947 contracting parties, and in place on the day before such entry into force, shall be governed by the provisions of this Agreement.

2. The TMB shall circulate these notifications to all Members for their information. It is open to any Member to bring to the attention of the TMB, within 60 days of the circulation of the notifications, any observations it deems appropriate with regard to such notifications. Such observations shall be circulated to the other Members for their information. The TMB may make recommendations, as appropriate, to the Members concerned.

3. When the 12-month period of restrictions to be notified under paragraph 1 does not coincide with the 12-month period immediately preceding the date of entry into force of the WTO Agreement, the Members concerned should mutually agree on arrangements to bring the period of restrictions into line with the agreement year², and to establish notional base levels of such restrictions in order to implement the provisions of this Article. Concerned Members agree to enter into consultations promptly upon request with a view to reaching such mutual agreement. Any such arrangements shall take into account, *inter alia*, seasonal patterns of shipments in recent years. The results of these consultations shall be notified to the TMB, which shall make such recommendations as it deems appropriate to the Members concerned.

(*footnote original*)² The "agreement year" is defined to mean a 12-month period beginning from the date of entry into force of the WTO Agreement and at the subsequent 12-month intervals.

4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.³ Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith.

(*footnote original*)³ The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.

5. Any unilateral measure taken under Article 3 of the MFA prior to the date of entry into force of the WTO Agreement may remain in effect for the duration specified therein, but not exceeding 12 months, if it has been reviewed by the Textiles Surveillance Body (referred to in this Agreement as the "TSB") established under the MFA. Should the TSB not have had the opportunity to review any such unilateral measure, it shall be reviewed by the TMB in accordance with the rules and procedures governing Article 3 measures under the MFA. Any measure applied under an MFA Article 4 agreement prior to

the date of entry into force of the WTO Agreement that is the subject of a dispute which the TSB has not had the opportunity to review shall also be reviewed by the TMB in accordance with the MFA rules and procedures applicable for such a review.

6. On the date of entry into force of the WTO Agreement, each Member shall integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports of the products in the Annex, in terms of HS lines or categories. The products to be integrated shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing.⁶

7. Full details of the actions to be taken pursuant to paragraph 6 shall be notified by the Members concerned according to the following:

- (a) Members maintaining restrictions falling under paragraph 1 undertake, notwithstanding the date of entry into force of the WTO Agreement, to notify such details to the GATT Secretariat not later than the date determined by the Ministerial Decision of 15 April 1994. The GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the TMB, when established, for the purposes of paragraph 21;
- (b) Members which have, pursuant to paragraph 1 of Article 6, retained the right to use the provisions of Article 6, shall notify such details to the TMB not later than 60 days following the date of entry into force of the WTO Agreement, or, in the case of those Members covered by paragraph 3 of Article 1, not later than at the end of the 12th month that the WTO Agreement is in effect. The TMB shall circulate these notifications to the other Members for information and review them as provided in paragraph 21.

8. The remaining products, i.e. the products not integrated into GATT 1994 under paragraph 6, shall be integrated, in terms of HS lines or categories, in three stages, as follows:

- (a) on the first day of the 37th month that the WTO Agreement is in effect, products which

⁶ With respect to Article 2.6, in Marrakesh, the Ministerial Conference took the following Decision on Notification of First Integration under Article 2.6 of the ATC:

"Ministers agree that the participants maintaining restrictions falling under paragraph 1 of Article 2 of the Agreement on Textiles and Clothing shall notify full details of the actions to be taken pursuant to paragraph 6 of Article 2 of that Agreement to the GATT Secretariat not later than 1 October 1994. The GATT Secretariat shall promptly circulate these notifications to the other participants for information. These notifications will be made available to the Textiles Monitoring Body, when established, for the purposes of paragraph 21 of Article 2 of the Agreement on Textiles and Clothing."

accounted for not less than 17 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;

- (b) on the first day of the 85th month that the WTO Agreement is in effect, products which accounted for not less than 18 per cent of the total volume of the Member's 1990 imports of the products in the Annex. The products to be integrated by the Members shall encompass products from each of the following four groups: tops and yarns, fabrics, made-up textile products, and clothing;
- (c) on the first day of the 121st month that the WTO Agreement is in effect, the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this Agreement having been eliminated.

9. Members which have notified, pursuant to paragraph 1 of Article 6, their intention not to retain the right to use the provisions of Article 6 shall, for the purposes of this Agreement, be deemed to have integrated their textiles and clothing products into GATT 1994. Such Members shall, therefore, be exempted from complying with the provisions of paragraphs 6 to 8 and 11.

10. Nothing in this Agreement shall prevent a Member which has submitted an integration programme pursuant to paragraph 6 or 8 from integrating products into GATT 1994 earlier than provided for in such a programme. However, any such integration of products shall take effect at the beginning of an agreement year, and details shall be notified to the TMB at least three months prior thereto for circulation to all Members.

11. The respective programmes of integration, in pursuance of paragraph 8, shall be notified in detail to the TMB at least 12 months before their coming into effect, and circulated by the TMB to all Members.

12. The base levels of the restrictions on the remaining products, mentioned in paragraph 8, shall be the restraint levels referred to in paragraph 1.

13. During Stage 1 of this Agreement (from the date of entry into force of the WTO Agreement to the 36th month that it is in effect, inclusive) the level of each restriction under MFA bilateral agreements in force for the 12-month period prior to the date of entry into force of the WTO Agreement shall be increased annually by not less than the growth rate established for the respective restrictions, increased by 16 per cent.

14. Except where the Council for Trade in Goods or the Dispute Settlement Body decides otherwise under paragraph 12 of Article 8, the level of each remaining restric-

tion shall be increased annually during subsequent stages of this Agreement by not less than the following:

- (a) for Stage 2 (from the 37th to the 84th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 1, increased by 25 per cent;
- (b) for Stage 3 (from the 85th to the 120th month that the WTO Agreement is in effect, inclusive), the growth rate for the respective restrictions during Stage 2, increased by 27 per cent.

15. Nothing in this Agreement shall prevent a Member from eliminating any restriction maintained pursuant to this Article, effective at the beginning of any agreement year during the transition period, provided the exporting Member concerned and the TMB are notified at least three months prior to the elimination coming into effect. The period for prior notification may be shortened to 30 days with the agreement of the restrained Member. The TMB shall circulate such notifications to all Members. In considering the elimination of restrictions as envisaged in this paragraph, the Members concerned shall take into account the treatment of similar exports from other Members.

16. Flexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this Article, shall be the same as those provided for in MFA bilateral agreements for the 12-month period prior to the entry into force of the WTO Agreement. No quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward.

17. Administrative arrangements, as deemed necessary in relation to the implementation of any provision of this Article, shall be a matter for agreement between the Members concerned. Any such arrangements shall be notified to the TMB.

18. As regards those Members whose exports are subject to restrictions on the day before the entry into force of the WTO Agreement and whose restrictions represent 1.2 per cent or less of the total volume of the restrictions applied by an importing Member as of 31 December 1991 and notified under this Article, meaningful improvement in access for their exports shall be provided, at the entry into force of the WTO Agreement and for the duration of this Agreement, through advancement by one stage of the growth rates set out in paragraphs 13 and 14, or through at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions. Such improvements shall be notified to the TMB.

19. In any case, during the duration of this Agreement, in which a safeguard measure is initiated by a Member under Article XIX of GATT 1994 in respect of a particular product during a period of one year immediately following the integration of that product into GATT 1994 in accordance with the provisions of this Article, the pro-

visions of Article XIX, as interpreted by the Agreement on Safeguards, will apply, save as set out in paragraph 20.

20. Where such a measure is applied using non-tariff means, the importing Member concerned shall apply the measure in a manner as set forth in paragraph 2(d) of Article XIII of GATT 1994 at the request of any exporting Member whose exports of such products were subject to restrictions under this Agreement at any time in the one-year period immediately prior to the initiation of the safeguard measure. The exporting Member concerned shall administer such a measure. The applicable level shall not reduce the relevant exports below the level of a recent representative period, which shall normally be the average of exports from the Member concerned in the last three representative years for which statistics are available. Furthermore, when the safeguard measure is applied for more than one year, the applicable level shall be progressively liberalized at regular intervals during the period of application. In such cases the exporting Member concerned shall not exercise the right of suspending substantially equivalent concessions or other obligations under paragraph 3(a) of Article XIX of GATT 1994.

21. The TMB shall keep under review the implementation of this Article. It shall, at the request of any Member, review any particular matter with reference to the implementation of the provisions of this Article. It shall make appropriate recommendations or findings within 30 days to the Member or Members concerned, after inviting the participation of such Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

6. At its meeting in December 1999, the TMB addressed the concern expressed by a number of Members that the United States had introduced a new restraint measure on exports of certain products from Turkey. The measure was published under the United States domestic procedures, but not notified to the TMB, since, according to the United States and Turkey, it “was taken pursuant to a provision of the ATC which does not require notification to the TMB”.⁷ The TMB “examine[d] briefly all the provisions of the ATC with a view to identifying under which provision such a measure could have been agreed without requiring its notification to the TMB”, stating as follows:

“Furthermore, restrictions maintained under Article 2 had to be notified, in detail, within 60 days following the entry into force of the WTO Agreement. A measure that had not been notified at all, obviously could not fall under the provisions of Article 2. Article 2.4 for its part states, *inter alia*, that ‘[n]o new restrictions in terms of products or Members shall be introduced except under

the provisions of this Agreement or relevant GATT 1994 provisions’, but no provision under Article 2 provides the possibility of introducing new restrictions. The TMB noted, therefore, that the particular measure subject to its examination could not have been taken pursuant to Article 2.”⁸

2. Article 2.1

7. In *Turkey – Textiles*, the Panel established that the notification requirement related to MFA restrictions set out in Article 2.1 which required that such notification should be made within 60 days following the entry into force of the WTO Agreement is mandatory. The Panel noted that all Members that maintained MFA-derived restrictions upon the entry into force of the WTO Agreement, and were accordingly vested the maintenance of that right under the ATC, had notified the maintained restrictions to the TMB:

“The lists of restrictions notified pursuant to Article 2.1 set the starting point for the treatment of the restraints carried over from the former MFA regime. Four WTO Members notified the TMB pursuant to Article 2.1 of the ATC: Canada, the European Communities, Norway and the United States. We consider that the notification requirement of 60 days referred to in Article 2.1 of the ATC is mandatory both for formal and substantive reasons. The wording of Article 2.1 is unequivocal with the use of the term “shall”. Moreover, since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly.⁹ Stemming from this provision, only the four Members above had the right to and did notify measures which allowed them to maintain MFA-derived quantitative restrictions for a maximum period of 10 years during which import quotas must increase annually until the products they cover are integrated into GATT. In the absence of an exception under the ATC or a justification under GATT, no new quantitative restrictions introduced by a Member can benefit from the exceptions provided for in Article 2.1 of the ATC after this 60 day period.”¹⁰

3. Article 2.4

(a) Jurisprudence

8. In *Turkey – Textiles*, the complainant, India, claimed that Turkey’s increase in restrictions were ‘new’

⁷ G/TMB/R/60, para. 29.

⁸ G/TMB/R/60, para. 30.

⁹ (*footnote original*) See for instance in Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R, (“*Indonesia – Autos*”) (Not appealed), para. 14.92, where the period allowed for notification to the TRIMS Committee under Article 5 of the TRIMS Agreement, in order for a Member to benefit from the transition provisions of the TRIMS Agreement, was considered mandatory.

¹⁰ Panel Report on *Turkey – Textiles*, para. 9.69.

measures and therefore inconsistent with Article 2.4 of the ATC. The Panel held that any increase of an existing restriction was a 'new measure' and hence a violation of Article 2.4:

"The prohibition on 'new restrictions' must be interpreted taking into account the preceding sentence: 'The restrictions notified under paragraph 1 shall be deemed to constitute the *totality of such restrictions* applied by the respective Members on the day before the entry into force of the WTO Agreement'. The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a 'new restriction', would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a 'new' restriction."¹¹

(b) TMB statements

9. In its report of the meeting in December 1999, when examining a new restriction introduced by the United States on Turkey's exports of certain textile products, as part of a broader understanding reached between the two Members, the TMB recalled the content of Article 2.4 of the ATC and concluded that the measure agreed upon by Turkey and the United States had "not been demonstrated to be in conformity with the provisions of the ATC".¹²

"In concluding its examination of the measure mutually agreed between Turkey and the United States, the TMB recalled that Article 2.4 of the ATC states that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions". After having considered the new measure against the different provisions of the ATC on the basis of the information available to it [...], the TMB concluded that the measure agreed upon by Turkey and the United States, affecting imports by the United States of category 352/652 products, had not been demonstrated to be in conformity with the provisions of the ATC."¹³

4. Article 2.6

(a) The issue of "ex-positions"

10. At its meeting in May 1997, the TMB examined a notification by Colombia, on behalf of itself and certain other WTO Members, regarding certain aspects of the European Communities' integration programme noti-

fied under Article 2.6. With respect to the treatment of certain products for which only a respective part (defined as "ex-position" in the Harmonized System) is included in "List of Products covered by this Agreement", the TMB stated as follows:

"The TMB agreed with Colombia that the integration programme of the European Community for the first stage had also included certain imports which did not qualify for integration as they did not fall under the coverage of the ATC, as defined in its Annex. The TMB observed that with respect to a number of HS ex-positions concerned this was not contested by the European Community, which in particular referred to difficulties or the impossibility of providing trade data for these products strictly conforming to the description contained in the Annex to the ATC.

...

Also due to the lack of reliable statistical information, the TMB was not in a position to pronounce itself on the magnitude of the discrepancies which had occurred. It appeared however possible that after necessary corrections, the EC's integration programme could account for less than 16 per cent of the EC's total volume of 1990 imports. The TMB believed that the size of the shortfall, if any, could best be assessed by the importing Member itself.

The TMB, therefore, recommended that the European Community re-examine its first stage integration programme in light of the TMB's comments and findings, [...]. The TMB expected the European Community to report on the results of this examination as rapidly as possible. The TMB agreed that it would keep this matter under review."¹⁴

11. On the issue of "ex-positions", at its meeting in May 1997, the TMB further stated:

"During its review [...] of the notification made by Colombia, [...] alleging certain discrepancies in the programme of integration notified by the European Community under paragraph 6 of Article 2 of the ATC [...], the TMB noted the statement of the EC's representative that several other WTO Members had included in the list of products to be integrated in the first and/or second stages of implementation of the ATC products of those HS lines in the Annex for which only part of the line fell under the coverage of the ATC (indicated as 'ex' HS lines in the Annex).

With regard to the programmes for the first stage of integration which had already been reviewed by the TMB, the Body noted that it had not ascertained whether the statistical information provided by Mem-

¹¹ Panel Report on *Textiles – Turkey*, para. 7.71.

¹² G/TMB/R/60, para. 33.

¹³ G/TMB/R/60, para. 33.

¹⁴ G/TMB/R/29, paras. 39, 41 and 42.

bers referred to the whole HS line or only to that portion of the HS line covered by the ATC. The TMB, therefore, decided to verify with the Members concerned whether the volume of imports they had notified for the "ex HS lines" related precisely to the products described in the Annex.

With respect to the second stage of integration the review of which had not yet been completed by the TMB, the Body decided to pay due regard to these issues."¹⁵

12. Again, on the issue of "ex-positions", at its meeting in July 1997, the TMB concluded that, in principle, all Members that had notified integration programmes could be affected by technical problems due to the non-availability of statistical information in respect to the precise product descriptions included in the Annex to the ATC:

"The TMB had a follow-up discussion on this matter which led to a conclusion according to which, in principle, all the Members which had notified integration programmes may be affected by technical problems resulting essentially from the non-availability of statistical information corresponding to the precise product descriptions contained in the Annex to the ATC, independently of whether or not they had included 'ex HS items' in their respective integration programmes for Stage 1 and/or Stage 2. This resulted from the fact that in quantifying and notifying the total volume of 1990 imports each Member concerned had to include the relevant data related to the 'ex HS lines' defined in the Annex to the ATC. Therefore, the TMB decided to request that all Members which had submitted integration programmes, including those which had not as yet included in such programmes 'ex HS items', ascertain whether the statistical data counted in calculating the total volume of the Member's 1990 imports of the products in the Annex referred to the whole HS lines, or only to that portion of those HS lines which was covered by the ATC. The TMB expected that Members would report to it on the outcome of such verification."¹⁶

13. In its Implementation Report in July 1997, the TMB observed that several integration programmes did not fully meet the particular technical criteria established under Article 2.6, but before examining this data the TMB noted that it had not been possible to provide more accurate data:

"[T]he TMB in some instances took note of integration programmes which, in certain respects, did not fully meet the technical criteria established under Article 2.6. This concerned cases where the data were not available in volume, or for the year 1990, or where the share of integration was calculated relative to data for the textiles and clothing sector as a whole since data for the exact product coverage of the ATC were not available. Prior to

taking note of such notifications, the TMB was assured that no better data could be obtained."¹⁷

5. Article 2.7(b)

14. As regards late notifications, at its meeting in December 1996, the TMB stated:

"With respect to notifications addressed to the TMB after the respective deadlines foreseen in the ATC, the TMB reiterated that its taking note of late notifications was without prejudice to the legal status of such notifications."¹⁸

6. Article 2.8

15. At its meeting in May 1997, in examining the notifications of a number of Members pursuant to Articles 2.8(a) and 2.11, the TMB held:

"With regard to those notifications mentioned above for which the calculation of the share of the products integrated had been made on the basis of value, or of volume of imports of a different base year other than 1990, the TMB ensured that no better data were available and that the Members concerned had followed the same approach as for the notification they had made pursuant to paragraphs 6 and 7(b) of Article 2."¹⁹

7. Article 2.11

16. With respect to the treatment of late notifications, see paragraph 14 above.

8. Articles 2.13 and 2.14

(a) Implementation of the growth-on-growth provisions

17. At its meeting in July 2002, the TMB considered it necessary, in the context of the review of several notifications received pursuant to Articles 2.1 and 2.2, to address the cross-cutting issue of the manner in which the growth-on-growth provisions provided for in Articles 2.13 and 2.14 had to be implemented with respect to recently acceded Members, such as China and Chinese Taipei.²⁰

¹⁵ G/TMB/R/29, paras. 43–45.

¹⁶ G/TMB/R/34, para. 7.

¹⁷ G/L/179, para. 29.

¹⁸ G/TMB/R/22, para. 16. This statement was subsequently repeated on a number of occasions.

¹⁹ G/TMB/R/30, para. 8. At its forty-second (March 1998) and forty-fourth meetings (May 1998), the TMB reiterated the aforesaid position. G/TMB/R/41, para. 28; G/TMB/R/43, para. 5.

²⁰ In order to discharge its responsibilities, the TMB was also required to examine and to reach an understanding on the modalities agreed and guidance provided by Members in the respective legal instruments of accession *vis-à-vis* the implementation of the growth-on-growth provisions of the ATC. Only such a common understanding could provide a basis and serve as a benchmark for the TMB, enabling it to verify if the actual implementation had been effected in compliance with the requirements established by the Members.

18. In relation to China, the TMB noted that the increase in the growth rates should have been ideally implemented on the date of China's accession on 11 December 2001. The TMB observed that the four Members maintaining restrictions on imports from China with reference to Article 2.1 had actually taken into account the growth rates only on 1 January 2002. This raised the issue whether the provisions of the accession instrument allowed for the implementation of the growth-on-growth provisions on 1 January 2002 only:

"In considering this aspect of the subject-matter, the TMB noted that the increase in the respective growth rates, as far as, when applicable, Stage 1 and in any event, Stage 2 were concerned, should have been ideally implemented on 11 December 2001. At the same time, the TMB recalled that it had already accepted that in any possible reading of the third sentence of paragraph 241 of the Working Party report, the term "as appropriate" could (also) be related to the very last part of the sentence which indicated that the respective commitments should be applied "as from the date of China's accession". Based on this flexibility inherent in the formulation, practical considerations could also be raised in support of why an actual implementation starting on 1 January 2002 could be found to be appropriate. In terms of the administration of restraints under the ATC, the beginning of a new calendar year has always been a turning-point, since it represented the start of a new "quota-year", *inter alia*, by establishing the new annual restraint levels, also as a result of the application of the respective annual growth rates. Since the time difference between China's accession and the start of the implementation of the new annual restraint levels for the year 2002 did not exceed three weeks, this delayed actual implementation could be explained by practical administrative considerations and the time-lag could not be considered to be too excessive.

In light of the above considerations, the TMB concluded that though some of the measures in question could have already been implemented as from 11 December 2001, they had to be implemented at latest by 1 January 2002, and this had been done by Canada, the European Communities, Turkey and the United States."²¹

19. The TMB also discussed which increases in the growth rate should apply, i.e. the growth rate increase of 16 per cent in paragraph 13 or the rates in paragraph 14. In the absence of clarity with regard to this issue, the TMB referred to the minimum requirements incumbent on Members:

"[S]ince the relevant provisions of the legal instruments of China's accession did not provide an unambiguous guidance, it was not possible to provide a clear answer to the question of whether the restraining Members had also been required to apply the not less than 16 per cent increase in the respective growth rates, as provided for

in Article 2.13, for the Stage 1 integration process. The lack of a clear answer regarding this aspect had led the TMB to consider those minimum requirements which had to be implemented by the Members concerned. These minimum requirements could be summarized in the following: as from 1 January 2002, the base levels in force on 10 December 2001 had to be increased by the respective growth rates applied for the year 2001 (prior to China's accession), increased by the full 25 per cent applicable to Stage 2 and further increased by the 27 per cent applicable to Stage 3."²² (emphasis original)

20. Concerning Chinese Taipei, the TMB reiterated its holding in its examination of the rights of China with regard to this issue:

"[S]ince the relevant provisions of the legal instruments of Chinese Taipei's accession did not provide unambiguous guidance in this regard, it was not possible to give a clear answer to the question of whether restraining Members had also been required to apply the not less than 16 per cent, followed by the not less than 25 per cent increase in the respective growth rates, as provided for in Articles 2.13 and 2.14(a) for Stages 1 and 2, respectively. The lack of a clear reply regarding this aspect led the TMB to consider those minimum requirements which had to be implemented by the Members concerned. The TMB concluded that these minimum requirements implied that on 1 January 2002, the base levels in force on 31 December 2001 had to be increased by the respective growth rates applied in 2001, as further increased by 27 per cent which was applicable for Stage 3."²³ (emphasis original)

9. Article 2.17

21. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, which provided for, *inter alia*, the introduction of a new restraint (on United States imports from Pakistan on products falling under US categories 666-S and 666-P), the TMB indicated that:

"The TMB also recalled that according to Article 2.17, '[a]dministrative arrangements, as deemed necessary in relation to the implementation of any provision' of Article 2 could be agreed between the Members concerned. As the restrictions on category 666-S and 666-P products had not been notified pursuant to Article 2.1 and, therefore, did not fall under the scope of the provisions of Article 2, the TMB did not see how the imposition of these new restrictions, even if mutually agreed between the two Members, could be considered to be necessary in relation to the implementation of the provisions of Article 2. The TMB also observed that the administrative arrangements concluded between the United States and

²¹ G/TMB/R, paras. 30-31.

²² (footnote original) G/TMB/R/90, para. 32.

²³ (footnote original) G/TMB/R/90, para. 43.

Pakistan . . . did not provide for the introduction of new quantitative restrictions . . .

The TMB, therefore, concluded that there appeared to be no justification to apply new quantitative restrictions under Article 2.17."²⁴

22. With respect to the same subject-matter examined under Article 5, see also the excerpts from the reports of the TMB referenced in paragraphs 31–38 below.

10. Article 2.18

23. In examining the notifications provided by some Members on the improvements in access provided to those Members whose exports had been subject to restrictions on 31 December 1994 and whose restrictions represented 1.2 per cent or less of the total volume of the importing Members' restrictions on 31 December 1991, the TMB stated as follows:

"The TMB observed that the implementation of this provision of the ATC had been made by the Members concerned using different methodologies and no Member used the option of equivalent changes with respect to a different mix of base levels, growth and flexibility provisions. It was observed that Article 2.18 does not provide precise guidance as to how to implement the advancement by one stage of the growth rates set out in Articles 2.13 and 2.14, or how to apply 'at least equivalent changes as may be mutually agreed with respect to a different mix of base levels, growth and flexibility provisions'. However, it was noted that the result in terms of market access in the first stage would have been improved if the methodology chosen for the advancement by one stage of the growth rates included the growth factor of the first stage, as done by one Member."²⁵

11. Article 2.21

24. See the excerpts from the reports of the TMB referenced above.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

1. Within 60 days following the date of entry into force of the WTO Agreement, Members maintaining restrictions⁴ on textile and clothing products (other than restrictions maintained under the MFA and covered by the provisions of Article 2), whether consistent with GATT 1994 or not, shall (a) notify them in detail to the TMB, or (b) provide to the TMB notifications with respect to them which have been submitted to any other WTO body. The notifications should, wherever applicable, provide information with respect to any GATT 1994 justifi-

cation for the restrictions, including GATT 1994 provisions on which they are based.

(*footnote original*)⁴ Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.

2. Members maintaining restrictions falling under paragraph 1, except those justified under a GATT 1994 provision, shall either:

- (a) bring them into conformity with GATT 1994 within one year following the entry into force of the WTO Agreement, and notify this action to the TMB for its information; or
- (b) phase them out progressively according to a programme to be presented to the TMB by the Member maintaining the restrictions not later than six months after the date of entry into force of the WTO Agreement. This programme shall provide for all restrictions to be phased out within a period not exceeding the duration of this Agreement. The TMB may make recommendations to the Member concerned with respect to such a programme.

3. During the duration of this Agreement, Members shall provide to the TMB, for its information, notifications submitted to any other WTO bodies with respect to any new restrictions or changes in existing restrictions on textile and clothing products, taken under any GATT 1994 provision, within 60 days of their coming into effect.

4. It shall be open to any Member to make reverse notifications to the TMB, for its information, in regard to the GATT 1994 justification, or in regard to any restrictions that may not have been notified under the provisions of this Article. Actions with respect to such notifications may be pursued by any Member under relevant GATT 1994 provisions or procedures in the appropriate WTO body.

5. The TMB shall circulate the notifications made pursuant to this Article to all Members for their information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

25. With respect to the measure concerning the United States and Turkey, referred to in paragraphs 6 and 8 above, the TMB confirmed that all restrictive measures that touch upon the subject matter of the ATC, even if they have been adopted on a basis other than ATC provisions, have to be notified to the TMB:

"Since restrictions other than those covered by the provisions of Article 2 also had to be notified within 60 days

²⁴ G/TMB/R/45, paras. 27–28.

²⁵ G/L/179, para. 210.

following the date of entry into force of the WTO Agreement, the TMB observed that the restraint could not have been agreed between Turkey and the United States under the provisions of Article 3.1 either. Article 3.3 does not exclude the possibility, *inter alia*, of introducing new restrictions on textile and clothing products. However, it contains not only the requirement of 'double' notification (i.e. to the appropriate WTO body and also to the TMB, for its information), but also limits the possibility of applying, *inter alia*, new restrictions to those cases where the measures were taken under any GATT 1994 provision. As to the restraint agreed between Turkey and the United States, the TMB noted that, according to the joint communication submitted by the two Members concerned, this measure had not been introduced under a GATT 1994 provision, but that it had been taken pursuant to a provision of the ATC. On this basis the TMB observed that the new restraint in question could not have been introduced pursuant to the provisions of Article 3.²⁶

2. Article 3.1

(a) "restrictions"

26. At its meeting in November 2002, while reviewing an Article 3.1 notification received from China, following its accession to the WTO, the TMB considered, *inter alia*, the scope of the application of Article 3, i.e. whether it also applies to export restrictions. The TMB noted that the term "restriction" in Article 3.1 is not subject to any additional qualifications and that the language of the Article does not support an interpretation whereby Article 3.1 only applies to imports:

"[A]rticle 3.1 uses the word 'restrictions' without any additional qualifications and that the footnote to this provision related to the same term states the following: 'Restrictions denote all unilateral quantitative restrictions, bilateral arrangements and other measures having a similar effect.'²⁷ The language of Article 3 does not limit the application of this provision to any specific type of restriction. The export quotas maintained by China affecting silk yarn and woven fabrics of silk are, undoubtedly, unilateral quantitative restrictions, corresponding to the definition provided in the footnote referred to above. Therefore, also in view of the lack of any further precision in the respective provision of the ATC, export restrictions are not *a priori* excluded from the scope of application of Article 3. This conclusion is also in line with past practice in the TMB, whereby the notification under Article 3 of certain measures affecting exports of some textile products was not questioned.²⁸

The TMB noted, furthermore, that the additional notification by China referred to 'restrictions on certain textile products which fall under the coverage of ATC and are subject to Article 3 of [that] Agreement'. This reference presumably indicated that, in the view of China, the measures in question should be considered under the

applicable provisions of the ATC. It was observed that the notification of these export restrictions under Articles 3.1 and 3.2(b) did not appear to be in contradiction with the relevant portion of the Report of the Working Party on the Accession of China.²⁹³⁰

3. Article 3.2(b)

27. At its meeting in February 1996, the TMB considered a notification by Hungary of the phase-out programme to be applied to the restrictions maintained by that Member under Article 3.1. In taking note of this programme, the TMB:

"[O]bserved that, in view of the general nature of this programme, it expected that the details of its implementation in the respective stages would be notified to the Body prior to their implementation, for the Body's consideration".³¹

28. At its meeting in March 1996, "[t]he TMB reverted to its consideration of a notification made by Japan, under Article 3.2(b), of the phase out of the measures notified under Article 3.1. In taking note of this phase-out programme the TMB expressed the expectation that its implementation, in conformity with paragraph 2(b) of Article 3, would be such as to provide appropriate progressive increases to the level of restrictions on imports of silk yarn and silk fabric from Korea."³²

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

1. Restrictions referred to in Article 2, and those applied under Article 6, shall be administered by the exporting Members. Importing Members shall not be obliged to accept shipments in excess of the restrictions notified under Article 2, or of restrictions applied pursuant to Article 6.

2. Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products, including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not upset the balance of rights and obligations between the

²⁶ G/TMB/R/60, para. 30.

²⁷ (*footnote original*) See footnote 4 of the ATC.

²⁸ (*footnote original*) Japan notified the application of an export approval system affecting certain products with certain specified destinations (United States, European Communities). For details see G/TMB/N/82 and G/TMB/N/175.

²⁹ (*footnote original*) See WT/ACC/CHN/49, paragraph 165.

³⁰ G/TMB/R/93, paras. 19–20.

³¹ G/TMB/R/9, para. 12.

³² G/TMB/R/11, para. 8.

Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.

3. If a product which constitutes only part of a restriction is notified for integration pursuant to the provisions of Article 2, Members agree that any change in the level of that restriction shall not upset the balance of rights and obligations between the Members concerned under this Agreement.

4. When changes mentioned in paragraphs 2 and 3 are necessary, however, Members agree that the Member initiating such changes shall inform and, wherever possible, initiate consultations with the affected Member or Members prior to the implementation of such changes, with a view to reaching a mutually acceptable solution regarding appropriate and equitable adjustment. Members further agree that where consultation prior to implementation is not feasible, the Member initiating such changes will, at the request of the affected Member, consult, within 60 days if possible, with the Members concerned with a view to reaching a mutually satisfactory solution regarding appropriate and equitable adjustments. If a mutually satisfactory solution is not reached, any Member involved may refer the matter to the TMB for recommendations as provided in Article 8. Should the TSB not have had the opportunity to review a dispute concerning such changes introduced prior to the entry into force of the WTO Agreement, it shall be reviewed by the TMB in accordance with the rules and procedures of the MFA applicable for such a review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

29. In the context of examining the measure introduced by the United States on exports of certain products from Turkey, referred to in paragraphs 6 and 8 above, the TMB held that the provisions of Article 4 have to be read in conjunction with the other provisions of the Agreement:

"[A]rticle 4.1 deals with the administration of 'restrictions referred to in Article 2, and those applied under Article 6'. Article 4.2 states that 'Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement.' Article 4.4 pro-

vides, *inter alia*, the possibility to reach a 'mutually acceptable solution regarding appropriate and equitable adjustment' between Members when necessary changes, in the sense of Article 4.2, are introduced in the implementation or administration of existing restrictions. The TMB noted that, according to Article 4.4, such mutually acceptable solutions did not have to be notified to the TMB. The TMB recalled its findings that the new restriction could not have been agreed pursuant to the provisions of Articles 2 and 6. It was also observed that Article 4.4 does not provide explicit guidance regarding the scope of the adjustment that can be agreed between the Members concerned in the framework of the mutually acceptable solution. A reading according to which the introduction of a new restriction, in the sense of Article 2.4, can be agreed upon pursuant to Article 4.4 as an adjustment to balance possible improvements in the implementation or administration of restrictions maintained pursuant to Article 2 was, however, in the view of the TMB not consistent with the intention of the drafters of the ATC, since Article 4 relates to the implementation or administration of the restrictions referred to in Article 2, or applied under Article 6. Also, the construction of Article 4 and its language seem to suggest that when changes, in the sense of Article 4.2 are introduced, the appropriate and equitable adjustment referred to in Article 4.4 can only involve and affect the restrictions that have already been in place and notified pursuant to Article 2 or Article 6."³³

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

1. Members agree that circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents, frustrates the implementation of this Agreement to integrate the textiles and clothing sector into GATT 1994. Accordingly, Members should establish the necessary legal provisions and/or administrative procedures to address and take action against such circumvention. Members further agree that, consistent with their domestic laws and procedures, they will cooperate fully to address problems arising from circumvention.

2. Should any Member believe that this Agreement is being circumvented by transshipment, re-routing, false declaration concerning country or place of origin, or falsification of official documents, and that no, or inadequate, measures are being applied to address and/or to take action against such circumvention, that Member should consult with the Member or Members concerned with a view to seeking a mutually satisfactory solution. Such consultations should be held promptly, and within 30 days when possible. If a mutually satisfactory solution

³³ G/TMB/R/60, para. 31.

is not reached, the matter may be referred by any Member involved to the TMB for recommendations.

3. Members agree to take necessary action, consistent with their domestic laws and procedures, to prevent, to investigate and, where appropriate, to take legal and/or administrative action against circumvention practices within their territory. Members agree to cooperate fully, consistent with their domestic laws and procedures, in instances of circumvention or alleged circumvention of this Agreement, to establish the relevant facts in the places of import, export and, where applicable, transshipment. It is agreed that such cooperation, consistent with domestic laws and procedures, will include: investigation of circumvention practices which increase restrained exports to the Member maintaining such restraints; exchange of documents, correspondence, reports and other relevant information to the extent available; and facilitation of plant visits and contacts, upon request and on a case-by-case basis. Members should endeavour to clarify the circumstances of any such instances of circumvention or alleged circumvention, including the respective roles of the exporters or importers involved.

4. Where, as a result of investigation, there is sufficient evidence that circumvention has occurred (e.g. where evidence is available concerning the country or place of true origin, and the circumstances of such circumvention), Members agree that appropriate action, to the extent necessary to address the problem, should be taken. Such action may include the denial of entry of goods or, where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin. Also, where there is evidence of the involvement of the territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members. Any such actions, together with their timing and scope, may be taken after consultations held with a view to arriving at a mutually satisfactory solution between the concerned Members and shall be notified to the TMB with full justification. The Members concerned may agree on other remedies in consultation. Any such agreement shall also be notified to the TMB, and the TMB may make such recommendations to the Members concerned as it deems appropriate. If a mutually satisfactory solution is not reached, any Member concerned may refer the matter to the TMB for prompt review and recommendations.

5. Members note that some cases of circumvention may involve shipments transiting through countries or places with no changes or alterations made to the goods contained in such shipments in the places of transit. They note that it may not be generally practicable for such places of transit to exercise control over such shipments.

6. Members agree that false declaration concerning fibre content, quantities, description or classification of merchandise also frustrates the objective of this Agreement. Where there is evidence that any such false declaration has been made for purposes of circumvention, Members agree that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Should any Member believe that this Agreement is being circumvented by such false declaration and that no, or inadequate, administrative measures are being applied to address and/or to take action against such circumvention, that Member should consult promptly with the Member involved with a view to seeking a mutually satisfactory solution. If such a solution is not reached, the matter may be referred by any Member involved to the TMB for recommendations. This provision is not intended to prevent Members from making technical adjustments when inadvertent errors in declarations have been made.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

30. In the context of examining the measure introduced by the United States on exports of certain products from Turkey, referred to in paragraphs 6 and 8 above, the TMB stated that all measures adopted on the basis of Article 5 shall be notified to the TMB, unless the parties reach a mutually agreed solution:

“[P]rovides, *inter alia*, the possibility of taking certain actions, after consultations had been held between the Members concerned with a view to arriving at a mutually satisfactory solution between them. Article 5.4 stipulates, *inter alia*, that ‘... where there is evidence of the involvement of territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members.’ Article 5.4 also states that ‘[t]he Members concerned may agree on other remedies in consultation’. However, any action taken pursuant to Article 5.4 has to be notified to the TMB. In case of evidence that the ATC is being circumvented by false declaration concerning fibre content, quantities, description or classification of merchandise, Article 5.6 allows the Members concerned to consult with a view to seeking a mutually satisfactory solution and the same Article does not require the notification of such mutually agreed solutions to the TMB. At the same time, the TMB observed that Article 5 refers to situations of ‘circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents’, and that neither Turkey nor the United States had invoked or reported such a situation. Without prejudice as to whether in particular circumstances a new restriction can be introduced, or not, pur-

suant to the provisions of Article 5, the TMB, on the basis of the information available to it, concluded that the provision of the ATC referred to by both Turkey and the United States could not be Article 5.”³⁴

2. Article 5.4

(a) “appropriate action, to the extent necessary to address the problem”

31. In reviewing a number of administrative arrangements agreed between the United States and several other Members under which triple charges could be imposed on quotas to counter circumventions, the TMB stated:

“[T]hat Article 5 of the ATC contained detailed descriptions of the rules and procedures to be followed. It appeared to the TMB that some aspects of the related provisions included in the administrative arrangements could go beyond what was specified in Article 5. The TMB noted, *inter alia*, that paragraph 4 of Article 5 of the ATC seemed to provide some flexibility in terms of remedies or agreed actions that could be foreseen in cases when circumvention has occurred. It observed, however, that Article 5 contained no mention of the possibility for the importing Member to impose triple charges on quotas, as a deterrent to circumvention. The TMB noted in this regard that this provision had not been utilized by the United States.

The TMB recalled that the United States had stated that when provisions of the administrative arrangements were inconsistent with the ATC, the provisions of the ATC would apply. The TMB understood that this statement applied to each and every provision of the arrangements notified. The TMB expected, therefore, that all the provisions of these administrative arrangements would be implemented by the respective Members in conformity with the relevant provisions of the ATC.”³⁵

(b) “Members concerned may agree on other remedies in consultation”

32. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, referenced in paragraph 21 above, which provided, *inter alia*, for the introduction of a new restraint (on United States imports from Pakistan on products falling under United States categories 666-S and 666-P), the TMB examined whether a new quantitative restriction, can be considered as an ‘appropriate action’ in the light of Article 5.4 of the ATC:

“The TMB observed that, apart from the third sentence of Article 5.4, the introduction of a new restriction, even if mutually agreed between the Members concerned, was not mentioned in Article 5.4 as an ‘appropriate action, to the extent necessary to address the problem’ when circumvention as defined in Article 5.1 had

occurred. Furthermore, the TMB understood that the introduction of restrictions, set out in the third sentence of Article 5.4, related only to the true country or place of origin in case there had been evidence of its involvement in the transshipment. This provision, therefore, could not *per se* allow the introduction of new restrictions on imports from Pakistan in the particular case when circumvention had occurred.

The TMB also observed that while the second and third sentences of Article 5.4 specified possible actions that could be taken when circumvention had occurred, they did not provide an exhaustive list for such actions. This was made clear by the language of the second sentence as well as by the fifth sentence of Article 5.4, the latter providing that ‘[t]he Members concerned may agree on other remedies in consultation’.”³⁶

33. While examining the measure referred to in paragraph 32 above, the TMB noted with respect to the fifth sentence of Article 5.4 that “the Agreement did not specify what, in the context of this paragraph, could or could not constitute the ‘other remedies’”. It also held that Article 5.4 was sufficiently clear that an objective interpretation of ‘other remedies’ could not be asserted as to grant Members the right to adopt new quantitative restrictions:

“It could be argued that the ‘other remedies’ referred to in Article 5.4 did not include the permission to introduce new quantitative restrictions, since Article 5.4 in itself as well as the broader context as determined by the ATC provided sufficient guidance to the Members concerned to develop a correct understanding on what could or could not constitute such ‘other remedies’ in the sense of Article 5.4. It could be contended that Article 5.4 was sufficiently specific in defining what type of actions can be taken in response to well defined circumstances. The second sentence of this Article, in addressing the issue of what kind of action could be taken in the relationship between the importing Member (the United States) and the Member constituting the true place of origin (Pakistan) of the goods allegedly circumvented (cotton bed-sheets), specified that ‘[s]uch action may include . . . , where goods have entered, having due regard to the actual circumstances and the involvement of the country or place of true origin, the adjustment of charges to restraint levels to reflect the true country or place of origin’. This formulation seemed to imply that the action taken should affect the product that was subject to circumvention. Since only the exports of products that had already been subject to restrictions could be circumvented, the remedy for such circumvention could not affect products other than those with respect to which circumvention had been claimed. Reading the second

³⁴ G/TMB/R/60, para. 30.

³⁵ G/TMB/R/31, paras. 20–21.

³⁶ G/TMB/R/45, paras. 33–34.

sentence of Article 5.4 in conjunction with the fifth sentence, it appeared, therefore, that the two Members could have agreed on adjustments of charges to the restraint level established for the category 361 products or on 'other remedies' affecting the same products, but not on 'other remedies' affecting other products, like category 666 – S and 666 – P products.

In addition, the third sentence of Article 5.4 explicitly allowed the introduction of new restrictions, but did so only in cases where there was evidence of the involvement of the territories of (third) Members through which the goods had been transhipped [. . .]. If this provision were read together with the fifth sentence of Article 5.4, it appeared that remedies other than the introduction of restrictions on imports of category 361 products could also have been foreseen, but these actions had to be limited to the products transhipped and to the Member through which the transshipment was effected. The TMB understood that no restrictions had been introduced by the United States against imports of category 361 products from the Member through which the products of Pakistani origin had allegedly been transhipped. Also, the TMB was not aware of any other action taken by the United States *vis-à-vis* imports of the transhipped products from the Member involved in this transshipment. In any case, this sentence did not provide authorization for the introduction of new restrictions on imports from Pakistan."³⁷

34. As further support for the proposition that the quantitative restriction at issue was not permitted under Article 5.4, the TMB referred to "the broader context" of the ATC. The TMB considered that as the ATC expressly provides for an exception to the prohibition on introducing new quantitative measures and that as it aims to achieve a complete integration of this sector in the covered agreements of the *GATT 1994*, these were conclusive in the determination that quantitative restrictions cannot be introduced on the basis of Article 5.4:

"It could be contended that the broader context as defined by the ATC also confirmed the statements included in [the] paragraphs [cited in paragraph 32 above]. It could be argued that, since the Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into *GATT 1994* and thus the ultimate objective of the Agreement was to ensure the full integration of trade in the covered products into the *GATT 1994* rules and disciplines, the ATC carefully circumscribed the possibilities for maintaining or introducing quantitative restrictions; (apart from the third sentence of Article 5.4) the relevant provisions were contained in Articles 2, 3 and 6. As indicated earlier, the provisions of Articles 2 and 3 were not applicable to the particular case in question. While Article 6 allowed for the introduction of new restrictions for a limited duration, if the

conditions specified in that Article were fully met, it was observed, however, that neither of the two Members had invoked the provisions of Article 6 as a justification for the introduction of the new restrictions. Keeping in mind also the provisions of Article 2.4, it could be concluded on the basis of the arguments presented above that the introduction of the new restrictions on imports of category 666 products from Pakistan, even if mutually agreed between the two Members, could not be justified under the ATC."³⁸

35. With a view to giving due consideration to possible readings to the fifth sentence of Article 5.4 other than its interpretation referenced in paragraphs 32–34 above, the TMB also noted:

"It could also appear, however, that the language of the fifth sentence of Article 5.4 was vague and permissive, not setting any limitation on the kind of actions that would constitute possible 'other remedies'. It could, therefore, be argued that this formulation provided broad discretion to the Members concerned in reaching an agreement, in consultation, on what they consider in a particular case to be appropriate remedies (other than those defined in the preceding sentences of the same Article). On the basis of such a reasoning, one could not exclude an argument that the introduction of restrictions on products previously not subject to such restrictions could be considered as a possibility for providing 'other remedies'."³⁹

36. With respect to the treatment of the measure at issue under Article 2.17, see the excerpts from the reports of the TMB referenced in paragraph 21 above. Also, with respect to the same issue under Article 5.6, see the excerpt from the report of the TMB referenced in paragraph 37 below.

3. Article 5.6

37. Concerning a mutually agreed solution notified by Pakistan under Article 2.17 and by the United States under Article 5, which provided, *inter alia*, for the introduction of a new restraint (on United States imports from Pakistan on products falling under United States categories 666–S and 666–P), the TMB examined, with respect to the measure referenced in paragraphs 21 and 32 above, whether the introduction of new quantitative import restrictions was permitted under Article 5.6, and held that "it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6":

"It could be argued that Article 5.6 did not allow for taking such measures as the introduction of new quan-

³⁷ G/TMB/R/45, paras. 36–37.

³⁸ G/TMB/R/45, para. 38.

³⁹ G/TMB/R/45, para. 39.

titative restrictions. The second sentence of Article 5.6 envisaged that appropriate measures, consistent with domestic laws and procedures, should be taken against the exporters or importers involved. Therefore, it appeared that a mutually satisfactory solution reached pursuant to this provision would encompass appropriate measures against the firms involved (exporters and/or importers), as opposed to those against governments. In addition, while Article 5.6 was not precise in providing Members with modalities for taking 'appropriate measures' in cases where false declarations had been made for purposes of circumvention, it could be contended that the loose disciplines attached to this provision (e.g. there was no requirement to notify the appropriate measures agreed to the TMB), compared to other provisions concerning the taking of measures having a restrictive effect embodied in the ATC, raised doubts as to whether the introduction of new restrictions could be contemplated under this particular provision. Based on these considerations as well as on the analysis regarding the broader context defined by the ATC, . . . it could be argued that the introduction of the new restraints, even if mutually agreed between the two Members, could not be justified in the context of Article 5.6.

It could also be argued, that if one accepted that (i) incorrect marking of cotton bedsheets had been, at least in part, the root of the problem identified and that (ii) this practice amounted to a false declaration as defined in Article 5.6, the language of this Article authorized the Members concerned to agree, in case when no, or inadequate, administrative measures were being applied to address and/or to take action against such circumvention, on any kind of mutually satisfactory solution, possibly including the introduction of new restraints. Such a conclusion would rely, *inter alia*, on the lack in this language of any explicit indication regarding the possible nature of the measures that could be agreed between the Members as a mutually satisfactory solution. The TMB declined to take a definitive position at this stage regarding the applicability of this provision, as well as on the conformity of the actions taken with Article 5.6.⁴⁰

38. With respect to the treatment of the measure at issue under Article 2.17, see excerpts from the reports of the TMB referenced in the section dealing with Article 2.17, paragraph 21 above.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

1. Members recognize that during the transition period it may be necessary to apply a specific transitional safeguard mechanism (referred to in this Agreement as "transitional safeguard"). The transitional safeguard may be applied by any Member to products covered by

the Annex, except those integrated into GATT 1994 under the provisions of Article 2. Members not maintaining restrictions falling under Article 2 shall notify the TMB within 60 days following the date of entry into force of the WTO Agreement, as to whether or not they wish to retain the right to use the provisions of this Article. Members which have not accepted the Protocols extending the MFA since 1986 shall make such notification within 6 months following the entry into force of the WTO Agreement. The transitional safeguard should be applied as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement.

2. Safeguard action may be taken under this Article when, on the basis of a determination by a Member⁵, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference.

(footnote original) ⁵ A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious damage or actual threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious damage, or actual threat thereof, shall be based on the conditions existing in that member State and the measure shall be limited to that member State.

3. In making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance.

4. Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent⁶, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors,

⁴⁰ G/TMB/R/45, paras. 47–48.

either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement.

(footnote original) ⁶ Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising, for example, from the existence of production capacity in the exporting Members.

5. The period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard action shall not exceed 90 days from the date of initial notification as set forth in paragraph 7.

6. In the application of the transitional safeguard, particular account shall be taken of the interests of exporting Members as set out below:

(a) least-developed country Members shall be accorded treatment significantly more favourable than that provided to the other groups of Members referred to in this paragraph, preferably in all its elements but, at least, on overall terms;

(b) Members whose total volume of textile and clothing exports is small in comparison with the total volume of exports of other Members and who account for only a small percentage of total imports of that product into the importing Member shall be accorded differential and more favourable treatment in the fixing of the economic terms provided in paragraphs 8, 13 and 14. For those suppliers, due account will be taken, pursuant to paragraphs 2 and 3 of Article 1, of the future possibilities for the development of their trade and the need to allow commercial quantities of imports from them;

(c) with respect to wool products from wool-producing developing country Members whose economy and textiles and clothing trade are dependent on the wool sector, whose total textile and clothing exports consist almost exclusively of wool products, and whose volume of textiles and clothing trade is comparatively small in the markets of the importing Members, special consideration shall be given to the export needs of such Members when considering quota levels, growth rates and flexibility;

(d) more favourable treatment shall be accorded to re-imports by a Member of textile and clothing products which that Member has exported to another Member for processing and subsequent reimportation, as defined by the laws and practices of the importing Member, and subject to satisfactory control and certification procedures, when these products are imported from a Member for which this type of trade represents a significant proportion of its total exports of textiles and clothing.

7. The Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action. The request for consultations shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors, referred to in paragraph 3, on which the Member invoking the action has based its determination of the existence of serious damage or actual threat thereof; and (b) the factors, referred to in paragraph 4, on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned. In respect of requests made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8. The Member invoking the action shall also indicate the specific level at which imports of the product in question from the Member or Members concerned are proposed to be restrained; such level shall not be lower than the level referred to in paragraph 8. The Member seeking consultations shall, at the same time, communicate to the Chairman of the TMB the request for consultations, including all the relevant factual data outlined in paragraphs 3 and 4, together with the proposed restraint level. The Chairman shall inform the members of the TMB of the request for consultations, indicating the requesting Member, the product in question and the Member having received the request. The Member or Members concerned shall respond to this request promptly and the consultations shall be held without delay and normally be completed within 60 days of the date on which the request was received.

8. If, in the consultations, there is mutual understanding that the situation calls for restraint on the exports of the particular product from the Member or Members concerned, the level of such restraint shall be fixed at a level not lower than the actual level of exports or imports from the Member concerned during the 12-month period terminating two months preceding the month in which the request for consultation was made.

9. Details of the agreed restraint measure shall be communicated to the TMB within 60 days from the date of conclusion of the agreement. The TMB shall determine whether the agreement is justified in accordance with the provisions of this Article. In order to make its determination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned. The TMB may make such recommendations as it deems appropriate to the Members concerned.

10. If, however, after the expiry of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of

this Article, within 30 days following the 60-day period for consultations, and at the same time refer the matter to the TMB. It shall be open to either Member to refer the matter to the TMB before the expiry of the period of 60 days. In either case, the TMB shall promptly conduct an examination of the matter, including the determination of serious damage, or actual threat thereof, and its causes, and make appropriate recommendations to the Members concerned within 30 days. In order to conduct such examination, the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7, as well as any other relevant information provided by the Members concerned.

11. In highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair, action under paragraph 10 may be taken provisionally on the condition that the request for consultations and notification to the TMB shall be effected within no more than five working days after taking the action. In the case that consultations do not produce agreement, the TMB shall be notified at the conclusion of consultations, but in any case no later than 60 days from the date of the implementation of the action. The TMB shall promptly conduct an examination of the matter, and make appropriate recommendations to the Members concerned within 30 days. In the case that consultations do produce agreement, Members shall notify the TMB upon conclusion but, in any case, no later than 90 days from the date of the implementation of the action. The TMB may make such recommendations as it deems appropriate to the Members concerned.

12. A Member may maintain measures invoked pursuant to the provisions of this Article: (a) for up to three years without extension, or (b) until the product is integrated into GATT 1994, whichever comes first.

13. Should the restraint measure remain in force for a period exceeding one year, the level for subsequent years shall be the level specified for the first year increased by a growth rate of not less than 6 per cent per annum, unless otherwise justified to the TMB. The restraint level for the product concerned may be exceeded in either year of any two subsequent years by carry forward and/or carryover of 10 per cent of which carry forward shall not represent more than 5 per cent. No quantitative limits shall be placed on the combined use of carryover, carry forward and the provision of paragraph 14.

14. When more than one product from another Member is placed under restraint under this Article by a Member, the level of restraint agreed, pursuant to the provisions of this Article, for each of these products may be exceeded by 7 per cent, provided that the total exports subject to restraint do not exceed the total of the levels for all products so restrained under this Article, on the basis of agreed common units. Where the periods of application of restraints of these products do not coin-

cide with each other, this provision shall be applied to any overlapping period on a *pro rata* basis.

15. If a safeguard action is applied under this Article to a product for which a restraint was previously in place under the MFA during the 12-month period prior to the entry into force of the WTO Agreement, or pursuant to the provisions of Article 2 or 6, the level of the new restraint shall be the level provided for in paragraph 8 unless the new restraint comes into force within one year of:

- (a) the date of notification referred to in paragraph 15 of Article 2 for the elimination of the previous restraint; or
- (b) the date of removal of the previous restraint put in place pursuant to the provisions of this Article or of the MFA

in which case the level shall not be less than the higher of (i) the level of restraint for the last 12-month period during which the product was under restraint, or (ii) the level of restraint provided for in paragraph 8.

16. When a Member which is not maintaining a restraint under Article 2 decides to apply a restraint pursuant to the provisions of this Article, it shall establish appropriate arrangements which: (a) take full account of such factors as established tariff classification and quantitative units based on normal commercial practices in export and import transactions, both as regards fibre composition and in terms of competing for the same segment of its domestic market, and (b) avoid over-categorization. The request for consultations referred to in paragraphs 7 or 11 shall include full information on such arrangements.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. General

(a) Elements of Article 6

39. In *US – Cotton Yarn*, the Appellate Body held that in applying Article 6 three different, although interrelated, elements of that provision have to be examined, namely “causation”, “attribution” and “application”:

“[W]e have to distinguish three different, but interrelated, elements under Article 6: first, *causation* of serious damage or actual threat thereof by increased imports⁴¹; second, *attribution* of that serious damage to the Member(s) the imports from whom contributed to

⁴¹ (*footnote original*) The element of *causation* of serious damage is referred to in paragraph 2 of Article 6 of the ATC. The second sentence of paragraph 2 provides that serious damage “must demonstrably be caused by such increased quantities in total imports of that product” and not by “*other factors*” such as technological changes or changes in consumer preferences.

that damage; and third, *application* of transitional safeguard measures to such Member(s)."^{42 43}

(b) Introduction of a restraint under Article 6 without notification to the TMB

40. In the context of examining a new restriction introduced by the United States on Turkey's exports of certain textile products, as part of a broader understanding reached between the two Members, the TMB held that it required notification of restraint measures under Article 6:

"Article 6 specifically provides in its paragraph 1 the possibility of introducing 'transitional safeguard' which, as stipulated in other provisions of the same Article, takes the form of restraint measures. However, the restraint measure or measures taken under this Article have to be notified to the TMB, whether agreed or applied unilaterally, as clearly set out in Articles 6.9, 6.10 and 6.11, so as to enable the TMB to examine the measure(s) in question, as required by the provisions of Article 6. Therefore, the measure agreed between Turkey and the United States could not have been taken under Article 6 since that Article requires notification and since both Members had stated to the TMB that the measure had been taken 'pursuant to a provision of the ATC which does not require notification to the TMB'."⁴⁴

(c) Scope of review

(i) Jurisprudence

41. In *US – Underwear*, the United States provided the Panel with the statement issued by the United States authorities on 23 March 1995 (the "March Statement"), based upon which it proposed the transitional safeguard measure in question, and another statement which the United States later provided to the complainant in the TMB review proceedings (the "July Statement"). The Panel, in a statement not reviewed by the Appellate Body, restricted its review to an examination of the March Statement, noting as follows:

"We believe that statements subsequent to the March Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof in the present case. A restriction may be imposed, in a manner consistent with Article 6 of the ATC, when based on a determination made in accordance with the procedure embodied in Article 6.2 and 6.4 of the ATC. This is precisely the role that the March Statement is called upon to play. Consequently, to review the alleged inconsistency of the US action with the ATC, we must focus our legal analysis on the March Statement as the relevant legal basis for the safeguard action taken by the United States."⁴⁵

42. While it declined to consider a later statement which the United States had provided to the com-

plainant (Costa Rica) in the TMB review proceedings, as referenced in paragraph 41 above, the Panel on *US – Underwear*, in a finding not reviewed by the Appellate Body, held that it could nevertheless "legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement":

"The March Statement included under the heading 'Market Situation' one sub-heading entitled 'Serious Damage to the Domestic Industry' (sub-heading A), which contained general information about the effect of underwear imports in Category 352/652, and a second sub-heading 'Industry Statements' (sub-heading B), which summarized statements to the US authorities by individual US companies. To some extent, there was an overlap between the information contained under the two sub-headings. The same categories of information were equally discussed in a statement submitted to the TMB by the United States in July 1995 (the 'July Statement'). While we have concluded that the July Statement should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof, we feel that we can legitimately take the July Statement into account as evidence submitted by the United States in our assessment of the overall accuracy of the March Statement. Consequently, we will use the July Statement for this limited purpose only. By doing so, we do not share the concerns expressed by the United States that such use of the July Statement would impair proceedings in the TMB in the future. We consider that a reluctance to submit updated information would normally adversely affect Members concerned. The interest to cooperate as required by Articles 6.7 and 6.9 of the ATC would prevail."⁴⁶

43. Also in the context of the scope of review, the Panel on *US – Underwear* held with respect to the information concerning bilateral negotiation between the parties:

"In our view, the wording of Article 4.6 of the DSU makes it clear that offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement, as far as the rights of the parties to the dispute are concerned. Consequently, we will not base our findings on such information."⁴⁷

⁴² (*footnote original*) The element of *application* of transitional safeguard measures to exporting Member(s) is dealt with in the first and the last sentences of paragraph 4 of Article 6 of the ATC. It is also dealt with in various places in paragraphs 6 through 16 of that Article. The first sentence of Article 6.4 provides that transitional safeguard measures "shall be applied on a Member-by-Member basis".

⁴³ Appellate Body Report on *US – Cotton Yarn*, para. 109.

⁴⁴ G/TMB/R/60, para. 30.

⁴⁵ Panel Report on *US – Underwear*, para. 7.26.

⁴⁶ Panel Report on *US – Underwear*, para. 7.29.

⁴⁷ Panel Report on *US – Underwear*, para. 7.27.

44. In *US – Cotton Yarn*, the Appellate Body considered that the Panel, in assessing the due diligence required of the United States in making a determination under Article 6.2, had exceeded its mandate under Article 11 of the DSU by considering certain evidence that could not possibly have been examined by the United States when it made that determination. The Appellate Body concluded:

“[I]f a Member that has exercised due diligence in complying with its obligations of investigation, evaluation and explanation, were held responsible before a panel for what it *could not have known* at the time it made its determination, this would undermine the right afforded to importing Members under Article 6 to take transitional safeguard action when the determination demonstrates the fulfilment of the specific conditions provided for in this Article”.⁴⁸

(ii) *TMB statements*

45. At its meeting in November 1998, in examining a safeguard measure introduced by Colombia against imports of certain products from Korea and Thailand, the TMB observed:

“With respect to requesting additional information, as referred to by Colombia, the TMB was of the view that its review of the measures introduced by Colombia had to be based essentially on the information made available by Colombia in accordance with Article 6.7 at the time the request for consultations had been made.”⁴⁹

(d) *Burden of proof*

46. In *US – Wool Shirts and Blouses*, on the issue of the burden of proof regarding whether a certain transitional safeguard measure complied with the requirements in Article 6, the Appellate Body held that it was for India to demonstrate that the United States measure had been imposed in violation of Article 6. In so doing, the Appellate Body also indirectly reversed a statement by the Panel on *US – Underwear*, which had held, in a finding not reviewed by the Appellate Body, that the burden of proof under Article 6 fell upon the Member imposing the safeguard measure. In *US – Wool Shirts and Blouses*, the Appellate Body found that Article 6 embodied “a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period”:

“We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United

States to bring evidence and argument to rebut the presumption.

...

The transitional safeguard mechanism provided in Article 6 of the *ATC* is a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the *ATC* during the transitional period. Consequently, a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the *ATC*. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the *ATC*. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States ‘violated the provisions of Articles 2 and 6 of the *ATC*’.⁵⁰

(e) *Standard of review*

47. For jurisprudence relating to the standard of review under the *ATC*, see Section XI.B.6(b) of the Chapter on the *DSU*.

(f) *Specificity of data*

48. At its meeting in March 1997, in examining a transitional safeguard measure taken by Brazil, with respect to the desired nature of information underpinning such measures, the TMB stated:

“[I]n case of recourse to Article 6, it was important to provide as much factual information and data as possible that was specific to the product category itself, as product-specific information and data should have a major impact on the overall assessment whether serious damage or actual threat thereof could be demonstrated.”⁵¹

49. On the same issue as referenced in paragraph 48 above, the TMB continued:

“[T]he Body agreed with Hong Kong’s main contention according to which a determination of serious damage could not be made almost entirely by reference to, and therefore by inferences drawn from, data relating to

⁴⁸ Appellate Body Report on *US – Cotton Yarn*, para. 79.

⁴⁹ G/TMB/R/49, para. 25. The TMB repeated this statement on several occasions (G/TMB/R/51, para. 32; G/TMB/R/81, paras. 15, 17; G/TMB/R/83, para. 26).

⁵⁰ Appellate Body Report on *US – Wool Shirts and Blouses*, pp. 13, 16 and 17.

⁵¹ G/TMB/R/26, para. 25.

much broader industries in respect of which damage is claimed.”⁵²

2. Article 6.2

(a) General

50. In *US – Cotton Yarn*, the Appellate Body explained that Article 6.2 provides for three analytical steps which precede the attribution exercise demanded by Article 6.4 (see paragraphs 80–89 below):

“Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, ‘[s]erious damage . . . must demonstrably be caused by such increased quantities in total imports of that product and not by . . . other factors’. (emphasis added)”⁵³

(b) “a particular product is being imported”

51. At its fourth meeting in July 1998, in examining a transitional safeguard measure introduced by Colombia on imports of certain products from Brazil and India, the TMB held the phrase “is being imported” indicated a temporal proximity between the serious damage and the request for consultation:

“Article 6.2 referred to a situation where ‘a particular product *is being imported* [. . .] in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry’ (emphasis added). This causal link seemed to indicate that the serious damage had to occur in a period close to the time at which the request for consultation was made. It followed that the information provided to demonstrate the serious damage had to be recent.”⁵⁴

(c) “in such increased quantities”

52. At its meeting in January 2000, the TMB considered the reasons given by Argentina for its inability to conform with the TMB’s recommendation to rescind a safeguard measure imposed on certain imports from Brazil. The TMB pointed to the decline in imports and held:

“Regarding the need to consider the increase in imports not only in absolute terms, but ‘also in relation to the parameters for determining the damage mentioned in Article 6.3’, as claimed by Argentina, the TMB observed that the conditions defined in Article 6.2 did not allow for the application of transitional safeguard measures in cases where imports were declining, even though their share in the apparent market were increasing.”⁵⁵

53. At its meeting in September 2001, the TMB examined the safeguard measure imposed by Poland on imports of certain textile products from Romania. The TMB, observing the trend of imports over a five-year period, held that the reference period should be seen in its proper context, taking into account the continuous and significant decrease of imports of the relevant product in the years prior to the reference period:

“In analysing the above information, the TMB noted that there had been an increase in the volume of total imports in the year 2000, the reference period, compared to the previous year. It could not be ignored, however, that the volume of imports continuously decreased in 1998 and 1999, and that the level achieved in 2000 still remained well below the volume of total imports in 1996 and 1997, respectively. In this light, the trends indicated, at most, a recovery of total imports, but did not appear to substantiate the claim of a significant increase compared to the performance achieved in previous years. As to the argument of Poland that the decrease experienced in 1998 and 1999 was only in absolute terms, but not relative to consumption, the TMB observed that the ATC does not incorporate the concept of increased quantities of imports relative to other factors.

In light of the trends described above, the TMB was of the view that the 10.5 per cent increase in total imports reported for the reference period should be assessed in its proper context. Noting the argument by Romania that it had serious doubts as to whether an increase of total imports of this magnitude could constitute a sufficient demonstration in the meaning of Article 6.2, which requires the demonstration that ‘a particular product is being imported into its territory **in such increased quantities** as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products (emphasis added)’, the TMB also expressed its doubts that the alleged serious damage could be caused by the 10.5 per cent increase in total imports during the reference period. These doubts notwithstanding, the TMB decided to review the state of the Polish domestic industry and to revert to this aspect of the case, if necessary, at a subsequent stage of its examination.”⁵⁶

(d) “serious damage, or actual threat thereof”

(i) Concepts of “serious damage, or actual threat thereof”

54. In *US – Underwear*, the Panel noted that, contrary to the determination of “serious damage”, a determination of an “actual threat thereof” requires the

⁵² G/TMB/R/26, para. 28.

⁵³ Appellate Body Report on *US – Cotton Yarn*, para. 112.

⁵⁴ G/TMB/R/46, para. 13.

⁵⁵ G/TMB/R/60, para. 13.

⁵⁶ G/TMB/R/81, para. 21–22.

competent authorities to carry out a prospective analysis in order that they can objectively conclude that unless action is taken, damage will surely occur in the near future:

“Article 6.2 and 6.4 of the ATC make reference to ‘serious damage, or actual threat thereof’. The word ‘thereof’, in our view, clearly refers to ‘serious damage’. The word ‘or’ distinguishes between ‘serious damage’ and ‘actual threat thereof’. In our view, ‘serious damage’ refers to a situation that has already occurred, whereas ‘actual threat of serious damage’ refers to a situation existing at present which might lead to serious damage in the future. Consequently, in our view, a finding on ‘serious damage’ requires the party that takes action to demonstrate that damage has already occurred, whereas a finding on ‘actual threat of serious damage’ requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future.⁵⁷ The March Statement contains no elements of such a prospective analysis. In our view, even if the mention of ‘actual threat’ in the Diplomatic Note accompanying the March Statement were to be considered, the fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual threat of serious damage.”⁵⁸

55. In *US – Cotton Yarn*, the Panel quoted the above-mentioned paragraph in *US – Underwear* as support for its finding that when a, “actual threat of serious damage” supplements the determination of existing serious damage, the former is redundant and not an autonomous concept. Consequently, to the extent that the serious damage is established, a determination of an “actual threat thereof” is supplementary and needs not to be followed by a prospective analysis. In a ruling not reviewed by the Appellate Body, the Panel held:

“In our view, the US finding on actual threat of serious damage contained in the 1998 Market Statement is essentially a finding that the existing ‘serious damage’ to the domestic industry would continue if imports were to continue as before. It would seem a reasonable inference to assume that if the trend in imports were to continue, the trend in domestic sales would continue, and consequently, the existing ‘serious damage’ would continue. Under the terms of Article 6.4, there seems to be no basis for demanding any further ‘prospective analysis’ than taking into consideration the prospect that the price-undercutting of imports from Pakistan would likely continue, in contrast to Pakistan’s argument.

However, this US finding of ‘actual threat of serious damage’ in the 1998 Market Statement is totally dependent on the finding of serious damage. It is based on a finding that there is current serious damage and extra-

polates to a conclusion that there is an actual threat of the serious damage continuing. This means that it does not serve as an independent (or alternative) determination of actual threat of serious damage. It is a redundant exercise and that means that if there is a fatal flaw in the serious damage determination, the actual threat determination necessarily falls, too. If the United States were to make an independent finding of actual threat of serious damage, further analysis would need to be done to substantiate the finding. In other words, a prospective analysis is required if an independent finding of actual threat is to be made rather than a redundant and dependant one as was effectively made by the United States in the 1998 Market Statement.”⁵⁹

(ii) Indicators of serious damage

56. In *US – Cotton Yarn*, Pakistan had argued that the United States should not have treated as indicators of damage to its domestic industry the fact that establishments producing combed cotton yarn had been retooled to produce carded cotton yarn or any other products. The Panel, in a statement not addressed by the Appellate Body, considered that this issue related to the interpretation of “damage” under Article 6.2 and concluded “the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of ‘serious damage’ to a subject domestic industry”:

“In the Panel’s view, this issue concerns the interpretation of the term ‘damage’ under Article 6.2. Transitional safeguard measures are permitted to protect the domestic industry producing – rather than individual companies which are producers of – ‘like and/or directly competitive products’ from import competition. Pakistan itself argues that the scope of the domestic industry is determined not by producers but by products. Otherwise, changes in ownership of domestic enterprises producing ‘like and/or directly competitive products’ could be deemed as an indicator of ‘serious damage’ to the ‘domestic industry’.

In this connection, we recall that Pakistan argued that ‘if a plant produces carded instead of combed yarn, thrives in its new capacity and retains its workforce, the increase in imports obviously did not cause *grave injury that impaired its value or usefulness*.’ However, we disagree with this argument. Assume that, in reaction to import surge, domestic producers of certain textile products merged into companies in another industry; and the establishments of the acquired producers, after retooling

⁵⁷ (footnote original) See GATT Panel Reports on *United States – Measures Affecting Imports of Softwood Lumber from Canada*, BISD 40S/358, paras. 402, 408; *New Zealand – Imports of Electrical Transformers from Finland*, para. 4.8; and *Korea – Antidumping Duties on Imports of Polyacetal Resins from the United States*, paras. 253, 272, 278.

⁵⁸ Panel Report on *US – Underwear*, para. 7.55.

⁵⁹ Panel Report on *US – Cotton Yarn*, paras. 7.138–7.139.

to produce totally different products, achieved the same level of production, sales, profit, employment, etc. In this situation, indeed, the 'value' of the retooled establishments may not have been impaired in some overall sense, but it would be obviously unreasonable that no transitional safeguard measure would be permitted since the 'domestic industry' producing the textile products was driven out by the import surge. In our view, the fact that an establishment changed its products to those which are neither like nor directly competitive products should be treated as an indicator of 'serious damage' to a subject domestic industry."⁶⁰

(iii) Choice of investigation period

Length of the investigation period

57. In *US – Cotton Yarn*, Pakistan had argued that the eight-month investigation period chosen by the United States authorities for determining serious damage and causation was not enough. The Panel, in a finding not addressed by the Appellate Body, "deem[ed] it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC".⁶¹ The Panel further considered that the question of whether an eight-month period was sufficiently long for finding serious damage and causation should be done on a "case-by-case determination".⁶² The Panel dismissed Pakistan's claim on the ground that Pakistan had not established that the eight-month period was unjustifiable:

"The Panel first notes that Article 6.2 does not explicitly set forth any specific period of time as the minimum period for investigation, or for determining whether damage is serious or, in turn, is caused by the subject imports. The parties agreed on this point.

Second, Article 6.7 of the ATC requires that when the Member invoking a transitional safeguard measure seeks consultations with the Member or Members which would be affected by such action, it shall provide the Member or Members with 'specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors . . . on which the Member invoking the action has based its determination of the existence of serious damage or actual threat of damage; and (b) the factors . . . on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned.' Also, that Article provides that 'the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8', which period is defined under paragraph 8 as 'the 12-month period terminating two months preceding the month in which the request for consultation was made.' In our view, Article 6.7 does not address, directly or indirectly, the length of either investigation periods or periods

during which damage occurs. For example, the requirement that the information to be provided to the exporting Member or Members 'be related, as closely as possible, to the [12-month] reference period' does not give any guidance as to how long the investigation period should be or how long damage should continue in order to constitute 'serious damage' and causation thereof.

In this respect, we recall Pakistan's argument that 'since the damage must be determined to be 'serious', the period must be adequately long to discern that the effect of imports was more than just temporary.' However, it is unclear how this general consideration demands that the period during which the serious damage occurred must be longer than the eight months utilised by the United States. In our view, whether or not the chosen period is justifiably long would depend on, at least partly, the extent of the damage suffered by a subject domestic industry during that period. Thus, we deem it inappropriate to set out a general guideline on the length of the period during which damage or causation occurs, when there is no specific treaty language in the ATC."⁶³

Most recent period

58. At its meeting in October 1999, the TMB examined certain transitional safeguard measures taken by Argentina on imports of several products from Brazil. With respect to the choice of the investigation period, the TMB stated that "a determination of serious damage, in the sense of Article 6, could not be based on developments that had affected the domestic industry years before the actual determination was being made":

"[T]he TMB reiterated that in examining and assessing the determination of serious damage, or actual threat thereof, caused to the domestic industry producing like and/or directly competitive products by increased quantities of imports, decisive guidance had to be provided by the developments which had occurred in the most recent period, while data related to the longer time-period provided supplementary information that could support the justification of the determination made. The evidence that developments in the most recent period should have a decisive role in such a determination was, in the view of the TMB, supported by the time-frame referred to in Articles 6.7 and 6.8, by the requirements defined in Article 6.2 that in a determination it has to be demonstrated that a particular product 'is being imported' in increased quantities, and by the period of validity of a determination of serious damage or actual threat thereof for the purpose of invoking safeguard as stated in Article 6.5. Also, the object and the nature of

⁶⁰ Panel Report on *US – Cotton Yarn*, para. 7.104.

⁶¹ Panel Report on *US – Cotton Yarn*, para. 7.115.

⁶² Panel Report on *US – Cotton Yarn*, para. 7.120.

⁶³ Panel Report on *US – Cotton Yarn*, paras. 7.113–7.115.

the ATC (constituting an agreement for a transition period) as well as Article 6.12 (allowing for the maintenance of a transitional safeguard measure for up to three years without extension) confirmed that a determination of serious damage, in the sense of Article 6, could not be based on developments that had affected the domestic industry years before the actual determination was being made."⁶⁴

(e) "the domestic industry producing like and/or directly competitive products"

(i) *Product-oriented definition of domestic industry*

59. In *US – Cotton Yarn*, which dealt with a safeguard measure introduced by the United States on imports of cotton yarn from Pakistan (see paragraph 70 below), the issue of the exclusion by the United States from the scope of its definition of domestic industry of the vertically integrated fabric producers who produce yarn for their own internal use was considered. The Appellate Body, which upheld the Panel's finding that such an exclusion was inconsistent with Article 6.2⁶⁵, was of the view that the definition of domestic industry is "product-oriented and not producer-oriented, and that the definition must be based on the products⁶⁶ produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive"⁶⁷.

(ii) *"producing"*

60. In *US – Cotton Yarn*, the Appellate Body defined the scope of the term "producing" in Article 6.2 as producing for commercial purposes and concluded that its meaning was not dependent on what the producer chooses to do with its product:

"[T]he term 'producing' in Article 6.2 means producing for commercial purposes and that it cannot be interpreted, in itself, to be limited to or qualified as producing for sale on the merchant or any other segment of the market. The definition of the domestic industry, in terms of Article 6.2, is determined by what the industry *produces*, that is, like and/or directly competitive products. In our view, the term "*producing*", in itself, cannot be given a different or a qualified meaning on the basis of what a domestic producer chooses to do with its product."⁶⁸

(iii) *"directly competitive products"*

Article III:2 of GATT 1994: interpretation of "directly competitive"

61. In *US – Cotton Yarn*, the Appellate Body looked into the concept of directly competitive products. In this case, the United States had claimed that its exclusion of yarn produced by vertically integrated fabric producers from the definition of the domestic industry

was not because they were not producing a like product, but because they were not producing a directly competitive product.⁶⁹ The Appellate Body, which had not yet interpreted this concept in the context of Article 6.2, started its analysis by referring to its previous decisions in *Korea – Alcoholic Beverages* and *Japan – Taxes on Alcoholic Beverages*, interpreting the term "directly competitive" products in the context of Interpretative Note *Ad Article III:2 of the GATT 1994*. (In this respect, see also Section IV.C.3 of the Chapter on the *GATT 1994*.) The Appellate Body described the key elements of its interpretation of "directly competitive":

"(a) The word '*competitive*' means 'characterised by competition'. The context of the competitive relationship is necessarily the marketplace, since that is the forum where consumers choose different products that offer alternative ways of satisfying a particular need or taste. As competition in the marketplace is a dynamic and evolving process, the competitive relationship between products is not to be analyzed exclusively by current consumer preferences⁷⁰; the competitive relationship extends as well to potential competition.⁷¹

(b) According to the ordinary meaning of the term 'directly competitive', products are competitive or substitutable when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste.⁷²

(c) In the context of Article III:2, second sentence, the qualifying word 'directly' in the *Ad Article* suggests a degree of proximity in the competitive relationship between the domestic and imported products. The word 'directly' does not, however, prevent a consideration of both latent and extant demand.⁷³

(d) 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products,

⁶⁴ G/TMB/R/58, para. 14.

⁶⁵ Panel Report on *US – Cotton Yarn*, paras. 7.90 and 8.1(a). Appellate Body Report on *US – Cotton Yarn*, para. 105.

⁶⁶ (*footnote original*) In *United States – Lamb Safeguard*, we also found that the *product* defines the scope of the definition of the domestic industry under the *Agreement on Safeguards*. In that case, the "like" product at issue was lamb *meat*. (Appellate Body Report, . . . paras. 84, 86–88 and 95)

⁶⁷ Appellate Body Report on *US – Cotton Yarn*, para. 86.

⁶⁸ Appellate Body Report on *US – Cotton Yarn*, para. 87.

⁶⁹ Therefore, the Appellate Body concluded that it did not need to consider the concept of like product in the context of Article 6.2 because both parties agreed that the yarn imported from Pakistan and yarn produced by the producers of the United States, regardless of whether they are vertically integrated fabric producers or independent yarn producers, were like products.

⁷⁰ (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 114–115.

⁷¹ (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, paras. 115–116.

⁷² (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 115.

⁷³ (*footnote original*) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 116.

whereas not all 'directly competitive or substitutable' products are 'like'.⁷⁴⁷⁵

62. At the same time, the Appellate Body in *US – Cotton Yarn* dismissed the United States' argument that the above elements could not be applied to a definition of "directly competitive products" under Article 6.2 of the *ATC*, because they have been developed to define not only "directly competitive" products but also "directly substitutable" products pursuant to Article III:2 of the GATT 1994. In the Appellate Body's view, "the mere absence of the word 'substitutable' in Article 6.2 of the *ATC*" does not "[render] our interpretation of the term 'directly competitive' under Article III:2 of the GATT 1994 irrelevant in terms of its contextual significance for the interpretation of that term under Article 6.2 of the *ATC*."⁷⁶

Proximity in competitive relationship

63. As regards the definition of "directly competitive" in the specific context of Article 6.2 of the *ATC*, the Appellate Body in *US – Cotton Yarn* put an emphasis on the critical importance of the degree of proximity between domestic and imported products in their competitive relationship to underpin the reasonableness of a safeguard action against an imported product:

"We must bear in mind that Article 6.2 permits a safeguard action to be taken in order to protect a domestic industry from serious damage (or actual threat thereof) caused by a surge in imports, provided the domestic industry is identified as the industry producing 'like and/or directly competitive products' in comparison with the imported product. The criteria of 'like' and 'directly competitive' are characteristics attached to the domestic product in order to ensure that the domestic industry is the appropriate industry in relation to the imported product. The degree of proximity between the imported and domestic products in their competitive relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product."⁷⁷

Dynamic competitive relationship

64. The Appellate Body on *US – Cotton Yarn* further indicated that the competitive relationship between domestic and imported products is not static but dynamic since "products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions":

"According to the ordinary meaning of the term 'competitive', two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. 'Competitive' is a characteristic attached to a product and denotes the *capacity* of a

product to compete both in a current or a future situation. The word 'competitive' must be distinguished from the words 'competing' or 'being in actual competition'. It has a wider connotation than 'actually competing' and includes also the notion of a potential to compete. It is not necessary that two products be competing, or that they be in actual competition with each other, in the marketplace at a given moment in order for those products to be regarded as competitive. Indeed, products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions. Thus, a static view is incorrect, for it leads to the same products being regarded as competitive at one moment in time, and not so the next, depending upon whether or not they are in the marketplace."⁷⁸

"Directly" as a qualifier and limit to "competitive"

65. The Appellate Body on *US – Cotton Yarn* also stressed the relevance of the word "directly" which qualifies and limits the word "competitive" "to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike". In the Appellate Body's view, "[u]nder this definition of 'directly', a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product."⁷⁹ In its view:

"It is significant that the word 'competitive' is qualified by the word 'directly', which emphasizes the degree of proximity that must obtain in the competitive relationship between the products under comparison. As noted earlier, a safeguard action under the *ATC* is permitted in order to protect the domestic industry against competition from an imported product. To ensure that such protection is reasonable, it is expressly provided that the domestic industry must be producing 'like' and/or 'directly competitive products'. Like products are, necessarily, in the highest degree of competitive relationship in the marketplace.⁸⁰ In permitting a safeguard action, the first consideration is, therefore, whether the domestic industry is producing a like product as compared with the imported product in question. If this is so, there can be no doubt as to the reasonableness of the safeguard action against the imported product.

⁷⁴ (footnote original) The Appellate Body refers to its Report on *Korea – Alcoholic Beverages*, para. 118.

⁷⁵ Appellate Body Report on *US – Cotton Yarn*, para. 91.

⁷⁶ Appellate Body Report on *US – Cotton Yarn*, para. 94.

⁷⁷ Appellate Body Report on *US – Cotton Yarn*, para. 95.

⁷⁸ Appellate Body Report on *US – Cotton Yarn*, para. 96.

⁷⁹ Appellate Body Report on *US – Cotton Yarn*, para. 98.

⁸⁰ (footnote original) Appellate Body Report, *Korea – Alcoholic Beverages . . .*, para. 118; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 473. In these cases, we stated that "like" products are perfectly substitutable and that "directly competitive" products are characterized by a high, but imperfect, degree of substitutability.

When, however, the product produced by the domestic industry is not a 'like product' as compared with the imported product, the question arises how close should be the competitive relationship between the imported product and the 'unlike' domestic product. It is common knowledge that unlike or dissimilar products compete or can compete in the marketplace to varying degrees, ranging from direct or close competition to remote or indirect competition. The more unlike or dissimilar two products are, the more remote or indirect their competitive relationship will be in the marketplace. The term 'competitive' has, therefore, purposely been qualified and limited by the word 'directly' to signify the degree of proximity that must obtain in the competitive relationship when the products in question are unlike. Under this definition of 'directly', a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product."⁸¹

Captive production

66. In *US – Cotton Yarn*, the United States had excluded from the scope of its definition of domestic industry those vertically integrated United States' fabric manufacturers producing yarn for their own captive consumption. The United States had argued that such yarn was not directly competitive with imported yarn (in spite of being like products) because it was not offered for sale on the market (except when the captive production was "out of balance", and even then only in *de minimis* quantities). The United States also argued that vertically integrated fabric producers were not dependent on the merchant market for meeting any of their requirements of yarn except to a *de minimis* extent. The Appellate Body did not subscribe to the United States' arguments because it was a "static"⁸² view which makes the competitive relationship between yarn sold on the merchant market and yarn used for internal consumption by vertically integrated producers dependent on what they choose to do at a particular point in time."⁸³ The Appellate Body concluded that a proper analysis of the competitive relationship between the two products would clearly show that they were "directly competitive" within the meaning of Article 6.2.⁸⁴ The Appellate Body also dismissed the United States' argument that its decision in *US – Hot-Rolled Steel* supported the United States' contention that the captive segment of the market can be separated from the merchant market segment because the Appellate Body had observed that captive production was "shielded from direct competition":

"We did not hold, however, that captive production can be excluded from either the definition of the domestic industry or from the injury analysis. We said that, while

an injury analysis can be carried out segment-by-segment before assessing damage to the domestic industry as a whole, an analysis of the captive segment of the market cannot be excluded. Our observation that captive steel production was 'shielded from direct competition' did not mean that steel produced in the captive market segment is not directly competitive with imported steel destined for the merchant market. Our ruling in *United States – Hot-Rolled Steel*, therefore, does not support the argument of the United States."⁸⁵

(iv) "and/or"

67. In *US – Cotton Yarn*, the parties disagreed on the interpretation of the connectors "and/or" in Article 6.2. According to Pakistan, a subject domestic industry consisted of producers of: (i) like products; or (ii) directly competitive products; or (iii) both like products and directly competitive products. In contrast, the United States argued that Members are permitted to identify a "domestic industry" as an industry producing a product that is: (i) like but not directly competitive; or (ii) unlike but directly competitive; or (iii) both like and directly competitive.⁸⁶ The Panel, in a finding not addressed by the Appellate Body⁸⁷, analysed the various possible combinations and concluded that the United States' interpretation was flawed because: (i) it included "like but not directly competitive products" which is a meaningless alternative; and (ii) it permitted Members to impose transitional safeguard measures for domestic producers of "unlike but directly competitive products":

"Both of the parties' interpretations of the term 'and/or' are grammatically possible. However, in our view, the chart shows that the US interpretation is flawed in that among other things, one of the categories of a domestic industry, *i.e.* the producers of [like but not directly competitive products], is a meaningless alternative. Imports of any textile product cannot damage producers of "like but not directly competitive products" through market competition. The United States itself conceded that "if the products of domestic producers are *not* directly competitive with imports – such as in the case of yarn manufactured by vertically integrated producers for their internal consumption – the need for safeguard action would not arise." Indeed, not only would the need not arise, but the case could not be made because causation could not be demonstrated. Thus, the treaty would give a meaningless right. In this respect, the US

⁸¹ Appellate Body Report on *US – Cotton Yarn*, paras. 97–98.

⁸² As regards "static" versus "dynamic" approach to the competitive relationship between domestic and imported products, see para. 64.

⁸³ Appellate Body Report on *US – Cotton Yarn*, paras. 99–100.

⁸⁴ Appellate Body Report on *US – Cotton Yarn*, para. 101.

⁸⁵ Appellate Body Report on *US – Cotton Yarn*, para. 102.

⁸⁶ Panel Report on *US – Cotton Yarn*, para. 7.81.

⁸⁷ Appellate Body Report on *US – Cotton Yarn*, para. 104.

interpretation is inconsistent with the principle of effectiveness in treaty interpretation.⁸⁸

...

[I]n our view, the US interpretation is problematic in permitting Members to impose transitional safeguard measures for domestic producers of “unlike but directly competitive products”. This means that “serious damage” would be found based upon the examination of the situation regarding these producers, without taking into consideration the situation regarding producers of “like and directly competitive products”, which are *core* products competing with subject imports. To give an example of the absurdity of the potential result from the US formulation, take the following example of an investigation with respect to an industry producing directly competitive but unlike products. In such a case the imported products could be combed cotton yarn as in the present case, but the domestic industry would not be the cotton yarn industry; rather, it could be the synthetic yarn industry if such products were found to be directly competitive. But because the chosen category is unlike but directly competitive, then the combed cotton yarn producers would be excluded from the investigation. This would leave open the possibility of finding serious damage and causation thereof even where the domestic combed cotton yarn industry was flourishing, but the synthetic yarn industry was in trouble. This would seem to be in direct conflict with the requirement of the treaty language in Article 6.2 that “Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product *and not by such other factors as technological changes or changes in customer preferences.*” (emphasis added)⁸⁹

(v) *TMB statements*

68. At its meeting in November 1998, in examining certain transitional safeguard measures introduced by Colombia on imports from Korea and Thailand, the TMB noted that the *ATC* does not include a definition of “domestic industry” and that this leaves a certain discretion to the Members. However, to only account one company, representing 62 per cent of the total domestic production, as the whole domestic industry hindered the TMB in making a proper assessment of the domestic industry:

“[T]he Colombian investigating authorities had determined that one company, which had requested the application of the safeguard measure on imports, represented on average 62 per cent of the total domestic production of plain polyester filaments and, therefore, could be considered to represent the domestic industry. It followed from this determination that Colombia had provided information regarding the economic variables referred to in Article 6.3 which reflected data pertaining to that one company. The TMB observed in this respect

that the *ATC* does not provide a definition of what constitutes the domestic industry. The TMB noted, however, that Colombia had failed to provide information on a significant part of its domestic industry producing plain polyester filaments. This lack of information brought about important uncertainties and, therefore, hampered the TMB’s ability to assess the situation of the Colombian industry producing plain polyester filaments.”⁹⁰

69. On the subject referenced in the above-mentioned paragraph, the TMB noted that as a consequence of the incomplete information on the domestic industry, it could not be determined whether the commercial difficulties that the sole concerned domestic producer faced (who had requested the investigation) were due to the increase of imports or whether it was a result of enhanced competition between domestic producers:

“[B]earing in mind in particular the information that had been made available by Colombia pursuant to Article 6.7, continued to be of the view that in the absence of any information on a significant part of the domestic industry, it had not been possible to assess the state of the industry producing plain polyester filaments, in particular the effect of increased imports on the companies constituting the domestic industry producing the particular product. Therefore, it had been impossible to determine whether the difficulties encountered by the company requesting the investigation could be attributed to a possible damage caused by the increased volume of total imports or to other factors such as, for example, an important increase in the production of the other domestic company producing plain polyester filaments, resulting in an increased competition between the domestic producers;

...

The TMB observed that it had not provided any interpretation of the definition of the term ‘domestic industry’, as claimed by Colombia. Similarly, the TMB had not suggested that the information on the domestic industry should cover 100 per cent of the domestic producers of such products.”⁹¹

70. At its meeting in April 1999, the TMB examined a safeguard measure introduced by the United States on

⁸⁸ (*footnote original*) Appellate Body, in *US – Gasoline*, stated as follows:

“... One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”

Appellate Body Report on *US – Gasoline*, op. cit., p. 23. Also Appellate Body Reports on *Japan – Alcoholic Beverages*, op. cit., p. 12; *US – Underwear*, op. cit., p. 16; *Argentina – Footwear*, op. cit., para. 95; and *Korea – Dairy*, op. cit., para. 81.

⁸⁹ Panel Report on *US – Cotton Yarn*, paras. 7.87 and 7.89.

⁹⁰ G/TMB/R/49, para. 18.

⁹¹ G/TMB/R/51, para. 21.

certain imports from Pakistan. The United States had determined, with respect to the term “domestic industry producing like and/or directly competitive products” a category of “vertically integrated firms whose yarn did not ordinarily enter normal channels of trade and did not compete with yarn produced for sale in the open market” and that had not provided the TMB with information concerning this category. The TMB recalled that:

“[A]ccording to Article 6.2, ‘[s]afeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference’. It followed from this that the factual information referred to in Article 6.7 had to be provided with respect to the domestic industry producing like and/or directly competitive products.”⁹²

71. The TMB then went on to hold that it “would ordinarily be up to the Body, on the basis of the detailed information provided pursuant to Article 6.7, to determine whether it was justified in excluding a particular segment of production”:

“The TMB noted that the particular product subject to the safeguard measure introduced by the United States was *combed cotton yarn identified as US category 301*. The TMB observed, furthermore, that *in terms of its characteristics any combed cotton yarn was identical, i.e. alike in all respects, including common end-uses, with respect to the particular product subject to the safeguard measure in question*.

The TMB noted that the United States had defined the domestic industry producing products like and/or directly competitive with imports of combed cotton yarn (category 301) as the US industry segment that produced spun yarn for sale, chief weight combed cotton defined as category 301, sold to other firms for use in the manufacture of fabric and finished textile products. It followed from this that the United States had provided information regarding all the economic variables referred to in Article 6.3 with respect to that segment of the industry. As regards the other segment of the US industry producing cotton spun yarn, chief weight combed cotton, the United States had explained that this segment had been composed of vertically integrated firms whose yarn did not ordinarily enter normal channels of trade and did not compete with yarn produced for sale in the open market.

...

The TMB noted that the United States had provided arguments why, in its view, the combed cotton yarn production of the vertically integrated mills should be excluded from the scope of the investigation and, by extension, why it had not provided data pursuant to Article 6.3 with respect to this segment of production. The TMB observed that it *would ordinarily be up to the Body, on the basis of the detailed information provided pursuant to Article 6.7, to determine whether it was justified to exclude a particular segment of production. Therefore the TMB would have expected to receive, to the extent practicable, sufficient information to allow it to do so.*⁹³ (emphasis added)

72. At its meeting in June 1999, on the same matter, the TMB confirmed its findings referenced in paragraphs 70–71 above:

“The United States had claimed, in view of the lack of ‘direct competitiveness’ between the two segments of the industry, that the vertically integrated segment should be excluded from the definition of the domestic industry and, therefore, from the investigation conducted under Article 6 without the necessity to provide specific information on the economic variables, pursuant to Article 6.7, regarding the vertically integrated firms. The TMB, on the other hand, guided by the fact that the domestic industry producing combed cotton yarn encompassed two segments (i.e. that of the ‘for sale’ companies as well as that of the vertically integrated firms), had held the view that:

- information reflecting the status of the vertically integrated firms should also have been provided by the United States, to the extent practicable, regarding the economic variables defined in Article 6.3; and
- on the basis of this information the TMB could have determined whether for the purpose of the particular investigation it was justified, or not, to exclude this segment of the production from the scope of the domestic industry producing like and/or directly competitive products for which serious damage, or actual threat thereof, as a result of increased imports, had been claimed.”⁹⁴

(f) Causation

(i) “*demonstrably*”

73. The Panel on *US – Underwear*, referring to Article 6.2, second sentence, emphasized, in a finding not reviewed by the Appellate Body, the word “*demonstrably*” and found that it is not sufficient to merely make a mechanical causal link between the increase in imports and the alleged serious damage to the domestic industry in making a determination of whether the imports have caused serious damage to the domestic industry:

⁹² G/TMB/R/53, para. 12.

⁹³ G/TMB/R/53, paras. 13–14 and 16. Emphases added.

⁹⁴ G/TMB/R/55, para. 14.

"Nowhere in the March Statement [on which the United States proposed the subject transitional safeguard measure] could we find a discussion or demonstration of causality as required under this provision, beyond the mere statement that the imports were responsible for the damage. This assertion is inadequate, in our view, because of special factors affecting trade in underwear between the United States and a number of exporting Members including Costa Rica. (As noted above, most of this trade with Costa Rica – at least 94 per cent – is apparently 807 or 807A trade.) While such trade may certainly cause damage to the domestic industry, the nature of the trade is such that it may benefit the domestic firms that participate in it (see paragraph 7.44). Thus, in a discussion of whether such trade has caused serious damage, it is necessary to look at this trade to determine its effects on the industry. Because of the nature of the trade it is not possible in these circumstances to conclude from the simple fact that there has been a fall in production that there has also been serious damage. The March Statement undertakes no such discussion. Moreover, the March Statement suggests other possible causes of serious damage, such as rising cotton prices (see paragraph 7.44), but does not consider their role as a cause of such damage. Thus, it cannot be said that the March Statement 'demonstrably' shows that serious damage was caused by increased levels of imports. We find, therefore, that an objective assessment of the March Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.2 of the ATC by imposing a restriction on imports of Costa Rican underwear without adequately demonstrating that increased imports had caused serious damage."⁹⁵

74. In *US – Wool Shirts and Blouses*, with respect to the term "demonstrably", the Panel found, in a statement not reviewed by the Appellate Body, that under Article 6.2 of the ACT there is an explicit obligation incumbent on the Member introducing the safeguard measure to demonstrate that the serious damage or actual threat thereof was not due to consumer preferences or technological changes:

"[T]he clear wording of Article 6.2 of the ATC '... Serious damage or actual threat thereof must demonstrably be caused by ... and not by such other factors as technological changes or changes in consumer preference' imposes on the importing Member at least an explicit obligation to address the question whether serious damage or actual threat thereof to the particular domestic industry was caused by changes in consumer preferences or technological changes. The importing Member remains free to choose the method of assessing whether the state of its particular domestic industry was caused by such other factors as technological changes or changes in consumer preferences, but it must demonstrate that it has addressed the issue."⁹⁶

(ii) *Choice of investigation period*

75. At its meeting in April 2000, the TMB reviewed certain transitional safeguard measures taken by Argentina on certain textile products imported from Korea. Korea claimed that since there was a five-month gap between the end of the period investigated and the application of the safeguard measures, Argentina had failed to establish the substantial increase in imports under Article 6.2 and had violated Article 6.7, which stipulates that "the information shall be related, as closely as possible, to ... the reference period set out in paragraph 8" of Article 6. The TMB responded as follows:

"In the present case, Argentina should have provided in the relevant factual data information at least with respect to the developments in total imports and imports from Korea for the period August 1998–July 1999. At the same time, the TMB recognized that the formulation of Article 6.7 (i.e. that the information shall be related as closely as possible to the reference period) permitted certain flexibility in providing information on the different economic variables listed in Article 6.3, depending on the availability of the relevant data and information. However, the safeguard measures in question had been applied by Argentina pursuant to the provisions of Article 6.11, which required the existence of 'highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair'. The TMB was of the view that the existence of such circumstances could only be proven if information was provided regarding developments which occurred in the very recent period, i.e. during or very close to the reference period.

With reference to the five-month gap between the end of the period investigated (i.e. May 1999) and the provisional application of the safeguard measures in question (i.e. October 1999), as raised by Korea, the TMB observed that the National Commission for Foreign Trade of Argentina had made its finding regarding the determination of the existence of serious damage caused by increased imports on 30 July 1999, on the basis of information including the 12-month period ending in May 1999. Therefore, had the Government of Argentina decided to invoke the provisions of Article 6 soon thereafter, it could have provided all the information referred to in Articles 6.2 and 6.3 covering the reference period specified in Articles 6.7 and 6.8. The TMB noted the explanation of the representative of Argentina that this finding had only been a step in the internal administrative procedures, and that the formal determination of serious damage could only be made by the Minister for the Economy and Public Works and Services. In view of the administrative procedures involved, this decision was made only on 28 October 1999. The TMB

⁹⁵ Panel Report on *US – Underwear*, para. 7.46.

⁹⁶ Panel Report on *US – Wool Shirts and Blouses*, para. 7.50.

considered that it would be inappropriate for it to comment on the internal administrative procedures involved in any Member's recourse to the provisions of the ATC. The Body had to observe, however, that possible delays in taking decisions, as a result of such procedures, may have an impact on the findings and conclusions the TMB could reach, in accordance with the provisions of the ATC, regarding the justification of the measures in question or aspects thereof."⁹⁷

76. As regards the investigation period for the determination of causation, see paragraphs 57–58 above.

3. Article 6.3

(a) List of conditions in Article 6.3

77. In *US – Underwear*, the Panel held that the criteria in *inter alia* Article 6.3 had to be fulfilled in order for transitional safeguard measures to be consistent with the ATC. Further on in the report, the Panel stated that despite its observation that the United States had failed to analyse all of the listed economic factors of Article 6.3 it could not be concluded that the finding of serious damage was inconsistent with that provision, because the economic factors in Article 6.3 represent only an illustrative list. In a finding, not reviewed by the Appellate Body, the Panel held that “Article 6.3 of the ATC contains an indicative list of economic variables that can be taken into account in order to assess the serious damage or actual threat thereof.”⁹⁸

78. In *US – Wool Shirts and Blouses*, which the DSB adopted three months after *US – Underwear*, the Panel did not follow the approach adopted in *US – Underwear*. In a finding not reviewed by the Appellate Body, the Panel held that the criteria in Article 6.3 reflected an exhaustive, and not “indicative”, list of economic factors. Hence, all the 11 economic factors included in that paragraph had to be considered in order for the imposition of transitional safeguard measures to be consistent with the ATC.⁹⁹ The Panel held:

“In our view, the wording of Article 6.2 and 6.3 of the ATC makes it clear that all relevant economic factors, namely, all those factors listed in Article 6.3 of the ATC, had to be addressed by CITA, whether subsequently discarded or not, with an appropriate explanation. The wording of paragraph 3, which reads

‘... the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment.’, (emphasis added)

implies two requirements. First, the relevant economic variables must be examined. Second, output, productiv-

ity, utilization of capacity, etc. ... are relevant economic variables. The wording of Article 6.3 of the ATC ‘... the Member shall examine the effects ... on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, etc. ...’ makes clear that each of the listed factors is not only relevant but must be examined. Effectively, the listed economic variables are examples of relevant economic variables, they are presumed to be ‘relevant economic variables’ and must be examined by the importing country in its determination.”

The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide – in its assessment of whether or not serious damage or actual threat thereof has been caused to the domestic industry – that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC.

The last part of Article 6.3 of the ATC, which states that ‘none of which, either alone or combined with other factors, can necessarily give decisive guidance’, confirms that some consideration and a relevant and adequate explanation have to be provided of *how the facts as a whole support the conclusion* that the determination is consistent with the requirements of the ATC.”¹⁰⁰ (emphasis original)

79. The conclusions of panels and the Appellate Body on the interpretation of the similarly worded provision can be found in Section V.B.4(a)(viii) of the Chapter on the *Agreement on Safeguards*; in Section III.B.6(c) the Chapter on the *Anti-Dumping Agreement*, and Article 15.4 of the Chapter on the *SCM Agreement*.

4. Article 6.4

(a) Steps preceding the attribution of serious damage to individual Members

80. In *US – Cotton Yarn*, the Appellate Body explained that before carrying out the attribution exercise demanded by Article 6.4 it is necessary to apply the three analytical steps set forth in Article 6.2:

“Attribution is preceded by three analytical steps which are set forth in Article 6.2: (i) an assessment of whether the domestic industry is suffering serious damage (or actual threat thereof) according to Articles 6.2 and 6.3; (ii) an examination of whether there is a surge in imports as envisaged by Article 6.2; and, (iii) an establishment of

⁹⁷ G/TMB/R/64, paras. 23–24.

⁹⁸ Panel Report on *US – Underwear*, para. 7.22.

⁹⁹ Panel Report on *US – Wool Shirts and Blouses*, para. 7.26.

¹⁰⁰ Panel Report on *US – Wool Shirts and Blouses*, paras. 7.25–7.27.

a causal link between the surge in imports and the serious damage (or actual threat thereof); according to the last sentence of Article 6.2, “[s]erious damage . . . must demonstrably be caused by such increased quantities in total imports of that product and not by . . . other factors”. (emphasis added)¹⁰¹

(b) Attribution requirements

81. In *US – Cotton Yarn*, the Appellate Body emphasized the two requirements mandated by Article 6.4 to which the attribution of serious damage to individual Members must conform.¹⁰² The first requirement is that “the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase”.¹⁰³ The second requirement is “a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports.”¹⁰⁴

(i) *First requirement: only those Members from whom imports have shown a sharp and substantial increase*

82. In *US – Cotton Yarn*, the Appellate Body referred to the first attribution requirement as follows:

“The first requirement is that the attribution be confined to only those Members from whom imports have shown a sharp and substantial increase. Such Members will be identified on an individual basis by virtue of the wording in Article 6.4, second sentence, ‘on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually’. The Panel interpreted the term ‘sharp’ to refer to the rate of the import increase, and the term ‘substantial’ to the amount of that increase.¹⁰⁵ These interpretations of the Panel have not been appealed and are, therefore, not before us.”¹⁰⁶

“sharp” and “substantial” increase in imports

83. The Panel on *US – Cotton Yarn* interpreted the terms “sharp” and “substantial”. These interpretations were not considered by the Appellate Body.¹⁰⁷ The Panel interpreted the “term ‘sharp’ to refer to the percentage increase and the term ‘substantial’ to refer to the absolute increase”.¹⁰⁸

Attribution to all Members whose imports cause serious damage or threat thereof

84. In *US – Cotton Yarn*, the Panel had found that the United States had acted inconsistently with Article 6.4 by not examining the effect of imports from Mexico (and possibly other appropriate Members) individually when attributing serious damage to Pakistan.¹⁰⁹ The Panel also ruled that Article 6.4 requires attribution to all Members whose imports cause serious damage or actual threat thereof.¹¹⁰ The Appellate Body, further to

upholding the Panel’s first finding regarding US inconsistency with Article 6.4¹¹¹, considered that its findings on that first issue¹¹² resolved the dispute as defined by Pakistan’s claims before the Panel. The Appellate Body therefore declined to rule on the issue of whether Article 6.4 requires attribution to all Members whose imports are causing serious damage or actual threat thereof and indicated that “[i]n these circumstances, the Panel’s interpretation on this question is of no legal effect”.¹¹³

(ii) *Second requirement: comparative analysis*

85. In *US – Cotton Yarn*, the Appellate Body referred to the second attribution requirement:

“The second requirement of Article 6.4, second sentence, is a comparative analysis, in the event that there is more than one Member from whom imports have shown a sharp and substantial increase in its imports.¹¹⁴ The conduct of the comparative analysis is governed by the latter part of the second sentence of Article 6.4, which requires the analysis to address certain specific factors, namely: (i) the level of imports as compared with imports from other sources; (ii) market share; and (iii) import and domestic prices at a comparable stage of commercial transaction. Article 6.4 further specifies that

¹⁰¹ Appellate Body Report on *US – Cotton Yarn*, para. 112.

¹⁰² Appellate Body Report on *US – Cotton Yarn*, para. 113.

¹⁰³ Appellate Body Report on *US – Cotton Yarn*, para. 114.

¹⁰⁴ Appellate Body Report on *US – Cotton Yarn*, para. 115.

¹⁰⁵ (footnote original) Panel Report, para. 7.130.

¹⁰⁶ Appellate Body Report on *US – Cotton Yarn*, para. 114.

¹⁰⁷ Appellate Body Report on *US – Cotton Yarn*, para. 114.

¹⁰⁸ Panel Report on *US – Cotton Yarn*, para. 7.130.

¹⁰⁹ Panel Report on *US – Cotton Yarn*, para. 8.1(b).

¹¹⁰ Panel Report on *US – Cotton Yarn*, paras. 7.126–7.127. The Panel had found that “unlike other safeguard investigations, and resulting applications of measures, which are done on an MFN basis, . . . [t]he Member imposing a safeguard under the ATC must then do a further attribution analysis and narrow the causation down to only those Members whose exports are causing the serious damage.”

¹¹¹ The Appellate Body upheld the Panel’s finding in para. 8.1(b) of its Report “albeit for reasons partly different from those given by the panel”. Appellate Body Report on *US – Cotton Yarn*, para. 126.

¹¹² Appellate Body Report on *US – Cotton Yarn*, paras. 119 and 125–126.

¹¹³ Appellate Body Report on *US – Cotton Yarn*, para. 128.

¹¹⁴ (footnote original) We note that the panel in *United States – Underwear* stressed that such a comparative analysis of the effects of imports is indispensable in attributing serious damage to a Member. The panel noted that, while there had been a significant increase in imports of underwear from Costa Rica, the position of Costa Rica was not significantly different from that of the other five exporting Members considered in the United States’ determination. Nonetheless, the determination failed to undertake a comparative assessment of the effects of imports from Costa Rica with those five exporting Members. The panel further reasoned that the United States could not enter into agreements permitting an overall increase of imports of 478 percent over the current import levels from those five Members and, at the same time, claim that an import increase of 22 percent from Costa Rica contributed to serious damage. (Panel Report, *supra*, footnote 29, paras. 7.49 and 7.51) The issue of attribution was not appealed in that case.

none of these factors, either alone or combined with other factors, can necessarily give decisive guidance.”¹¹⁵

Why is a comparative analysis required?

86. In *US – Cotton Yarn*, the Appellate Body faced the question of why a comparative analysis is needed under Article 6.4 as the means to respond to another question, namely how to conduct a comparative analysis since Article 6.4 does not directly address this issue.¹¹⁶ The Appellate Body concluded that attributing damage actually caused to the domestic industry by imports from a Member to a different Member imports amounted to a “‘mis-attribution’ of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4”:

“Article 6.4 provides, in relevant part, that ‘[t]he Member or Members to whom serious damage . . . is attributed, shall be determined on the basis of a sharp and substantial increase in imports . . . from such a Member or Members’. (emphasis added) The clear inference from this phrase is that the sharp and substantial increase of imports from such a Member determines not only the basis, but also the scope of attribution of serious damage to that Member.

In consequence, where imports from more than one Member contribute to serious damage, it is only that part of the total damage which is actually caused by imports from such a Member that can be attributed to that Member under Article 6.4, second sentence. Damage that is actually caused to the domestic industry by imports from one Member cannot, in our view, be attributed to a different Member imports from whom were not the cause of that part of the damage. This would amount to a ‘mis-attribution’ of damage and would be inconsistent with the interpretation in good faith of the terms of Article 6.4. Therefore, the part of the total serious damage attributed to an exporting Member must be proportionate to the damage caused by the imports from that Member. Contrary to the view of the United States, we believe that Article 6.4, second sentence, does not permit the attribution of the totality of serious damage to one Member, unless the imports from that Member alone have caused all the serious damage.”¹¹⁷

87. As support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* referred to the rules of general international law on State responsibility and Article 22.4 of the *DSU* (suspension of concessions)¹¹⁸:

“Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.¹¹⁹ In the same vein, we note that Article 22.4 of the *DSU*¹²⁰ stipulates that the suspension of concessions shall be equivalent to the level of nullifi-

cation or impairment. This provision of the *DSU* has been interpreted consistently as not justifying punitive damages.¹²¹ These two examples illustrate the consequences of breaches by states of their international obligations, whereas a safeguard action is merely a remedy to WTO-consistent ‘fair trade’ activity.¹²² It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, ‘punitive’, attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case.”¹²³

88. Also in support for its conclusions on the reasons why a comparative analysis is needed, the Appellate Body pointed out:

“Finally, and most significantly, if the totality of serious damage could be attributed to only one of those Members the imports from whom have contributed to it, there would be no need to undertake a comparative analysis of the effects of imports from that one Member, once the imports from that Member have been found to have increased sharply and substantially; such an interpretation would reduce a whole segment of Article 6.4 to inutility.”¹²⁴

¹¹⁵ Appellate Body Report on *US – Cotton Yarn*, para. 115.

¹¹⁶ Appellate Body Report on *US – Cotton Yarn*, para. 117.

¹¹⁷ Appellate Body Report on *US – Cotton Yarn*, paras. 118–119.

¹¹⁸ See Sections III.B.1.(c) and XXII.B.7 of the Chapter on the *DSU*.

¹¹⁹ (footnote original) Article 51 of the International Law Commission’s draft articles on Responsibility of States reads:

“Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”

(International Law Commission, State Responsibility: Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading, A/CN.4/L.602/Rev.1, 26 July 2001)

¹²⁰ (footnote original) Article 22.4 of the *DSU* reads:

“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”

¹²¹ (footnote original) The Arbitrators in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* stated that “there is nothing in Article 22.1 of the *DSU*, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a punitive nature.” (Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999, para. 6.3) See also, Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 20 August 2000, para. 3.55.

¹²² (footnote original) Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, footnote 41, para. 94.

¹²³ Appellate Body Report on *US – Cotton Yarn*, para. 120.

¹²⁴ Appellate Body Report on *US – Cotton Yarn*, para. 121.

How to conduct a comparative analysis

89. Further to responding to the question why a comparative analysis is needed, the Appellate Body in *US – Cotton Yarn* focussed on the question how to conduct a comparative analysis since this is not expressly stated in the wording of Article 6.4, second sentence.¹²⁵ In this regard, the Appellate Body considered that such an analysis “is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member.” The Appellate Body further concluded that “an assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken **individually**” (emphasis added):

“We now turn to the question of how to conduct the comparative analysis required by Article 6.4. This analysis is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member. We recall that Article 6.4 enjoins the importing Member to conduct this comparative analysis on a multi-factor basis including “levels of imports”, “market share” and “prices”, while specifying that none of these factors alone or in combination with other factors can necessarily give decisive guidance. The comparison is to take place between the effects of imports from the Member in question, on the one hand, and those of imports from other sources, on the other. The comparison must thus be based on a variety of factors, each of which has a different significance and weight, and is to be measured on a different scale.

It is of course possible to compare the level of imports of one Member with the level of imports from other sources taken together. Likewise, it is possible to establish the market share of one Member in comparison with all other imports and the output of the domestic industry. However, the full effects of the level of imports from, and the market share of, one Member can only be assessed if this level and this share are compared *individually* with the level of imports from, and the market share of, the other Members from whom imports have also increased sharply and substantially. This conclusion is even more obvious for the comparison of import and domestic prices. The price of imports from one Member can be compared with the average price of imports from other sources and with domestic prices. However, prices of imports from the other Members may vary widely from one another. A fair assessment of the effects of the price of imports from one Member will therefore require a comparison with the price of imports from other Members taken individually. Moreover, these different factors

interact in different ways, producing different effects, under different circumstances, not to mention the possible existence of other relevant factors (and their effects) that must be taken into account in the comparison according to the proviso at the end of Article 6.4, second sentence.

An assessment of the share of total serious damage, which is proportionate to the damage actually caused by imports from a particular Member, requires, therefore, a comparison according to the factors envisaged in Article 6.4 with all other Members (from whom imports have also increased sharply and substantially) taken individually.”¹²⁶

90. In *US – Underwear*, the Panel considered on a comparative basis whether the attribution of serious damage in the United States’ domestic industry to Costa Rican imports was consistent with the requirements under Article 6.4. In this context the Panel analysed the five bilateral agreements that the United States had concluded with five different exporting States which represented a substantial portion of all United States’ imports. In these agreements the United States agreed to ensure unrestricted imports to the United States’ territory of more than 170 million “dozen units of a product (an increase of 478 per cent over then current import levels).”¹²⁷ The Panel concluded, in a finding not reviewed by the Appellate Body, that the attribution of serious damage to Costa Rican imports was inconsistent with the requirements of Article 6.4 as follows:

“In light of (i) the fact that restrictions under Article 6 of the ATC are to be applied only sparingly, (ii) the fact that the United States has the burden of proving that it has complied with the requirements of Article 6 of the ATC, (iii) the deficiencies detailed above in respect of the evidence on the existence of serious damage, which raise serious questions in our view as to whether there was serious damage shown under Article 6.2 at all, (iv) the fact that the United States failed to demonstrate adequately that the cause of serious damage was imports, and (v) the fact that the United States voluntarily agreed to accept import limits from other countries exporting underwear to the United States that permitted increases over their current export levels that were far in excess of Costa Rica’s export levels to the United States, we conclude that the United States failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC.”¹²⁸

¹²⁵ Appellate Body Report on *US – Cotton Yarn*, para. 117.

¹²⁶ Appellate Body Report on *US – Cotton Yarn*, paras. 122–124. See also Section III.B.1(xi) of the Chapter on the *DSU*.

¹²⁷ Panel Report on *US – Underwear*, para. 7.51.

¹²⁸ Panel Report on *US – Underwear*, para. 7.52.

5. Article 6.6

(a) Article 6.6(a)

91. With respect to the definition of “least-developed country Members”, see excerpts referenced in the Chapter on the *WTO Agreement*, Article XI:2.

(b) Article 6.6(d)

92. The Panel on *US – Underwear* examined whether the United States, in its application of the transitional safeguard measure at issue, accorded more favourable treatment to re-imports into its territory in accordance with Article 6.6(d). Specifically, the Panel held that the United States could not have complied with Article 6.6(d) merely by offering Costa Rica enhanced access for its textiles exports under certain other programmes:

“The ‘chapeau’ to Article 6.6(d) of the ATC makes it clear that the more favourable treatment must be granted ‘in the application of the transitional safeguard’ (emphasis added). This means, in our view, that Members availing themselves of the Article 6 transitional safeguard are obliged to grant more favourable treatment to re-imports, independently of whether such treatment has been previously rejected by the affected Member during the bilateral consultations or whether other privileges were envisaged to be accorded to such a Member in negotiations based upon the implemented safeguard measure. The term ‘more favourable treatment’ is not further qualified in the ATC. We, therefore, reject the United States argument (paragraph 5.157) that they had complied with Article 6.6(d) of the ATC by offering Costa Rica enhanced access under GAL programmes during the course of the consultations.”¹²⁹

93. In response to the Costa Rican claim for quotas larger than those required under Article 6.8, the Panel on *US – Underwear* rejected the notion that more favourable treatment within the meaning of Article 6.6(d) necessarily implies the availability of larger quotas:

“We agree with Costa Rica that quantitatively more favourable treatment for the full three-year period is one of the options available to Members in order to comply with the requirements of Article 6.6(d) of the ATC. We do not consider it, however, to be the only option. In our view, a Member could, for example, comply with the requirements under Article 6.6(d) of the ATC by imposing a restriction for a period shorter than three years.”¹³⁰

6. Article 6.7

94. At its meeting in July 1998, the TMB examined a transitional safeguard measure taken by Colombia on imports of denim from Brazil and India. The TMB stated that while Article 6.7 “allowed for some flexibility, in particular in view of the availability of most

recent data”, this “did not provide for the possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made”:

“[T]he TMB addressed the time-lag of about fifteen months that had taken place between the investigation concluded by INCOMEX and the time at which Colombia had requested consultations with, *inter alia*, Brazil and India. The TMB recalled in this respect that, according to Article 6.7, the information referred to in Articles 6.3 and 6.4 shall be related, as closely as possible, to the reference period set out in Article 6.8, i.e. the 12-month period terminating two months preceding the month in which the request for consultation was made [. . .]. The TMB recognised that this formulation allowed for some flexibility, in particular in view of the availability of most recent data. In the view of the TMB, however, this did not provide for the possibility of taking a safeguard measure on the basis of economic variables describing the status of the industry almost two years before the time at which the request for consultation had been made.”¹³¹

95. At its meeting in November 1998, examining a transitional safeguard measure taken by Colombia on imports from Korea and Thailand, the TMB stated as follows:

“The TMB [. . .] decided to make an examination, on the basis of the information available, of the possible effects of the increased quantities in total imports of plain polyester filaments on the state of the particular industry, as specified in Article 6.3. The TMB noted in this respect that it could not base its assessment on estimates provided by Colombia for the year 1998; and that the monthly averages provided by Colombia could not be considered in most cases as providing reliable indications.”¹³²

96. At its meeting in January 1999, the TMB provided a clarification on its statement referenced in paragraph 95 above. The TMB agreed that Article 6 did not “lay down a single methodology for the presentation of the information in question”. Furthermore, the TMB emphasized that in its statement referenced in paragraph 95 above, it had not made a finding on “how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6”, but rather “had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case”:

¹²⁹ Panel Report on *US – Underwear*, para. 7.57.

¹³⁰ Panel Report on *US – Underwear*, para. 7.58.

¹³¹ G/TMB/R/46, para. 12.

¹³² G/TMB/R/49, para. 21.

"[T]he TMB agreed with Colombia that Article 6 does not lay down a single methodology for the presentation of the information in question. The TMB had recalled what were the time periods covered by the information presented by Colombia pursuant to Article 6.7. '[T]he technical report prepared by INCOMEX contained data regarding the performance of total imports for the 12-month periods June to May of 1995–1996, 1996–1997 and 1997–1998, the reference period referred to in Article 6.8. The data and information incorporated into the report regarding the economic variables set out in Article 6.3 referred to calendar years; for 1998, it incorporated actual data for the period January to May and provided estimates for the full calendar year. In addition, the report provided monthly averages regarding each variable for 1995, 1996, 1997 and January to May 1998' (G/TMB/R/49, paragraph 11). The TMB could not agree with the contention of Colombia that the TMB had omitted to observe that information had been presented in three different forms. The TMB had not qualified whether these forms were mutually supportive, as claimed by Colombia, since the Body had not found that certain such forms were convincing. This had been reflected in the report adopted by the TMB: '[t]he TMB noted [. . .] that it could not base its assessment on estimates provided by Colombia for the year 1998; and that the *monthly averages* provided by Colombia could not be considered in most cases as providing reliable indications.' (G/TMB/R/49, paragraph 21, emphasis added). Therefore, the TMB had added that '[f]or data to be meaningful Colombia would have had *in the present case* to have provided comparisons either on a January/May basis or on a year-ending May basis' (same paragraph, emphasis added). In the view of the TMB, the above excerpts of its report made it clear that (i) the report faithfully reflected the forms of information provided, including the respective time-frames; (ii) the TMB had not provided any interpretation, but had expressed the view that *in the present case* the presentation was such that it did not allow a reliable comparison of the developments or changes in the relevant economic variables referred to in Article 6.3. The reference of the TMB to the January/May comparisons was not an interpretation and was not contrary to any provision of Article 6, since the Body had not suggested that this information should have been provided *in lieu* of the information submitted, but *in addition* to what had been made available. Without such additional information it was not possible for the TMB to assess whether developments during the first five months of 1998 could be an indication of serious damage caused by imports or whether they constituted a seasonal phenomenon which had characterised the domestic industry in the same period of the preceding years as well. The TMB recognized that Colombia had explained that the product subject to safeguard measures was not subject to seasonal factors. This statement, however, had not been substantiated by the information presented pursuant to Article 6.7.

The TMB reiterated that it had not provided any interpretation regarding how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6. Instead, it had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case." (emphasis original)¹³³

97. At its meeting in October 1999, concerning the choice of periods for comparison, the TMB held that two data series for overlapping periods were insufficient for the purposes of Article 6.7. In the specific case, there had been an overlap of eight months. The TMB emphasized that "[r]eliable indications cannot be obtained but by comparing data for identical time-periods":

"The TMB recalled that the relevant provisions of the ATC (Article 6.7) required, *inter alia*, that '[i]n respect of requests [for consultations] made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8' of Article 6. In the particular cases referred to the TMB and subject to the present review, this reference period, in accordance with Article 6.8, corresponded to the period May 1998/April 1999, for which category-specific information had been provided by Argentina. It had to be observed, however, that in the factual information given by Argentina developments of this most recent period could not be compared to the state of the domestic industry as reflected in the different variables during a preceding corresponding period, i.e. during May 1997/April 1998, since all other data had been provided on a calendar-year basis. Though Argentina gave indications (expressed in terms of percentages) regarding 'changes over 12 months', these indications could not be considered to provide a reliable basis, as they compared data relating to May 1998/April 1999 to those reported for January/December 1998. Therefore, between the two data series compared there had been an overlap of eight months. Reliable indications cannot be obtained but by comparing data for identical time-periods. Though Argentina had explained that there had not been indications referring to the existence of seasonal factors, the TMB was of the view that the availability of data for the calendar-year 1998 and for the period May 1998/April 1999 could give an indication for comparing trends between January–April 1998 and the same period in 1999, but did not allow for more far-reaching comparisons."¹³⁴

98. At its meeting in November 2001, the TMB examined a notification by Poland which considered itself unable to conform with the recommendation the TMB had made regarding a transitional safeguard measure introduced by Poland on imports of certain products

¹³³ G/TMB/R/51, paras. 26–27.

¹³⁴ G/TMB/R/58, para. 13.

from Romania. The TMB found that “developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member’s inability to conform with the TMB’s recommendation”:

“[T]he TMB recognized that the ATC does not provide specific guidance as to how long the period of investigation (and, consequently, the period covered in the specific and relevant information in the sense of Article 6.7) should be. Therefore, the definition of the length of the period of investigation is very much left to the discretion of the authorities of the Member invoking the provisions of Article 6. While the use of the present tense of the verb in Article 6.2 (i.e. ‘... a particular product is being imported ...’) and the reference to the information ‘as up-to-date as possible’ in Article 6.7 appear to indicate that the information to be provided should at the minimum, include developments of the recent past, there is no similar guidance regarding what should be the starting-point of the period covered by the factual information. In view of this, the TMB had proceeded to the examination of the matter under Article 6.10 on the basis of the information provided by Poland for the period of 12 months (from 1 January 2000 to 1 January 2001);

It follows from the above that reference to developments that occurred prior to the period covered by the factual information provided pursuant to Article 6.7 can hardly be considered as a valid reason for a Member’s inability to conform with the TMB’s recommendation;”¹³⁵

7. Article 6.10

99. In *US – Underwear*, the Appellate Body examined the Panel’s finding that a transitional safeguard measure imposed by the United States was inconsistent with Article 6. The Panel had held that the wording of Article 6.10 did not provide any guidance on whether backdating a transitional safeguard measure was permissible. Proceeding to the provisions of the *GATT 1994*, the Panel then took Article X:2 thereof as its applicable and controlling text.¹³⁶ The Appellate Body disagreed with these findings of the Panel. As to whether Article 6 permits the retroactive application of transitional safeguard measures, referring to Article 6.10, the Appellate Body held that there was a “presumption [in the] very text of Article 6.10 that such a measure may be applied only prospectively”:

“It is essential to note that, under the express terms of Article 6.10, *ATC*, the restraint measure may be ‘applied’ only ‘after the expiry of the period of 60 days’ for consultations, without success, and only within the ‘window’ of 30 days immediately following the 60-day period. Accordingly, we believe that, in the absence of an express authorization in Article 6.10, *ATC*, to back-

date the effectivity of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively. This presumption appears to us entirely appropriate in respect of measures which are limitative or deprivational in character or tenor and impact upon Member countries and their rights or privileges and upon private persons and their acts.”¹³⁷

100. Further, the Appellate Body considered that the context of Article 6.10, “includ[ing], of course, the whole of Article 6”, supported its finding referenced in paragraph 99 above:

“Article 6.1 directs that transitional safeguard measures be applied ‘as sparingly as possible’ on the one hand and, on the other, applied ‘consistently with the provisions of [Article 6] and the effective implementation of the integration process under [the *ATC*]’. It appears to the Appellate Body that to inject into Article 6.10 an authorization for backdating the effectivity of a restraint measure will encourage return to the practice of backdating restraint measures which appears to have been widespread under the regime of the *MFA*, a regime which has now ended, as discussed below, with the advent of the *ATC*. Such an introjection would moreover loosen up the carefully negotiated language of Article 6.10, which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proven. For retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota measure earlier rather than later.”¹³⁸

101. Finally, the Appellate Body also held that backdating measures imposed pursuant to Article 6.10 would “diminish the utility and significance of prior consultations with the identified exporting Member or Members”:

“It further appears to us that to read Article 6.10 as somehow authorizing the backdating, as a matter of course, of the effectivity or operation of a restraint measure, will tend to diminish the utility and significance of prior consultations with the identified exporting Member or Members. Article 6.7 of the *ATC* provides for those consultations in very substantial detail. Thus, Article 6.7 requires that the request for consultations be accompanied by specific, relevant and up-to-date information on the factors which led the importing Member to make a determination of ‘serious damage’ (listed in

¹³⁵ G/TMB/R/83, para. 29.

¹³⁶ Panel Report on *US – Underwear*, paras. 7.63–7.64.

¹³⁷ Appellate Body Report on *US – Underwear*, p. 14.

¹³⁸ Appellate Body Report on *US – Underwear*, p. 15.

Article 6.3) and the factors which led to the unilateral attribution of such damage to an identified exporting Member or Members (referred to in Article 6.4). One clear objective of requiring a 60-day period for consultations is to give such Member or Members a real and fair, not merely *pro forma*, opportunity to rebut or moderate those factors. The requirement of consultations is thus grounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter. It is, again, noteworthy that Article 6.7 refers *repeatedly* to the Member '*proposing* to take safeguard action', or who '*proposes* to invoke the safeguard action' and to the level at which imports of the goods specified '*are proposed* to be restrained'. The common, day-to-day, implication which arises from this language is clear to us: the restraint is to be applied *in the future*, after the consultations, should these prove fruitless and the proposed measure not withdrawn. The principle of effectiveness in treaty interpretation¹³⁹ sustains this implication."¹⁴⁰

102. In addition to its reasoning referenced in paragraphs 99–101 above, the Appellate Body in *US – Underwear* also addressed “the prior existence and demise, as it were, of the *MFA*” and pointed out that one particular provision of the *MFA* expressly permitted backdating:

“Article 3(5)(i) of the *MFA* expressly permitted backdating of the effectivity of a restraint measure to the date of the importing Member’s call for consultations.¹⁴¹ The above underscored clause of Article 3(5)(i), *MFA*, however, disappeared with the supersession of the *MFA* by the new *ATC*; no comparable clause was carried over into Article 6.10 of the *ATC*. The Panel did not draw any operable inference from the disappearance of the *MFA* clause.¹⁴² Appellant Costa Rica urges that the absence of an equivalent clause in Article 6.10 of the *ATC* means that backdating of a restraint measure may no longer be resorted to under Article 6.10, *ATC*. Appellee United States, in contrast, insists that such backdating is nevertheless available under the regime of the *ATC*.”¹⁴³

103. With respect to the fact that a provision of the *MFA* expressly provided for the possibility to backdate preliminary safeguard measures, the Appellate Body held that the disappearance in the *ATC* of this provision “strongly reinforces the presumption that such retroactive application is no longer permissible”:

“We believe the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operative effect of a restraint measure, strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from such disappearance. We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen.

That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption. At the oral hearing, the United States stated that since 1974, for over 20 years, all importing countries had ‘counted’ imports in the textile area against quotas imposed by restraints from the date of the request for consultations. While that may well have been the practice of many importing countries, it was, of course, the practice *under the MFA*. Two considerations bear upon this matter. Firstly, assuming, *arguendo* only, that the WTO Members had wanted to keep that practice, it is very difficult to understand why the treaty basis for such practice was not maintained but was instead wiped out. Secondly, it has not been suggested that such a widely followed practice has arisen *under Article 6.10 of the ATC* notwithstanding the absence of the *MFA* backdating clause. At any rate, it is much too early for practice to have arisen under the *ATC* regime which commenced only on 1 January 1995.”¹⁴⁴ (emphasis original)

104. Further, in response to the United States claim that the retroactive application of transitional safeguard measures was needed to deal with flood of imports after an announcement of a request for consultations under the *ATC*, the Appellate Body stated:

“When and to the extent that a speculative ‘flood of imports’ turns out, in a particular situation, to be a real and serious problem engaging the legitimate interests of the Member proposing a safeguard measure, we consider that recourse may be had to Article 6.11 of the *ATC*. Article 6.11 authorizes the importing Member, ‘in highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair’, to

¹³⁹ (footnote original) See Report of the Appellate Body, “*United States – Standards for Reformulated and Conventional Gasoline*”, AB-1996-1, (adopted 20 May 1996) p. 23; and Report of the Appellate Body, “*Japan – Taxes on Alcoholic Beverages*”, AB-1996-2 (adopted 1 November 1996), p. 12.

¹⁴⁰ Appellate Body Report on *US – Underwear*, pp. 15–16.

¹⁴¹ (footnote original) Simply as a matter of comparative texts, it may be noted that like Article 6.10 of the *ATC*, Article XIX of the *General Agreement* and the *Agreement on Safeguards* do not contain any language expressly permitting backdating of the effectivity of a safeguard restraint measure taken thereunder with respect to categories of goods already integrated into the *General Agreement*. In contrast, it may also be noted that both Article 10(2) of the *Anti-dumping Agreement* and Article 20(2) of the *SCM Agreement* expressly authorize, under certain conditions, the *retroactive levying* of anti-dumping and countervailing duties for the period when provisional measures were in force. (emphasis original)

¹⁴² (footnote original) We have noted in page 12 that the Panel “conclude[d] that the prevalent practice under the *MFA* of setting the initial date of a restraint period as the date of request for consultations cannot be maintained under the *ATC*”. Immediately thereafter, however, the Panel held that backdating could be resorted to (in 1995, under the *ATC*) provided that the date of initial effectivity is not earlier than the date of publication of the call for consultations. (Panel Report, para. 7.69) This ruling appears at odds with the Panel’s own immediately preceding conclusion. (emphasis original)

¹⁴³ Appellate Body Report on *US – Underwear*, pp. 16–17.

¹⁴⁴ Appellate Body Report on *US – Underwear*, p. 17.

impose and apply *immediately*, albeit provisionally, the restraint measure authorized under Article 6.10. The request for consultations and the notification to the Textile Monitoring Board must, however, be issued within five working days after the taking of provisional action. In other words, the requirements of Article 6.10 must nevertheless be observed. Action under Article 6.11 of the ATC is not in lieu of, and does not supersede, action taken or begun under Article 6.10, ATC. Provisional action under Article 6.11 is folded into action under Article 6.10. Considering that Article 6.11 permits the provisional imposition of a restraint measure even *before* consultations, *a fortiori* it would permit such imposition *after* consultations have in fact begun, so long as the requisites of both Articles 6.10 and 6.11 are met or continue to be met.

...

The conclusion we have arrived at, in respect of the issue of permissibility of backdating, is that the giving of retroactive effect to a safeguard restraint measure is no longer permissible under the regime of Article 6 of the ATC and is in fact prohibited under Article 6.10 of that Agreement. The presumption of prospective effect only, has not been overturned; it is a proposition not simply presumptively correct but one requiring our assent. We believe, accordingly, and so hold, that the Panel erred in ruling that Article 6.10 of the ATC had nothing to say on the issue of backdating and that such backdating to 21 April 1995, the date of publication of the call for consultations, was permissible under Article X:2 of the General Agreement. The importing Member is, however, not defenceless against a speculative 'flood of imports' where it is confronted with the circumstances contemplated in Article 6.11. Its appropriate recourse is, in other words, to action under Article 6.11 of the ATC, complying in the process with the requirements of Article 6.10 and Article 6.11.¹⁴⁵ (emphasis original)

105. In this connection, the Appellate Body held therefore with respect to the finding of the Panel on the permissibility of backdating, referenced in paragraph 99 above, that "[o]ur finding, therefore, that the safeguard restraint measure here involved is properly regarded as 'a measure of general application' under Article X:2 does not conflict with, and does not affect our conclusion under the first issue above that backdating the effectivity of a restraint measure is prohibited by Article 6.10 of the ATC."¹⁴⁶

8. Article 6.11

(a) Consultation requirements

106. At its meeting in January 2000, as regards the view of Pakistan that the request for consultations and the notification to the TMB had been made by Argentina more than five working days *after* the action had been taken, contrary to what is stipulated in Article 6.11, the TMB stated as follows:

"The measure had been introduced as from 31 July 1999 and the respective notification and request for consultation had been made on 4 August 1999 'within no more than five working days' as stipulated in Article 6.11, from the implementation of the provisional safeguard measure.

The notion of 'taking' a safeguard action is not defined clearly by Articles 6.10 and 6.11, at least as far as a possible distinction between 'taking' and 'applying' a measure is concerned.

There can be a reading that an action is being taken in the sense of the above provisions when the restraint is effectively implemented, while another reading according to which 'taking' and 'applying' the measure are distinct actions, cannot be excluded either.

In any case, while it could be argued that the effect of a restraint begins immediately once it is announced, the decision in the present case was taken on 13 July 1999, but was published (and, therefore, became known to the foreign and domestic economic operators) only later and the difference of slightly more than two weeks in administrative terms, including the preparation of the implementation through appropriate procedures, did not seem to be excessive."¹⁴⁷

(b) Notification requirements

107. At its meeting in April 2000, the TMB reviewed certain transitional safeguard measures taken by Argentina on certain textile products imported from Korea. With respect to Article 6.11, the TMB held that "the Member invoking the provisions of Article 6.11 and applying a safeguard measure provisionally was under clear obligation to respect also the relevant procedural requirements, including those related to notifications within established time-frames":

"[T]he language of Article 6.11 does not specify explicitly which of the Members involved has to submit such a notification within the deadline clearly defined. However, it followed from the logic and structure of Article 6, in particular of Articles 6.10 and 6.11, that the Member invoking the provisions of Article 6.11 and applying a safeguard measure provisionally was under clear obligation to respect also the relevant procedural requirements, including those related to notifications within established time-frames. It could be assumed as well that the Member affected by the provisional application of the safeguard measure would also have every interest in informing the TMB about developments as expeditiously as possible, in particular in case of lack of agreement as a result of consultations, since in these circumstances the provisionally applied safeguard measure would remain in place, at least until the TMB would have

¹⁴⁵ Appellate Body Report on *US – Underwear*, pp. 18–19.

¹⁴⁶ Appellate Body Report on *US – Underwear*, p. 21.

¹⁴⁷ G/TMB/R/61, para. 18.

conducted its examination and made appropriate recommendations to the Members concerned. The TMB also observed that the tight deadlines inscribed in Article 6.11 had been defined on purpose: while this provision enabled the importing Member to take action immediately, on a provisional basis, the respective procedures had been accelerated compared to those foreseen under Article 6.10 with a view to limiting the uncertainties regarding the justification of the measures, or lack thereof, thus introduced and limiting also the potentially adverse effects of the safeguards applied in case they were not to be found justified by the TMB under the provisions of Article 6.¹⁴⁸

(c) “highly unusual and critical circumstances”

108. At its meeting in November 1996, in examining certain transitional safeguard measures taken by Brazil under Article 6.11, the TMB stated as follows:

“The TMB was of the view that in cases where the provisions of paragraph 11 of Article 6 were invoked, the expectation was that the elements envisaged in paragraphs 2, 3 and 4 of Article 6 would indicate as unambiguously as possible the highly unusual and critical character of the circumstances. The TMB was also of the view that, unless such circumstances were met, any action taken under Article 6 should be preceded by consultations between the parties.”¹⁴⁹

109. At its meeting in January 2000, in examining certain transitional safeguard measures introduced by Argentina on imports of certain products from Pakistan, the TMB distinguished between procedural and substantive elements of Article 6.11:

“[T]he TMB noted that Article 6.11 involves procedural and substantive elements. In the view of the TMB, the procedural requirements, in particular the notification of the measure within a narrowly defined time period, had been met. As to the substantive elements, they can be summarized as follows:

- it has to be demonstrated that a particular product is being imported into a Member’s territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. In this context the TMB noted that Article 6 defines only one set of criteria for demonstrating serious damage and, therefore, they were the same whether Article 6.10 or 6.11 is invoked;
- in addition, the invoking Member has to provide explanations that would convince the Member affected by the measure, as well as the TMB, regarding the existence of highly unusual and critical circumstances where delay in taking action would cause damage which would be difficult to repair.”¹⁵⁰

110. After distinguishing between procedural and substantive elements of Article 6.11, as referenced in para-

graph 109 above, the TMB stated that it was not convinced by Argentina’s argument that in the case before it, “the continued increases of such imports during the period investigated had created a situation that was one as described in Article 6.11”. The TMB held that:

“[A]rgentina had not provided any explanation in the factual information of the reasons why it had considered that the circumstances were highly unusual and critical. Subsequently, Argentina had explained that developments in total imports could have, in its view, fully justified taking action pursuant to Article 6 earlier, and that the continued increases of such imports during the period investigated had created a situation that was one as described in Article 6.11. The TMB had not found this argument to be a convincing one. It noted, among other things, that the rate of increase of total imports seemed to have decelerated since the beginning of 1999. Consequently, the circumstances could not be highly unusual and critical, since some of the difficulties experienced by the industry had started earlier and the situation had, perhaps, gradually worsened throughout the period investigated.

In light of the above, the TMB continued to be of the view that Argentina’s recourse to the procedures laid down in Article 6.11 had not been appropriate. Whether such an inappropriate recourse to Article 6.11 can invalidate a transitional safeguard measure or not, was, in the view of the TMB, a decision to be taken case-by-case, on the basis of the consideration of all the relevant elements involved. In the present case the TMB found, on the one hand, that serious damage caused by increased imports had been demonstrated and that it could be attributed, *inter alia*, to imports from Pakistan. Furthermore, the procedural requirements under Article 6.11 had been met. On the other hand, the detailed examination of the determination of serious damage as well as the lack of convincing explanations pursuant to Article 6.11 revealed that the recourse to this provision, i.e. to apply the restraint provisionally, without having exhausted the possibility of prior consultations, had not been justified. The TMB came to the overall conclusion, however, that in this particular case the inappropriate recourse to Article 6.11, although it constituted an important shortcoming, would not lead to the conclusion that the safeguard measure should be rejected on that basis.”¹⁵¹

111. At its meeting in April 2000, the TMB examined certain transitional safeguard measures taken by Argentina under Article 6.11 on imports of certain products originating in Korea. With respect to the measure affecting one category of products, the TMB recalled:

¹⁴⁸ G/TMB/R/64, para. 18.

¹⁴⁹ G/TMB/R/20, para. 24. The TMB reiterated this view on several occasions. See G/TMB/R/27, para. 37 and G/TMB/R/58, para. 44.

¹⁵⁰ G/TMB/R/61, para. 53.

¹⁵¹ G/TMB/R/61, paras. 54–55.

"[T]hat in examining a previous case involving recourse to the provisions of Article 6.11 it had stated, *inter alia*, the following: "[w]hether . . . an inappropriate recourse to Article 6.11 can invalidate a transitional safeguard measure or not, was, in the view of the TMB, a decision to be taken case-by-case, on the basis of the consideration of all the relevant elements involved" (*emphasis added*)¹⁵². In the present case the TMB, in its thorough analysis of the developments affecting the Argentinian industry, was unable to identify any significant element of the case where it could find that the situation corresponded to the circumstances defined in Article 6.11.

The TMB concluded that Argentina had not demonstrated successfully that the products of category 229/629 were being imported into Argentina in the reference period in such increased quantities as to cause serious damage to the domestic industry producing like and/or directly competitive products and, in particular, as to substantiate the highly unusual and critical circumstances where delay would cause damage that would be difficult to repair. The TMB recommended, therefore, that Argentina rescind the safeguard measure applied provisionally on imports of these products originating from Korea."¹⁵³

112. At the same meeting, with respect to another safeguard measure on imports of another category of products, the TMB found a recourse by Argentina to Article 6.11 to be justified, even though no separate analysis had been provided by the National Commission for Foreign Trade of Argentina to support its statement that "the unusual and critical circumstances mentioned in Article 6.11 of the ATC existed":

"The TMB recalled that Argentina had decided to apply provisionally the safeguard measure on imports from Korea pursuant to the provisions of Article 6.11, which refers to 'highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair'. It was observed that in its findings, on 30 July 1999, the National Commission for Foreign Trade of Argentina had considered, *inter alia*, that 'the unusual and critical circumstances mentioned in Article 6.11 of the ATC existe[d], enabling the provisional application of measures'. Though no separate analysis was provided by this Commission to substantiate this statement, on the basis of the examination of this case pursuant to Articles 6.2, 6.3 and 6.4, the TMB came to the view that at the end of July 1999 the existence of the highly unusual and critical circumstances had been demonstrated on the basis of data covering the period June 1998–May 1999. Practically all the elements examined supported such a conclusion: the sharp and continuous rise of imports, both from all sources and from Korea; the significant and continuous decline of output and domestic sales of local production, while consumption continued to increase dynamically; the decline in productivity and employment; the low rate of utilization of capacity and, not the least, the important pressure import prices put on the

domestic market. All these, i.e. the elements envisaged in Articles 6.2, 6.3 and 6.4, seemed to indicate without ambiguity the existence of the highly unusual and, in particular, the critical nature of the circumstances."¹⁵⁴

113. With respect to the relationship with Article 6.10, see the excerpt from the Appellate Body Report on *US – Underwear*, referenced in paragraph 104 above.

9. Relationship with Article 2.4

114. In *US – Underwear*, the Panel examined whether certain transitional safeguard measures imposed by the United States on imports from Costa Rica were inconsistent with Article 6. The Panel, in a finding not addressed by the Appellate Body, stated with respect to the relationship between Articles 2.4 and 6 that "one of the central elements of the ATC is the prohibition, in principle, for Members to have recourse to any new restrictions beyond those notified under Article 2.1 of the ATC". Based on this reasoning, the Panel on *US – Underwear* concluded that "Article 6 of the ATC is an exception to the rule of Article 2.4 of the ATC".¹⁵⁵ The Appellate Body did not address these findings upon review. However, in its report in *US – Wool Shirts and Blouses*, the Appellate Body held that Article 6 was an integral part of the balance of rights and obligations under the ATC, that Article 6 did not have exceptional character and that the burden of proof in this context fell upon the complaining party. See paragraph 46 above.

115. In *US – Wool Shirts and Blouses*, the Panel examined whether a certain United States transitional safeguard measure was consistent with Article 6. With respect to the relationship between Articles 2.4 and 6, the Panel, in a statement not reviewed by the Appellate Body, indicated as follows:

"Since we conclude that the safeguard action taken by the United States violated the provisions of Article 6 of the ATC, it is our view that the United States applied a restraint not authorized under the ATC, which, therefore, constitutes also a violation of Article 2.4 of the ATC."¹⁵⁶

10. Relationship with other WTO Agreements

(a) Article III.2 of the GATT 1994

116. As regards the relationship between Article 6.2 and Article III.2 and the concept of "directly competitive" products, see paragraph 61 above.

¹⁵² G/TMB/R/61, para. 55.

¹⁵³ G/TMB/R/64, paras. 38–39.

¹⁵⁴ G/TMB/R/64, para. 57.

¹⁵⁵ Panel Report on *US – Underwear*, paras. 7.15–7.16.

¹⁵⁶ Panel Report on *US – Wool Shirts and Blouses*, para. 7.59. For same conclusion see Panel Report on *US – Underwear*, paras. 7.70–7.71.

(b) Article X:2 of the GATT 1994

117. In *US – Underwear*, the Appellate Body addressed the Panel's finding on Article X:2 of the *GATT 1994* and its applicability to transitional safeguard measures within the meaning of Article 6 of the *ATC*. The Panel reviewed the measure at issue in the light of Article X:2 of the *GATT 1994* because it had found that Article 6.10 of the *ATC* did not provide guidance on the issue of whether backdating a transitional safeguard measure was permissible; see paragraph 99 above. While the Appellate Body disagreed with the Panel's reading of Article 6.10 of the *ATC*¹⁵⁷, it agreed that the safeguard restraint measure was a measure of general application within the meaning of Article X:2:

"The Panel found that the safeguard restraint measure imposed by the United States is 'a measure of general application' within the contemplation of Article X:2. We agree with this finding. While the restraint measure was addressed to particular, i.e. named exporting Members, including Appellant Costa Rica, as contemplated by Article 6.4, *ATC*, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint."¹⁵⁸

118.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

1. As part of the integration process and with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round, all Members shall take such actions as may be necessary to abide by *GATT 1994* rules and disciplines so as to:

- (a) achieve improved access to markets for textile and clothing products through such measures as tariff reductions and bindings, reduction or elimination of non-tariff barriers, and facilitation of customs, administrative and licensing formalities;
- (b) ensure the application of policies relating to fair and equitable trading conditions as regards textiles and clothing in such areas as dumping and anti-dumping rules and procedures, subsidies and countervailing measures, and protection of intellectual property rights; and
- (c) avoid discrimination against imports in the textiles and clothing sector when taking measures for general trade policy reasons.

Such actions shall be without prejudice to the rights and obligations of Members under *GATT 1994*.

2. Members shall notify to the TMB the actions referred to in paragraph 1 which have a bearing on the implementation of this Agreement. To the extent that these have been notified to other WTO bodies, a summary, with reference to the original notification, shall be sufficient to fulfil the requirements under this paragraph. It shall be open to any Member to make reverse notifications to the TMB.

3. Where any Member considers that another Member has not taken the actions referred to in paragraph 1, and that the balance of rights and obligations under this Agreement has been upset, that Member may bring the matter before the relevant WTO bodies and inform the TMB. Any subsequent findings or conclusions by the WTO bodies concerned shall form a part of the TMB's comprehensive report.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

1. In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an *ad personam* basis.

2. The TMB shall develop its own working procedures. It is understood, however, that consensus within the TMB does not require the assent or concurrence of members appointed by Members involved in an unresolved issue under review by the TMB.

3. The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them. It may also rely on notifications to and reports

¹⁵⁷ Appellate Body Report on *US – Underwear*, p. 14.

¹⁵⁸ Appellate Body Report on *US – Underwear*, pp. 21–22.

from other WTO bodies and from such other sources as it may deem appropriate.

4. Members shall afford to each other adequate opportunity for consultations with respect to any matters affecting the operation of this Agreement.

5. In the absence of any mutually agreed solution in the bilateral consultations provided for in this Agreement, the TMB shall, at the request of either Member, and following a thorough and prompt consideration of the matter, make recommendations to the Members concerned.

6. At the request of any Member, the TMB shall review promptly any particular matter which that Member considers to be detrimental to its interests under this Agreement and where consultations between it and the Member or Members concerned have failed to produce a mutually satisfactory solution. On such matters, the TMB may make such observations as it deems appropriate to the Members concerned and for the purposes of the review provided for in paragraph 11.

7. Before formulating its recommendations or observations, the TMB shall invite participation of such Members as may be directly affected by the matter in question.

8. Whenever the TMB is called upon to make recommendations or findings, it shall do so, preferably within a period of 30 days, unless a different time period is specified in this Agreement. All such recommendations or findings shall be communicated to the Members directly concerned. All such recommendations or findings shall also be communicated to the Council for Trade in Goods for its information.

9. The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations.

10. If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding.

11. In order to oversee the implementation of this Agreement, the Council for Trade in Goods shall conduct a major review before the end of each stage of the integration process. To assist in this review, the TMB shall, at least five months before the end of each stage, transmit to the Council for Trade in Goods a comprehensive

report on the implementation of this Agreement during the stage under review, in particular in matters with regard to the integration process, the application of the transitional safeguard mechanism, and relating to the application of GATT 1994 rules and disciplines as defined in Articles 2, 3, 6 and 7 respectively. The TMB's comprehensive report may include any recommendation as deemed appropriate by the TMB to the Council for Trade in Goods.

12. In the light of its review the Council for Trade in Goods shall by consensus take such decisions as it deems appropriate to ensure that the balance of rights and obligations embodied in this Agreement is not being impaired. For the resolution of any disputes that may arise with respect to matters referred to in Article 7, the Dispute Settlement Body may authorize, without prejudice to the final date set out under Article 9, an adjustment to paragraph 14 of Article 2, for the stage subsequent to the review, with respect to any Member found not to be complying with its obligations under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. General

119. At the 1996 meeting, in Singapore, with respect to the role of the TMB, the Ministerial Conference declared as follows:

"We agree that, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the Agreement. We emphasize the responsibility of the Goods Council in overseeing, in accordance with Article IV:5 of the WTO Agreement and Article 8 of the ATC, the functioning of the ATC, whose implementation is being supervised by the TMB."¹⁵⁹

2. Role of the TMB

120. The Panel on *US – Wool Shirts and Blouses*, in statements not addressed by the Appellate Body, elaborated on the difference between the role and the function of dispute settlement panels on the one hand and the role and function of the TMB on the other. The Panel pointed out, *inter alia*, the lack of specific terms of reference for the TMB and the generally more "multi-faceted role" of the TMB, in particular its investigative powers:

"The wording of the ATC and the DSU confirms that the role and function of DSU panels differ substantially from that of the TMB. For instance, the TMB is not limited to any specific terms of reference as DSU panels are

¹⁵⁹ The Singapore Ministerial Declaration, para. 15.

(Article 7 of the DSU). The function of the TMB is to supervise the implementation of the ATC generally and to examine measures taken, agreements reached and any other matters referred to it. The nature of these broad functions confirms the special and multifaceted role of the TMB. This is also reflected in the TMB's rules of procedure, its decision-making rule and its composition. The TMB members are appointed by WTO Members designated by the Council for Trade in Goods but discharge their function on an ad personam basis. Pursuant to a General Council Decision, the TMB's membership is composed of constituencies, in most cases of several Members, where most members also appoint alternates. Furthermore, a TMB member appointed by a WTO Member involved in a dispute before the TMB, participates in the TMB's deliberations, although such TMB member cannot block a consensus (Article 8.2 of the ATC). On the contrary, panelists under the DSU are not selected on the basis of constituencies and the citizens of any party to a dispute under the DSU cannot participate as panelists, absent agreement of the parties (Article 8.3 of the DSU). In addition, a panelist may issue a dissenting opinion under the DSU, while the TMB can only act by consensus. Moreover, Article 8.3 of the ATC is clear as to the wide investigative authority of the TMB:

*'The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them. It may also rely on notifications to and reports from other WTO bodies and from such other sources as it may deem appropriate.'*¹⁶⁰

121. The Panel also noted that after completion of the TMB process, a Member was still free to request the establishment of a panel, but that the TMB process in these circumstances replaced consultations under Article 4 of the DSU:

"We note also that, according to Article 8.10 of the ATC, when the TMB process has been completed, a Member which remains unsatisfied with the TMB recommendations can request the establishment of a panel without having to request consultations under Article 4 of the DSU. This is to say that the TMB process can replace the consultation phase in the dispute settlement process under the DSU and is distinct from the formal adjudication process by panels¹⁶¹.

Therefore when differences arise, the ATC requires parties first to seek consultations with a view to reaching a mutually satisfactory solution to the problem, within the specific parameters or considerations set out in the relevant provision(s) of the ATC. If a mutually satisfactory solution is not reached in the consultations, the matter may be or shall be, depending on the applicable provi-

sion, referred to the TMB for review and recommendations. In the case of recourse to Article 6 of the ATC, the object of the consultations is to see whether there is a mutual understanding that the situation calls for restraint on the exports of the particular product or not. If there is such a mutual understanding, details of the agreed restraint measure shall be communicated to the TMB which has to determine whether the agreement is justified in accordance with the provisions of Article 6 of the ATC. If there is no agreement between the parties concerned and the safeguard action is taken, the matter also has to be referred to the TMB. According to Article 6.10 of the ATC, in order to conduct such an examination, '... the TMB shall have available to it the factual data provided to the Chairman of the TMB, referred to in paragraph 7 [of Article 6], as well as any other relevant information provided by the Members concerned'. During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we understand, may relate to subsequent events. Moreover, the TMB may hear witnesses on these facts and perform a genuine fact finding and evidence-building exercise on the continuing situation of the parties concerned with the safeguard action, in order to settle the dispute. TMB members deliberate on the basis of all the information presented to decide whether the safeguard action taken by the importing Member is justified and whether serious damage or actual threat thereof to the domestic industry of the importing Member and causation exist.

The second track is the DSU. If, after recourse to Articles 6.10 and 8.10 of the ATC, the exporting Member is not satisfied with the recommendation of the TMB, such exporting Member can challenge the safeguard action and bring it to the formal dispute settlement process under the DSU. Unlike the TMB, a DSU panel is not called upon, under its terms of reference, to reinvestigate the market situation. When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination. In respect of the US determination at issue in the present case, we consider,

¹⁶⁰ Panel Report on *US – Wool Shirts and Blouses*, para. 7.19(emphasis added).

¹⁶¹ (*footnote original*) Article 8.10 of the ATC: "If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding."

therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination.”¹⁶²

3. Article 8.1

- (a) “The TMB shall consist of a Chairman and 10 members.”

122. The General Council decided on the original composition of the TMB at its meeting of 31 January 1995.¹⁶³ The General Council further decided on the composition of the TMB at its meeting of 10 December 1997.¹⁶⁴

- (b) TMB members “discharge [...] their functions on an *ad personam* basis”

123. The Working Procedures adopted by the TMB state the following:

“In discharging their functions [...], TMB members and alternates undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary.”¹⁶⁵

124. The Council for Trade in Goods, at its meeting of 27 January 1997, further clarified the status of TMB Members:

“WTO Members which, pursuant to the decision of the General Council of 31 January 1995, appoint TMB members under Article 8.1 of the Agreement on Textiles and Clothing accept that TMB members discharge their function on an *ad personam* basis and not as government representatives. Consequently, they shall not give TMB members instructions, nor seek to influence them, with regard to matters before the TMB. The same applies to alternates.”¹⁶⁶

4. Article 8.2

- (a) “The TMB shall develop its own working procedures”

125. At its first meeting, in March to July 1995, the TMB adopted its working procedures.¹⁶⁷

126. At its meeting in December 1996, in relation to working procedures, the TMB took note of the decision of the DSB on 3 December 1996 to adopt rules of conduct for the DSU¹⁶⁸, “in view of the fact that such Rules apply, *inter alia*, to the Chairman of the TMB and other

members of the TMB secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the ATC, as well as, to the extent prescribed in the relevant Section of the Rules, to members of the TMB.”¹⁶⁹

- (b) “consensus within the TMB”

127. The decision of 31 January 1995 by the General Council on the composition of the TMB provides that “[t]he Textiles Monitoring Body will take all decisions by consensus”.¹⁷⁰ This general statement is qualified in that decision that “[a]s provided for in Article 8.2 of the Agreement on Textiles and Clothing, in case of an unresolved issue under review by the TMB, it is understood that consensus within the TMB does not require the assent or concurrence of members appointed by members involved in such unresolved issue.”¹⁷¹

128. The Working Procedures adopted by the TMB state the following:

“Consensus within the TMB does not require the assent or concurrence of TMB members appointed by WTO Members involved in an unresolved issue under review by the TMB.¹⁷² However, at least seven TMB members shall be present when deciding on such unresolved issues, except in cases where one or two TMB members have been appointed by WTO Members involved in an unresolved issue, where eight TMB members shall be present. For the purpose of this paragraph the term ‘TMB members’ covers the respective alternates in case a TMB member is absent.”¹⁷³

5. Article 8.3

- (a) Standard of review

129. In *US – Underwear*, addressing the issue of “standard of review” with reference to Articles 8.3 and 8.5, the Panel stated that it could not engage in a *de novo* review of the national measure at issue and added that such *de novo* review was, “if at all, to be conducted by the TMB”:

“A *de novo* review, if at all, is to be conducted by the TMB. Article 8.3 of the ATC reads as follows: ‘The TMB

¹⁶² Panel Report on *US – Wool Shirts and Blouses*, paras. 7.19–7.21.

¹⁶³ WT/GC/M/1, section 5. The text of the adopted decision can be found in WT/L/26. The General Council adopted an addendum to this decision at its meeting of 31 January 1995. See WT/L/26/Add.1.

¹⁶⁴ WT/L/253.

¹⁶⁵ G/TMB/R/1, para. 1.4 of the Annex.

¹⁶⁶ G/L/141.

¹⁶⁷ G/TMB/R/1, para. 5. The text of the adopted working procedures is found in Annex to G/TMB/R/1.

¹⁶⁸ WT/DSB/RC/1.

¹⁶⁹ G/TMB/R/22, para. 17.

¹⁷⁰ WT/L/26, para. 6.

¹⁷¹ WT/L/26, fn. 3.

¹⁷² (*footnote original*) See paragraph 2, Article 8 of the ATC.

¹⁷³ G/TMB/R/1, para. 7.2.

... shall rely on notifications and information supplied by the Members under the relevant Articles of the Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them'. Article 8.5 of the ATC calls for a 'thorough and prompt' review of the matter by the TMB.¹⁷⁴

6. Article 8.9

130. The Panel on *US – Wool Shirts and Blouses* addressed the issue of the legal force of the TMB's recommendations and found that the recommendations of the TMB are not binding:

"Concerning India's claim that the US restraint is invalid because the TMB did not endorse the measure which the United States attempted to justify in the Market Statement and on which consultations were held, we note that under Article 6.10 of the ATC, the United States, should it be entitled to impose a restraint, could do so without TMB authorization, although it would be required to refer the matter to the TMB for appropriate recommendations. Article 8.9 of the ATC confirms that the recommendations of the TMB are not binding:

'The Members shall endeavour to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations.' (emphasis added)

We, therefore, reject India's claim that under the ATC a safeguard action can be maintained only if adequately endorsed by the TMB."¹⁷⁵

7. Article 8.10

131. At its meeting in March 1997, with reference to the reasons provided by Hong Kong for its inability to conform to the TMB's recommendations, the TMB noted as follows:

"[P]aragraph 10 of Article 8 did not provide any express guidance on the reasons which can be given by a Member for its inability to conform with the recommendations of the TMB"¹⁷⁶

132. At its meeting in November 2001, whilst examining the reasons why Poland considered itself unable to conform with the TMB recommendation made at a previous meeting to rescind the transitional safeguard measure Poland had introduced on imports of certain products from Romania, the TMB addressed, *inter alia*, the question of the period for making notifications pursuant to Article 8.10, as follows:

"The TMB first addressed the argument made by Romania that Poland's communication regarding its inability to conform with the TMB's recommendation had not been made within the period established by Article 8.10, which requires that the Member concerned submit such a communication 'not later than one

month after receipt of such recommendations'. Noting the arguments of Romania in this regard, the TMB took the view that the one-month period started on the date when the report containing the TMB's examination, together with the conclusions reached and recommendations adopted, had been officially communicated to the Member concerned. In this particular case, this had been done on 17 September 2001 when the TMB's report on the examination of the safeguard measure had been circulated to all WTO Members¹⁷⁷ and the Chairman of the TMB had provided a separate official communication to the Polish authorities in this regard. The communication made by Poland under Article 8.10 was dated 17 October 2001 and had been received by the TMB on that same day, i.e. within the deadline specified in Article 8.10."¹⁷⁸

133. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the ATC were invoked:

Case Name	Case Number	Invoked Articles
1 <i>US – Underwear</i>	WT/DS24	Articles 6.2, 6.4, 6.6, 6.10, 8.3
2 <i>US – Wool Shirts and Blouses</i>	WT/DS33	Articles 6.2, 6.3 and 8.9
3 <i>Turkey – Textiles and Clothing</i>	WT/DS34	Articles 2 and 2.4
4 <i>US – Cotton Yarn</i>	WT/DS192	Articles 6.2 and 6.3

8. Article 8.11

(a) "a major review before the end of each stage of the integration process"

134. Pursuant to Article 8.11, to assist in the review by the Council for Trade in Goods, on 31 July 1997, the TMB adopted and subsequently circulated a comprehensive report on the implementation of the ATC during the first stage of integration.¹⁷⁹ The Council for Trade in Goods conducted a major review of the first stage of the integration process.¹⁸⁰ Furthermore, on 26 July 2001, the TMB adopted and subsequently circulated a comprehensive report on the implementation of the ATC during the second stage of the integration process.¹⁸¹

¹⁷⁴ Panel Report on *US – Underwear*, fn. 17.

¹⁷⁵ Panel Report on *US – Wool Shirts and Blouses*, para. 7.57.

¹⁷⁶ G/TMB/R/26, para. 16.

¹⁷⁷ See G/TMB/25.

¹⁷⁸ G/TMB/R/83, para.25.

¹⁷⁹ G/L/179.

¹⁸⁰ The outcome of its review can be found in G/C/W/105.

Discussions leading to preparation of the review document are fully set out in the Minutes of the Goods Council G/C/M/23 to G/C/M/29.

¹⁸¹ G/L/459.

X. ARTICLE 9**A. TEXT OF ARTICLE 9***Article 9*

This Agreement and all restrictions thereunder shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

135. This Agreement was terminated as scheduled on 1 January 2005, together with all the restrictions maintained under its jurisdiction.

136. As part of its overall assessment on the implementation of the ATC, the TMB submitted a comprehensive report to the Council for Trade in Goods. In its comments on the implementation of the ATC during the third and final stage of the integration process¹⁸², the TMB observed:

"[I]n the respective official notifications repeated assurances have been recently provided regarding the timely and full implementation of the ATC. The Agreement will be fully implemented as scheduled and provided for in Article 9. Thus the ATC and all restrictions thereunder shall stand terminated on 1 January 2005, on which date the textiles and clothing sector shall be fully integrated into GATT 1994, thereby putting an end to a special and discriminatory regime that has been in application for more than four decades."¹⁸³

XI. ANNEX**A. TEXT OF ANNEX***ANNEX**LIST OF PRODUCTS COVERED BY THIS AGREEMENT*

1. This Annex lists textile and clothing products defined by Harmonized Commodity Description and Coding System (HS) codes at the six-digit level.
2. Actions under the safeguard provisions in Article 6 will be taken with respect to particular textile and clothing products and not on the basis of the HS lines *per se*.
3. Actions under the safeguard provisions in Article 6 of this Agreement shall not apply to:
 - (a) developing country Members' exports of handloom fabrics of the cottage industry, or hand-made cottage industry products made of such handloom fabrics, or traditional folklore handicraft textile and clothing products, provided that such products are properly certified under arrangements established between the Members concerned;
 - (b) historically traded textile products which were internationally traded in commercially significant quantities prior to 1982, such as bags, sacks, carpetbacking, cordage, luggage, mats, mattings and carpets typically made from fibres such as jute, coir, sisal, abaca, maguey and henequen;
 - (c) products made of pure silk.

For such products, the provisions of Article XIX of GATT 1994, as interpreted by the Agreement on Safeguards, shall be applicable. [The list of products is omitted.]

B. INTERPRETATION AND APPLICATION OF ANNEX

No jurisprudence or decision of a competent WTO body.

¹⁸² See G/L/683, paras. 663–666.

¹⁸³ G/L/683, para. 664.

Agreement on Technical Barriers to Trade

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can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having regard to the Uruguay Round of Multilateral Trade negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

General Provisions

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1¹ applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

(a) Termination of Tokyo Round TBT Agreement

1. At its meeting on 20 October 1995, the Tokyo Round TBT Committee adopted a decision on the Termination of the Tokyo Round TBT Agreement with effect from 1 January 1996.²

(b) Scope of the TBT Agreement

2. In *EC – Asbestos*, the complainant (Canada) contended that the TBT Agreement applied to the French Decree at issue, because it was a “technical regulation” within the meaning of Annex 1, paragraph 1. The measure at issue contained a general prohibition on the importation, marketing and use of asbestos, but provided for a few limited exceptions to this ban. The Panel rejected the Canadian argument and held that “the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products” did not constitute a “technical regulation”.³ The Appellate Body reversed the Panel finding and held that it was necessary to consider the measure at issue in its entirety, i.e. both “the prohibitive and the permissive elements that are part of it”:

“[T]he proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. . . . the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit, inter alia*,

the use of certain product products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not a total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.”⁴

2. Article 1.2

3. On the definition of “technical regulation”, see paragraphs 58–62 below. On the definition of “standard”, see paragraphs 10–12 and 63–65 below.

3. Article 1.5

4. In *EC – Hormones*, the complainants (United States and Canada) claimed that measures taken by the European Communities were inconsistent with: (i) GATT Articles III or XI; (ii) Articles 2, 3 and 5 of the *SPS Agreement*; (iii) Article 2 of the *TBT Agreement*; and (iv) Article 4 of the *Agreement on Agriculture*. The Panel, referring to Article 1.5 of the *TBT Agreement*, found that, since the measures at issue were sanitary measures, the *TBT Agreement* was not applicable to the dispute.⁵

TECHNICAL REGULATIONS AND STANDARDS

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

¹ See Section XVII.

² TBT/M/50, para. 6. The text of the decision is contained in TBT/W/195.

³ Panel Report on *EC – Asbestos*, para. 8.72(a).

⁴ Appellate Body Report on *EC – Asbestos*, para. 64.

⁵ Panel Report on *EC – Hormones (US)*, para. 8.29 and Panel Report on *EC – Hormones (Canada)*, para. 8.32.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly

or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2.2

(a) Trade-restrictiveness

5. In *EC – Sardines*, the Panel decided to exercise judicial economy with regard to claims based on Article 2.2, but nonetheless included in its analysis under Article 2.4 some developments relating to the trade-restrictiveness of the measure at issue. The Appellate Body found that “the question whether the EC Regulation is trade-restrictive in nature could have been relevant to a legal analysis under Article 2.2 of the TBT Agreement.” However, as the Panel had not made legal findings under Article 2.2, the Appellate Body declared that the relevant analysis on trade-restrictiveness did not have legal effect.⁶

2. Article 2.4

(a) Temporal application of Article 2.4

6. In *EC – Sardines*, the Appellate Body upheld the Panel’s finding that Article 2.4 applies not only to the “preparation and adoption” of technical regulations, but also to the “application” of *existing* measures adopted *prior to* 1 January, 1995, such as the EC regulations that were adopted in June 1989 and have continued to exist. The Panel had observed, *inter alia*, that:

“Article 2.4 of the TBT Agreement starts with the language ‘where technical regulations are required’. We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. . . . Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense (‘exist’) and not in the past tense – ‘[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*’, Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not

consider that the word ‘imminent’, the ordinary meaning of which is ‘likely to happen without delay’, is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word ‘imminent’ means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations.”⁷

7. In *EC – Sardines*, the Appellate Body concurred with the Panel’s view on the applicability of Article 2.4 to existing technical regulations (see paragraph 6 above), and further noted:

“[We] fail to see how the terms ‘where technical regulations are required’, ‘exist’, ‘imminent’, ‘use’, and ‘as a basis for’ give any indication that Article 2.4 applies only to the two stages of *preparation* and *adoption* of technical regulations. To the contrary, as the panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the *TBT Agreement* entered into force. . . . The obligation refers to technical regulations generally and without limitations.

. . .

Like the sanitary measure in *EC – Hormones*, the EC Regulation concerned is currently in force. The European Communities has conceded that the EC regulation is an act or fact that has not “ceased to exist”. Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision “reveals a contrary intention”.

Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a “central provision” of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the TBT Agreement, they would have said so explicitly.”⁸

8. In *EC – Sardines*, the Appellate Body also agreed with the panel’s analysis of Articles 2.5 and 2.6 as relevant context for Article 2.4, providing support for the argument that Article 2.4 regulates measures adopted before the TBT Agreement entered into force.⁹ Finally, in the same case, the Appellate Body found further support for this conclusion in Article XVI:4 of the WTO Agreement and in the object and purpose of the TBT Agreement.¹⁰

⁶ Appellate Body Report on *EC – Sardines*, paras. 310–311.

⁷ Panel Report on *EC – Sardines*, para. 7.74.

⁸ Appellate Body Report on *EC – Sardines*, paras. 205 and 207–208.

⁹ Appellate Body Report on *EC – Sardines*, paras. 210–212. See also paras. 23–24 of this Chapter.

¹⁰ Appellate Body Report on *EC – Sardines*, paras. 214–215.

(b) Burden of proof

9. In *EC – Sardines*, the Appellate Body reversed the Panel's ruling on the issue of the burden of proof under Article 2.4. The Appellate Body ruled that the burden of proof should be borne by the complaining Member seeking a ruling of inconsistency with Article 2.4.¹¹ Specifically, the Appellate Body stated that, as with Articles 3.1 and 3.3 of the SPS Agreement, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4:¹²

"There are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an 'ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued' by that Member through the technical regulation.

... Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no 'general rule-exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru – as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities – to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used 'as a basis for the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation."¹³

(c) Relevant international standard

(i) "international standard"

10. The Appellate Body on *EC – Sardines* upheld the Panel's conclusion that even if not adopted by consensus, an international standard can constitute a "relevant international standard".¹⁴ The Appellate Body agreed with the following interpretation by the Panel of the last two sentences of the Explanatory note to the definition of the term "standard", as contained in Annex 1 paragraph 2:

"The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.¹⁵ This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard."¹⁶

11. In *EC – Sardines*, the Appellate Body made the following observation on the issue of consensus in international standards:

"[T]he text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to 'documents'. The term 'document' is also used in the singular in the first sentence of the definition of a 'standard'. We believe that 'document(s)' must be interpreted as having the same meaning in both the definition and the Explanatory note. . . . Interpreted in this way, the term 'documents' in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies . . .

Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing

¹¹ Appellate Body Report on *EC – Sardines*, paras. 274–275.

¹² In *EC – Hormones*, the Panel had assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The Panel was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. The Appellate Body reversed the panel's finding (see the Appellate Body Report on *EC – Hormones*, para. 104). See also Chapter on the *SPS Agreement*, Section IV.B.2(d).

¹³ Appellate Body Report on *EC – Sardines*, paras. 274–275.

¹⁴ Appellate Body Report on *EC – Sardines*, para. 227.

¹⁵ (*footnote original*) The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".

¹⁶ Panel Report on *EC – Sardines*, para. 7.90 and footnote 86 thereto.

from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word “also” in the last sentence suggests that the same subject is being addressed – namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.”¹⁷

12. In *EC – Sardines*, the Appellate Body also noted that the definition of “standard” in the ISO/IEC Guide includes a consensus requirement and that “the omission of a consensus requirement in the definition of a “standard” in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice”.¹⁸ In light of this, the Appellate Body upheld the Panel’s conclusion that:

“[T]he definition of a ‘standard’ in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a “recognized body” of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.”¹⁹

13. Also, on the notion of “standard”, see below, the section on the definition of the term “standard” in Annex 1 (see paragraphs 63–64 below).

(ii) “relevant”

14. In *EC – Sardines*, the Appellate Body agreed with the Panel’s statement that the ordinary meaning of the term “relevant” is “bearing upon or relating to the matter in hand; pertinent”.²⁰ The Panel reasoned that, to be a “relevant international standard”, the standard at issue in the dispute – Codex Stan 94 – would have to “bear upon, relate to, or be pertinent to the EC Regulation”.²¹ The Panel then noted the following about that standard:

“The title of Codex Stan 94 is “Codex Standard for Canned Sardines and Sardine-type Products” and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indi-

cated in its response that the term ‘canned sardines’ and ‘preserved sardines’ are essentially identical. Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement.”²²

15. In *EC – Sardines*, the Appellate Body upheld the Panel’s finding that Codex Stan 94 is a “relevant international standard” under Article 2.4.²³ The Appellate Body disagreed with the European Communities’ argument that the EC Regulation dealt only with preserved sardines – understood to mean exclusively preserved *Sardina pilchardus* – while Codex Stan 94 also covered other species of fish that are “sardine-type”:

“We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*. Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*. These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.”²⁴

(d) use . . . “as a basis for”

16. In *EC – Sardines*, the Appellate Body agreed with the panel that an international standard is used “as a basis for” a technical regulation “when it is used as the

¹⁷ Appellate Body Report on *EC – Sardines*, paras. 222–223.

¹⁸ Appellate Body Report on *EC – Sardines*, paras. 222–223. In this respect, see also paras. 63–64 of this Chapter.

¹⁹ Appellate Body Report on *EC – Sardines*, para. 227.

²⁰ Panel Report on *EC – Sardines*, para. 7.68, quoting *Webster’s New World Dictionary* (William Collins & World Publishing Co., Inc. 1976), p. 1199.

²¹ Panel Report on *EC – Sardines*, para. 7.68.

²² Panel Report on *EC – Sardines*, para. 7.69.

²³ Appellate Body Report on *EC – Sardines*, para. 233.

²⁴ Appellate Body Report on *EC – Sardines*, para. 232.

principal constituent or fundamental principle for the purpose of enacting the technical regulation.”²⁵ The Appellate Body cited certain definitions of the term “basis”, and concluded that:

“From these various definitions, we would highlight the similar terms ‘principal constituent’, ‘fundamental principle’, ‘main constituent’, and ‘determining principle’ – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is ‘the basis for’ the other.”²⁶

17. In *EC – Sardines*, in its analysis of the terms “as a basis for”, the Appellate Body considered its approach to the interpretation of the term “based on” in the context of Article 3.1 of the *SPS Agreement* as being relevant for the interpretation of Article 2.4.²⁷ However, it did not consider it necessary to decide in that case whether the term “as a basis”, in the context of Article 2.4 of the *TBT Agreement*, has the same meaning as the term “based on”, in the context of Article 3.1 of the *SPS Agreement*.²⁸

18. In *EC – Sardines*, the Appellate Body rejected the European Communities’ argument that a “rational relationship” between an international standard and a technical regulation is sufficient to conclude that the former is used “as a basis for” the latter:

“[W]e see nothing in the text of Article 2.4 to support the European Communities’ view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a ‘rational relationship’ is the appropriate criterion for determining whether something has been used “as a basis for” something else.

We see no need here to define in general the nature of the relationship that must exist for an international standard to serve ‘as a basis for’ a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said – at a minimum – that something cannot be considered a ‘basis’ for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot properly be concluded that the international standard has been used ‘as a basis for’ the technical regulation.”²⁹

19. With regard to the requirement in Article 2.4 that Members use relevant international standards “or the relevant parts of them” as a basis for their technical regulations, the Appellate Body observed in *EC – Sardines*:

“In our view, the phrase ‘relevant parts of them’ defines the appropriate focus of an analysis to determine whether a relevant international standard has been used

‘as a basis for’ a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only *some* of the ‘relevant parts’ of an international standard. If a part is relevant, then it must be one of the elements which is a basis for the technical regulation.”³⁰

(e) “ineffective or inappropriate means” of fulfilment of “legitimate objectives”

(i) “*ineffective or inappropriate means*”

20. The Appellate Body on *EC – Sardines* upheld the Panel’s statement regarding “ineffective or inappropriate means”. The Panel pointed out that the term “ineffective” “refers to something that does not ‘hav[e] the function of accomplishing’, ‘having a result’, or ‘brought to bear’, whereas [the term] ‘inappropriate’ refers to something which is not ‘specially suitable’, ‘proper’, or ‘fitting’”:

“Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its ‘unsuitability’. Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.”³¹

21. In addition, the Appellate Body, in *EC – Sardines*, shared the Panel’s view that the terms “ineffective” and “inappropriate” have different meanings, and “that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.”³²

²⁵ Appellate Body Report on *EC – Sardines*, para. 240–245.

²⁶ Appellate Body Report on *EC – Sardines*, para. 245.

²⁷ Appellate Body Report on *EC – Sardines*, para. 242. See also Chapter on the *SPS Agreement*, Section IV.B.2(a).

²⁸ Footnote 169 of the Appellate Body Report on *EC – Sardines*, at para. 244.

²⁹ Appellate Body Report on *EC – Sardines*, para. 247–248.

³⁰ Appellate Body Report on *EC – Sardines*, para. 250.

³¹ Panel Report on *EC – Sardines*, para. 7.116 and footnotes 91–92 thereto.

³² Panel Report on *EC – Sardines*, para. 7.116, and Appellate Body Report on *EC – Sardines*, para. 289.

(ii) “*legitimate objectives pursued*”

22. In *EC – Sardines*, the Appellate Body agreed with the Panel’s interpretation of the meaning of the phrase “legitimate objectives pursued”. The Panel stated that the “‘legitimate objectives’ referred to in Article 2.4 must be interpreted in the context of Article 2.2”, which provides an illustrative, open list of objectives considered “legitimate”.³³ Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are “legitimate”.³⁴ The Appellate Body further concurred with the panel in concluding that “the ‘legitimate objectives’ referred to in Article 2.4 must be interpreted in the context of Article 2.2”³⁵, which refers also to “legitimate objectives”; and includes a description of what the nature of some such objectives can be:

“Two implications flow from the Panel’s interpretation. First, the term ‘legitimate objectives’ in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: ‘national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.’ Second, given the use of the term ‘*inter alia*’ in Article 2.2, the objectives covered by the term ‘legitimate objectives’ in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.”³⁶

3. Article 2.5

23. In *EC – Sardines*, the Panel, in a reasoning supported by the Appellate Body, referred to Article 2.5, as contextual support for its conclusion that Article 2.4 applies to existing technical regulations:

“There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of ‘preparing, adopting or *applying*’ a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. The first sentence imposes an obligation on a Member ‘preparing, adopting or applying’ a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is ‘prepared, adopted or *applied*’ for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term ‘apply’, in our view, confirms that the requirement con-

tained in Article 2.4 is applicable to existing technical regulations.”³⁷

4. Article 2.6

24. In *EC – Sardines*, the Panel, in a reasoning confirmed by the Appellate Body, referred to Article 2.6 as providing contextual support for its conclusion that Article 2.4 applied to existing technical regulations:

“Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either ‘*adopted*, or expect to adopt technical regulations.’ Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards.”³⁸

25. See also the Decision of the TBT Committee on principles for the development of international standards, guides and recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement.³⁹

5. Article 2.9

26. The TBT Committee has adopted a number of recommendations and decisions concerning notification procedures for draft technical regulations and conformity assessment procedures, as described hereafter.⁴⁰

(a) Notification format and guidelines

27. The procedures for notification under the Agreement have been kept under constant review by the Committee. In order to ensure a uniform and efficient operation of these procedures the Committee agreed on a format and guidelines for notifications.⁴¹

³³ Panel Report on *EC – Sardines*, para. 7.118.

³⁴ Panel Report on *EC – Sardines*, para. 7.122.

³⁵ Panel Report on *EC – Sardines*, para. 7.118.

³⁶ Appellate Body Report on *EC – Sardines*, para. 286.

³⁷ Panel Report on *EC – Sardines*, para. 7.75. See also paras. 6–8 of this Chapter.

³⁸ Panel report on *EC – Sardines*, para. 7.76. See also paras. 6–8 of this Chapter.

³⁹ The text of the decision is contained in G/TBT/1/Rev.8, pp. 26–29.

⁴⁰ The text of these recommendations and decisions is contained in G/TBT/1/Rev.8, p. 11.

⁴¹ The text of the relevant recommendations and decisions is contained in G/TBT/1/Rev.8, pp. 11–14.

(b) Decision relating to notifications – labelling requirements

28. With the purpose of clarifying the coverage of the Agreement with respect to labelling requirements, the TBT Committee took the following decision:

“In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.”⁴²

(c) Timing of notifications

29. The TBT Committee issued the following recommendation with respect to the timing of notifications:

“When implementing the provisions of Articles 2.9.2, 3.2 (in relation to Article 2.9.2), 5.6.2 and 7.2 (in relation to Article 5.6.2), a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account.”⁴³

(d) Application of Articles 2.9 and 5.6 (Preambular part)

30. With a view to ensuring a consistent approach to the selection of proposed technical regulations and procedures for assessment of conformity to be notified, the TBT Committee established the following criteria in order to define the term “significant effect on trade of other Members”:

“For the purposes of Articles 2.9 and 5.6, the concept of “significant effect on trade of other Members” may refer to the effect on trade:

- (a) Of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;
- (b) in a specific product, group of products or products in general; and
- (c) between two or more Members.

When assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with the proposed technical regulations. The concept of a significant effect on trade of other Members should include both import-enhanc-

ing and import-reducing effects on the trade of other Members, as long as such effects are significant.”⁴⁴

(e) Translation of documents relating to notifications and address of body supplying the documents

31. The TBT Committee also agreed on certain procedures designed to address the difficulties that can arise due to the fact that the documentation relevant to technical regulations, standards and procedures for assessment of conformity is not available in one of the WTO working languages and that a body other than the enquiry point may be responsible for such documentation.⁴⁵

(f) Processing of requests for documentation

32. The TBT Committee addressed the problems of supplying and obtaining requested documentation on notified technical regulations and procedures for assessment of conformity and endorsed the electronic processing of such requests.⁴⁶

(g) Length of time allowed for comments

33. The TBT Committee set the following time-limits for presentation of comments on notified technical regulations and procedures for assessment of conformity:

“The normal time limit for comments on notifications should be 60 days. Any Member which is able to provide a time limit beyond 60 days, such as 90 days, is encouraged to do so and should indicate this in the notification.”⁴⁷

(h) Handling of comments on notifications

34. In order to improve the handling of comments on proposed technical regulations and procedures for assessment of conformity submitted under Articles 2.9.4, 2.10.3, 3.1 (in relation to 2.9.4 and 2.10.3), 5.6.4, 5.7.3 and 7.1 (in relation to 5.6.4 and 5.7.3) of the *TBT Agreement*, the TBT Committee agreed on the following procedures.

“(a) Each Member should notify the WTO secretariat of the authority or agency (e.g. its enquiry point) which it has designated to be in charge for handling of comments received; and

- (b) a Member receiving comments through the designated body should without further request
 - (i) acknowledge the receipt of such comments,
 - (ii) explain within a reasonable time to any Member from which it has received comments,

⁴² G/TBT/1/Rev.8, p. 18.

⁴³ G/TBT/1/Rev.8, p. 15.

⁴⁴ G/TBT/1/Rev.8, p. 15.

⁴⁵ G/TBT/1/Rev.8, p. 16.

⁴⁶ G/TBT/1/Rev.8, pp. 15–16.

⁴⁷ G/TBT/1/Rev.8, p. 17.

how it will proceed in order to take these comments into account and, where appropriate, provide additional relevant information on the proposed technical regulations or procedures for assessment of conformity concerned, and

- (iii) provide to any Member from which it has received comments, a copy of the corresponding technical regulations or procedures for assessment of conformity as adopted or information that no corresponding technical regulations or procedures for assessment of conformity will be adopted for the time being."⁴⁸

(i) **Monthly listing of notifications issued**

35. With a view to providing a brief indication of the notifications issued, the TBT Committee agreed that the Secretariat be requested to prepare a monthly table of notifications issued, indicating the notification numbers, notifying Members, Articles notified under, products covered, objectives and final dates for comments.⁴⁹

(j) **Enhancement of electronic transmission of information**

36. In order to facilitate access to information by Members, as well as to strengthen the notification process, including the time needed for the publication and circulation of notification by the Secretariat, the TBT Committee agreed that electronic transmission of information was the preferred method of filing notifications.⁵⁰

6. Article 2.12

37. At its meeting of 15 March 2002, the Committee took note of the Ministerial Decision (made at the Ministerial Conference of 14 November 2001) regarding the implementation of Article 2.12 of the Agreement:

"Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued."⁵¹

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

Preparation, Adoption and Application of Standards

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3⁵² to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-

⁴⁸ G/TBT/1/Rev.8, p. 17.

⁴⁹ G/TBT/1/Rev.8, pp. 17–18.

⁵⁰ G/TBT/1/Rev.8, p. 18.

⁵¹ G/TBT/1/Rev.8, p. 30.

⁵² In connection with the Code of Good Practice for the Preparation, Adoption and Application of Standards, the Marrakesh Ministerial Conference adopted two decisions on 15 December 1994. See Sections XVII and XXI.

governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

38. The TBT Committee adopted a decision in respect of the principles to be observed, when international standards, guidelines and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the *TBT Agreement*) are developed, so as to take account of, *inter alia*, transparency, openness, impartiality and consensus, and to ensure that the concerns of developing countries are considered.⁵³

39. The TBT Committee also decided, in order to keep abreast of the activities of regional standardizing bodies and systems for conformity assessment, that representatives of such bodies and systems may be invited to address the Committee on their procedures and how they relate to those embodied in the Agreement, on the basis of agreed lists of questions.⁵⁴

40. See also the Section on Annex 3 (paragraph 67 below).

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

- 5.1.1 conformity assessment procedures are prepared, adopted and applied so as to

grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

- 5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

- 5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;

- 5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

⁵³ See G/TBT/1/Rev.8, pp. 26–29.

⁵⁴ See G/TBT/1/Rev.8, p. 23.

- 5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;
- 5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;
- 5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;
- 5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;
- 5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;
- 5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.
- 5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.
- 5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.
- 5.5 With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures.
- 5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:
- 5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;
- 5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- 5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;
- 5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
- 5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

- 5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;
- 5.7.2 upon request, provide other Members with copies of the rules of the procedure;
- 5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

(a) Technical Working Group

41. At its meeting of 16 and 22 October 1996, the TBT Committee agreed to establish a Technical Working Group to study certain ISO/IEC Guides on conformity assessment procedures and how they might contribute to furthering the objectives of Articles 5 and 6 of the *TBT Agreement*.⁵⁵

2. Article 5.5 and 5.6

42. The TBT Committee adopted a decision in respect of the principles to be observed, when international standards, guidelines and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the *TBT Agreement*) are developed, so as to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to take account of the concerns of developing countries.⁵⁶

3. Article 5.6

43. With reference to the notification of draft conformity assessment procedures, see the recommendations and decisions adopted by the TBT Committee, as described in paragraphs 26–36 above.⁵⁷ See in particu-

lar the recommendation concerning the application of Articles 2.9 and 5.6 (preambular part).⁵⁸

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

- 6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;
- 6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories

⁵⁵ G/TBT/M/6, para. 8.

⁵⁶ See G/TBT/1/Rev.8, pp. 26–29.

⁵⁷ See G/TBT/1/Rev.8, pp. 11–18.

⁵⁸ See G/TBT/1/Rev.8, p. 15.

of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

INFORMATION AND ASSISTANCE

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

*Information About Technical Regulations,
Standards and Conformity Assessment
Procedures*

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals¹ of the Member concerned or of any other Member.

(footnote original) ¹ "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. General

44. At its meeting of 21 April 1995, the TBT Committee decided on the modalities for regular meetings of persons responsible for information exchange.⁵⁹

2. Article 10.1 and 10.3

(a) "enquiry points"

45. At its meeting of 14 July 1995, and with a view to encouraging the uniform application of Articles 10.1 and 10.3, the TBT Committee adopted the following recommendations:

"(a) (i) An enquiry should be considered "reasonable" when it is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations, or procedures for assessment of conformity; and

(ii) when an enquiry refers to a composite product, it is desirable that the parts or components, for which information is sought, are defined to the extent possible. When a request is made concerning the use of a product it is desirable that the use is related to a specific field.

(b) The Enquiry Point(s) of a Member should be prepared to answer enquiries regarding the membership and participation of that Member, or of relevant bodies within its territory, in international and regional standardizing bodies and conformity assessment systems as well as in bilateral arrangements, with respect to a specific product or group of products. They should likewise be prepared to provide reasonable information on the provisions of such systems and arrangement."⁶⁰

46. At its meeting of 14 July 1995, with respect to the handling of requests received under Article 10.1 and 10.3, the TBT Committee adopted the recommendation that an enquiry point should, without further request, acknowledge the receipt of the enquiry.⁶¹

47. See also the recommendations of the TBT Committee concerning booklets on enquiry points and the List of Enquiry Points prepared by the Secretariat.⁶²

3. Article 10.5

48. See the recommendation and decisions of the TBT Committee concerning translation of documents relating to notifications, referenced in paragraph 31 above.⁶³

4. Article 10.7

49. The TBT Committee agreed on a notification format concerning agreements reached by a member

⁵⁹ The text of the decision is contained in G/TBT/1/Rev.8, p. 19.

⁶⁰ G/TBT/1/Rev.8, p. 21.

⁶¹ The text of the decision is contained in G/TBT/1/Rev.8, p. 21.

⁶² The text of the relevant decisions is contained in G/TBT/1/Rev.8, pp. 19–21.

⁶³ The text of the relevant recommendation and decisions is contained in G/TBT/1/Rev.8, p. 16.

with another country or countries on issues related to technical regulations, standards or conformity assessment procedures.⁶⁴

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to

fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

50. In considering the ways in which the provisions of Article 11 could be put into practice, the TBT Committee laid down parameters for exchanging information on technical assistance.⁶⁵

XIII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in

⁶⁴ G/TBT/1/Rev.8, p. 24.

⁶⁵ G/TBT/1/Rev.8, p. 22.

their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and

conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

XIV. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. General

(a) Rules of procedure

51. At its meeting on 1 January 1996, the Council for Trade in Goods approved the Rules of Procedure adopted by the TBT Committee on 21 April 1995.⁶⁶

(b) Observer status

52. Annexes 1 and 2 to the Rules of Procedure adopted by the TBT Committee contain Guidelines for Observer Status for Governments in the WTO (Annex 1) and for Intergovernmental Organizations in the WTO (Annex 2).⁶⁷

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14

Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

1. Invocation of the TBT Agreement in disputes

53. The following table lists the disputes in which Appellate Body and/or panel reports have been adopted where the provisions of the *TBT Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>US – Gasoline</i>	WT/DS2	Articles 2.1, 2.2
2 <i>Argentina – Textiles and Apparel</i>	WT/DS56	Articles 2.1, 2.2
3 <i>EC – Hormones (US)</i>	WT/DS26	Articles 2.1, 2.2
4 <i>EC – Hormones (Canada)</i>	WT/DS48	Articles 2.1, 2.2
5 <i>EC – Asbestos</i>	WT/DS135	Articles 2.1, 2.2, 2.4, 2.8
6 <i>EC – Sardines</i>	WT/DS231	Articles 2.1, 2.2, 2.4

2. Article 14.2

54. In *EC – Asbestos*, the Panel, having determined that the case raised scientific or technical issues, decided to consult experts on an individual basis, rather than in the form of a technical expert group, as foreseen in Article 14 and Annex 2 of the *TBT Agreement*. In response to an argument by the European Communities that expert consultations under the *TBT Agreement* should be conducted in the form of technical expert groups, the Panel observed:

“[T]hat, if the measure at issue should be deemed to fall under the TBT Agreement, which the Communities contest, Article 14.2 of that Agreement would require the establishment of an expert review group for any scientific or technical matter, and the EC position that pursuant to Article 1:2 of the DSU, that provision would prevail over those of Article 13 to the DSU. Article 14:2 of the TBT Agreement is among the provisions mentioned in Appendix 2 to the DSU and which, under Article 1:2 of that Understanding, will prevail over the provisions of the Understanding to the extent that there is a difference between the two. The Panel notes, however, that it is only ‘to the extent that there is a difference’ between the rules and procedures of the Understanding and a special or additional rule or procedure in Appendix 2 to the DSU that the latter will prevail. Yet, as stated by the Appellate Body, it is only where the provisions of the DSU and the special or additional rules of Appendix 2 cannot be read as complementing each other that the special or additional provisions will prevail over those of the DSU, that is, in a situation where the two provisions would be mutually incompatible.⁶⁸ In the present case, Article 14:2 of the TBT Agreement provides that a panel ‘may’ establish a technical expert group. Like Article 13:2 of the DSU, this text envisages the

⁶⁶ G/C/M/7, para. 2.2. The text of the Rules of Procedures for the meetings of the TBT Committee is also contained in G/TBT/1/Rev.8, pp. 2–9.

⁶⁷ The text of the guidelines is contained in G/TBT/1/Rev.8, pp. 8 and 9. See also G/TBT/M/1, para. 22.

⁶⁸ (footnote original) Appellate Body Report on *Guatemala – Cement*, paras. 65–66.

possibility of establishing a technical expert group and lays down the procedures that would be applicable in the event. Nevertheless, it does not exclusively prescribe the establishment of a technical expert group, and this possibility, in our opinion, is not incompatible with the general authorization given under Article 13 of the DSU to consult with individual experts. The two provisions can be read as complementing each other.

The Panel believes that in this case the consultation of experts on an individual basis is the more appropriate form of consultation, inasmuch as it is the one that will better enable the panel usefully to gather opinions and information on the scientific or technical issues raised by this dispute. Considering in particular the range of areas of competence that might be required, it is appropriate in this case to gather information and different individual opinions rather than asking for a collective report on the various scientific or technical matters in question. In the light of the foregoing, the Panel wishes to underline that its decision to consult experts on an individual basis is without prejudice to the applicability of the TBT Agreement to the measure in question, on which the parties disagree.”⁶⁹

FINAL PROVISIONS

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15 *Final Provisions*

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice

to the provisions of Article 12. Having regard, *inter alia*, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Article 15.2

55. The TBT Committee agreed on the following decision concerning the contents of written statements to be made by members in response to Article 15.2 of the *TBT Agreement*:

“1. The statement should cover the legislative, regulatory and administrative action taken as a result of the negotiation of the Agreement or currently in existence to ensure that the provisions of the Agreement are applied. If the Agreement itself has been incorporated into domestic law, the statement should indicate how this has been done. In other cases, the statement should describe the content of the relevant laws, regulations, administrative orders, etc. All necessary references should also be provided.

2. In addition, the statement should specify

- (a) The names of the publications used to announce that work is proceeding on draft technical regulations or standards and procedures for assessment of conformity and those in which the texts of technical regulations and standards or procedures for assessment of conformity are published under Articles 2.9.1, 2.11; 3.1 (in relation to 2.9.1 and 2.11); 5.6.1, 5.8; 7.1, 8.1 and 9.2 (in relation to 5.6.1 and 5.8); and paragraphs J, L and O of Annex 3 of the Agreement;
- (b) the expected length of time allowed for presentation of comments in writing on technical regulations, standards or procedures for assessment of conformity under Articles 2.9.4 and 2.10.3; 3.1 (in relation to 2.9.4 and 2.10.3); 5.6.4 and 5.7.3; 7.1, 8.1 and 9.2 (in relation to 5.6.4 and 5.7.3); and paragraph L of Annex 3 of the Agreement;
- (c) the name and address of the enquiry point(s) foreseen in Articles 10.1 and 10.3 of the Agreement with an indication as to whether it is/they are fully operational; if for legal or administrative reasons more than one enquiry point is established, complete and unambiguous information on the scope of responsibilities of each of them;
- (d) the name and address of any other agencies that have specific functions under the Agreement, including those foreseen in Articles 10.10 and 10.11 of the Agreement; and

⁶⁹ Panel Report on *EC – Asbestos*, paras. 5.18–5.19.

- (e) measures and arrangements to ensure that national and sub-national authorities preparing new technical regulations or procedures for assessment of conformity, or substantial amendments to existing ones, provide early information on their proposals in order to enable the Member in question to fulfil its obligations on notifications under Articles 2.9, 2.10, 3.2, 5.6, 5.7 and 7.2 of the Agreement.⁷⁰

2. Article 15.3

56. The Committee carried out, at its meeting of 23 March 2004, the Ninth Annual Review of the Implementation and Operation of the Agreement under Article 15.3⁷¹ and the Ninth Annual Review of the Code of Good Practice for the Preparation, Adoption and Application of Standards based on the following background documents: a list of standardizing bodies that have accepted the Code in 2003⁷², a list of standardizing bodies that have accepted the Code since 1 January 1995⁷³ and the ninth edition of the WTO TBT Standards Code Directory prepared by the ISO/IEC Information Centre.

3. Article 15.4

57. The Committee concluded the First,⁷⁴ Second⁷⁵ and Third⁷⁶ Triennial Reviews of the Operation and Implementation of the Agreement on Technical Barriers to Trade on 13 November 1997, 10 November 2000, and 7 November 2003, respectively.

XVII. ANNEX 1

A. TEXT OF ANNEX 1

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. Standard

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. Conformity assessment procedures

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Explanatory note

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. International body or system

Body or system whose membership is open to the relevant bodies of at least all Members.

5. Regional body or system

Body or system whose membership is open to the relevant bodies of only some of the Members.

⁷⁰ G/TBT/1/Rev.8, p. 10.

⁷¹ G/TBT/14.

⁷² G/TBT/CS/1/Add.8.

⁷³ G/TBT/CS/2/Rev.10.

⁷⁴ First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5.

⁷⁵ Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9.

⁷⁶ Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13.

6. Central government body

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. Local government body

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. Non-governmental body

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

B. INTERPRETATION AND APPLICATION OF ANNEX 1

1. Technical regulation

58. In *EC – Asbestos*, the Appellate Body clarified the term “technical regulation” and held, *inter alia*, that “[a] ‘technical regulation’ must . . . regulate the ‘characteristics’ of products in a binding or compulsory fashion:

“The heart of the definition of a ‘technical regulation’ is that a ‘document’ must ‘lay down’ – that is, set forth, stipulate or provide – ‘product characteristics’. The word ‘characteristic’ has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the ‘characteristics’ of a product include, in our view, any objectively definable ‘features’, ‘qualities’, ‘attributes’, or other ‘distinguishing mark’ of a product. Such ‘characteristics’ might relate, *inter alia*, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a ‘technical regulation’ in Annex 1.1, the *TBT Agreement* itself gives certain examples of ‘product characteristics’ – ‘terminology, symbols, packaging, marking or labelling requirements’. These examples indicate that ‘product characteristics’ include, not only features and qualities intrinsic to the product itself, but also related ‘characteristics’, such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a ‘technical regulation’ may set forth the ‘applicable administrative provisions’ for products which have certain

‘characteristics’. Further, we note that the definition of a ‘technical regulation’ provides that such a regulation ‘may also include or deal *exclusively* with terminology, symbols, packaging, marking or labelling requirements’. (emphasis added) The use here of the word ‘exclusively’ and the disjunctive word ‘or’ indicates that a ‘technical regulation’ may be confined to laying down only one or a few ‘product characteristics’. The definition . . . also states that ‘*compliance*’ with the ‘product characteristics’ laid down in the ‘document’ must be ‘*mandatory*’. A ‘technical regulation’ must, in other words, regulate the ‘characteristics’ of products in a binding or compulsory fashion. It follows that, with respect to products, a ‘technical regulation’ has the effect of *prescribing* or *imposing* one or more ‘characteristics’ – ‘features’, ‘qualities’, ‘attributes’, or other ‘distinguishing mark’.

‘Product characteristics’ may . . . be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain ‘characteristics’, or the document may require, negatively, that products *must not possess* certain ‘characteristics’. In both cases, the legal result is the same: the document ‘lays down’ certain binding ‘characteristics’ for products, in one case affirmatively, and in the other by negative implication.”⁷⁷

59. Regarding the products to which a technical regulation applies, the Appellate Body in *EC – Asbestos* further held that while a technical regulation must be applicable to an identifiable product or groups of products, this did not signify that the products in question must be actually named or identified in the regulation at issue:

“A ‘technical regulation’ must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, of ‘the *products to be covered*’ by a proposed ‘technical regulation’. (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a ‘technical regulation’ must apply to ‘*given*’ products which are actually *named, identified* or *specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to ‘products’ generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a ‘technical regulation’. Moreover, there may be perfectly sound administrative reasons for formulating a ‘technical regulation’ in a way that does *not* expressly identify products by name, but

⁷⁷ Appellate Body Report on *EC – Asbestos*, paras. 67–69.

simply makes them identifiable – for instance, through the ‘characteristic’ that is the subject of regulation.”⁷⁸

60. In *EC – Sardines*, the Appellate Body summarized its interpretation of the definition of a “technical regulation”:

“We interpreted this definition in *EC – Asbestos*. In doing so, we set out *three criteria* that a document must meet to fall within the definition of “technical regulation” in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. At the oral hearing, both participants confirmed that they agree with these criteria for determining whether a document is a “technical regulation” under the *TBT Agreement*.”⁷⁹

61. In *EC – Asbestos*, the Appellate Body further elaborated on the first criterion – the requirement that the document apply to an identifiable product or group of products – confirming that “the product does not necessarily have to be mentioned explicitly in a document for that product to be an identifiable product. Identifiable does not mean expressly identified.”⁸⁰ The Appellate Body noted:

“The European Communities argues that the Panel erred in failing to acknowledge that the EC Regulation uses the term ‘preserved sardines’ to mean – exclusively – preserved *Sardina pilchardus*. The European Communities is of the view that preserved *Sardina pilchardus* and preserved *Sardinops sagax* are not like products. The European Communities reasons that preserved *Sardinops sagax* can neither be an identified nor an identifiable product under the EC Regulation.

...

As we explained in *EC – Asbestos*, the requirement that a ‘technical regulation’ be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to comply with or enforce a “technical regulation” without knowing to what the regulation applied. As the Panel record shows, the EC Regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax*. This confirms that the EC Regulation is applicable to preserved *Sardinops sagax*, and demonstrates that preserved *Sardinops sagax* is an *identifiable product* for purposes of the EC Regulation. Indeed, the European Communities admits that the EC Regulation is

applicable to *Sardinops sagax*, when it states in its appellant’s submission that “[t]he only legal consequence of the [EC] Regulation for preserved *Sardinops sagax* is that they may not be called ‘preserved sardines’”.

Therefore, we reject the contention of the European Communities that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.”⁸¹

62. With regard to the second criterion – the requirement that the document must lay down one or more characteristic of the product – the Appellate Body rejected, in *EC – Sardines*, an argument by the European Communities that the measure at issue did not lay down product characteristics, but rather constituted a “naming rule”. The Appellate Body found that “product characteristics include not only ‘features and qualities intrinsic to the product’, but also those that are related to it, such as ‘means of identification’.”⁸² It agreed with the panel’s ruling that the measure at issue did lay down product characteristics:

“As we stated earlier, the EC Regulation expressly identifies a product, namely ‘preserved sardines’. Further, Article 2 of the EC Regulation provides that, to be marketed as ‘preserved sardines’, products must be prepared exclusively from fish of the species *Sardina pilchardus*. We are of the view that this requirement – to be prepared exclusively from fish of the species *Sardina pilchardus* – is a product characteristic ‘intrinsic to’ preserved sardines that is laid down by the EC Regulation. . . .

In any event, as we said in *EC – Asbestos*, a “means of identification” is a product characteristic. A name clearly identifies a product; indeed, the European Communities concedes that a name is a ‘means of identification’. . . . the European Communities itself underscored the important role that a ‘name’ plays as a ‘means of identification’ when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer”⁸³

2. Standards

(a) Relationship between the definitions under the TBT Agreement and the definitions in the ISO/IEC Guide

63. In *EC – Sardines*, in the context of an analysis relating to the notion of “relevant international standard” under Article 2.4, the Appellate Body considered the relationship between the definitions under Annex 1 of the TBT Agreement and the ISO/IEC Guide:

⁷⁸ Appellate Body Report on *EC – Asbestos*, para. 70.

⁷⁹ Appellate Body Report on *EC – Sardines*, para. 176.

⁸⁰ Appellate Body Report on *EC – Sardines*, para. 180.

⁸¹ Appellate Body Report on *EC – Sardines*, paras. 181–186.

⁸² Appellate Body Report on *EC – Sardines*, para. 189.

⁸³ Appellate Body Report on *EC – Sardines*, paras. 190–191.

"[A]ccording to the chapeau [of Annex 1], the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the 'ISO/IEC Guide'). This is underscored by the word 'however'. The definition of a standard in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required."⁸⁴

(b) Consensus

64. With respect to whether consensus is required to meet the definition of "standard" under Annex 1.2, the Appellate Body observed in *EC – Sardines* that:

"The term 'standard' is defined in the ISO/IEC Guide as follows:

Document, established by *consensus* and approved by a *recognized* body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. (original emphasis)

Thus, the definition of a 'standard' in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the omission of a consensus requirement in the definition of a standard in Annex 1.2 of the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note."⁸⁵

65. See also the section on the notion of "relevant international standards" under Article 2.4 (paragraphs 10–12 above).

XVIII. ANNEX 2

A. TEXT OF ANNEX 2

ANNEX 2 *TECHNICAL EXPERT GROUPS*

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

B. INTERPRETATION AND APPLICATION OF ANNEX 2

66. On the issue of whether the establishment of a technical expert group is required under Article 14, see paragraph 54 above.

⁸⁴ Appellate Body Report on *EC – Sardines*, para. 224.

⁸⁵ Appellate Body Report on *EC – Sardines*, para. 225.

XIX. ANNEX 3**A. TEXT OF ANNEX 3****ANNEX 3****CODE OF GOOD PRACTICE FOR THE
PREPARATION, ADOPTION AND APPLICATION
OF STANDARDS***General Provisions*

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

Substantive Provisions

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its

resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

B. INTERPRETATION AND APPLICATION OF ANNEX 3

1. Notification procedure under paragraph J

67. The TBT Committee adopted the following decision relating to the communication of the work programme of standardizing bodies via the Internet:

“The communication of the work programmes of standardizing bodies via the Internet would be another possibility to fulfil paragraph J obligations on transparency. Hard copies of such work programmes would, nevertheless, always be made available on request in accordance with paragraph P of the Code of Code of Good Practice.”⁸⁶

XX. DECISION ON PROPOSED UNDERSTANDING ON WTO-ISO STANDARDS INFORMATION SYSTEM

A. TEXT OF THE DECISION

Decision on Proposed Understanding on WTO-ISO Standards Information System

Ministers,

Decide to recommend that the Secretariat of the World Trade Organization reach an understanding with the International Organization for Standardization (“ISO”) to establish an information system under which:

1. ISONET members shall transmit to the ISO/IEC Information Centre in Geneva the notifications referred to in paragraphs C and J of the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to the Agreement on Technical Barriers to Trade, in the manner indicated there;
2. the following (alpha)numeric classification systems shall be used in the work programmes referred to in paragraph J:
 - (a) *a standards classification system* which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the subject matter;
 - (b) *a stage code system* which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the stage of development of the standard; for this purpose, at least five stages of development should be distinguished: (1) the stage at which the decision to develop a standard has been taken, but technical work has not yet begun; (2) the stage

⁸⁶ See G/TBT/1/Rev.8, p. 25.

at which technical work has begun, but the period for the submission of comments has not yet started; (3) the stage at which the period for the submission of comments has started, but has not yet been completed; (4) the stage at which the period for the submission of comments has been completed, but the standard has not yet been adopted; and (5) the stage at which the standard has been adopted;

(c) *an identification system* covering all international standards which would allow standardizing bodies to give for each standard mentioned in the work programme an (alpha)numeric indication of the international standard(s) used as a basis;

3. the ISO/IEC Information Centre shall promptly convey to the Secretariat copies of any notifications referred to in paragraph C of the Code of Good Practice;
4. the ISO/IEC Information Centre shall regularly publish the information received in the notifications made to it under paragraphs C and J of the Code of Good Practice; this publication, for which a reasonable fee may be charged, shall be available to ISONET members and through the Secretariat to the Members of the WTO.

B. INTERPRETATION AND APPLICATION OF THE DECISION

No jurisprudence or decision of a competent WTO body.

XXI. DECISION ON REVIEW OF THE ISO/IEC INFORMATION CENTRE PUBLICATION

A. TEXT OF THE DECISION

Decision on Review of the ISO/IEC Information Centre Publication

Ministers,

Decide that in conformity with paragraph 1 of Article 13 of the Agreement on Technical Barriers to Trade in Annex 1A of the Agreement Establishing the World Trade Organization, the Committee on Technical Barriers to Trade established thereunder shall, without prejudice to provisions on consultation and dispute settlement, at least once a year review the publication provided by the ISO/IEC Information Centre on information received according to the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the Agreement, for the purpose of affording Members opportunity of discussing any matters relating to the operation of that Code.

In order to facilitate this discussion, the Secretariat shall provide a list by Member of all standardizing bodies that have accepted the Code, as well as a list of those standardizing bodies that have accepted or withdrawn from the Code since the previous review.

The Secretariat shall also distribute promptly to the Members copies of the notifications it receives from the ISO/IEC Information Centre.

B. INTERPRETATION AND APPLICATION OF THE DECISION

No jurisprudence or decision of a competent WTO body.

XXII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. GATT 1994

68. See the Interpretative Note to Annex 1A of the *WTO Agreement*.

B. SPS AGREEMENT

69. See Article 1.5 and paragraph 4 above.

Agreement on Trade-Related Investment Measures

<hr style="border: 1px solid black; margin-bottom: 10px;"/> <p>I. PREAMBLE 504</p> <p>A. TEXT OF THE PREAMBLE 504</p> <p>B. INTERPRETATION AND APPLICATION OF THE PREAMBLE 504</p> <p>II. ARTICLE 1 505</p> <p>A. TEXT OF ARTICLE 1 505</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 1 505</p> <p style="padding-left: 20px;">1. “Investment measures” 505</p> <p style="padding-left: 20px;">2. “related to trade” 505</p> <p style="padding-left: 20px;">3. Necessity of separate analysis on whether a measure is a trade-related investment measure 506</p> <p>III. ARTICLE 2 506</p> <p>A. TEXT OF ARTICLE 2 506</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 2 506</p> <p style="padding-left: 20px;">1. Illustrative List 506</p> <p style="padding-left: 40px;">(a) Paragraph 1(a) 506</p> <p style="padding-left: 20px;">2. Relationship with GATT 1994 507</p> <p>IV. ARTICLE 3 507</p> <p>A. TEXT OF ARTICLE 3 507</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 3 507</p> <p>V. ARTICLE 4 507</p> <p>A. TEXT OF ARTICLE 4 507</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 4 507</p> <p>VI. ARTICLE 5 507</p> <p>A. TEXT OF ARTICLE 5 507</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 5 508</p> <p style="padding-left: 20px;">1. Article 5.1 508</p> <p style="padding-left: 20px;">2. Article 5.3 508</p> <p style="padding-left: 20px;">3. Article 5.5 508</p> <p>VII. ARTICLE 6 508</p> <p>A. TEXT OF ARTICLE 6 508</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 6 509</p> <p style="padding-left: 20px;">1. Article 6.2 509</p> <p>VIII. ARTICLE 7 509</p> <p>A. TEXT OF ARTICLE 7 509</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 7 509</p> <p style="padding-left: 20px;">1. General 509</p> <p style="padding-left: 40px;">(a) Rules of procedure 509</p> <p style="padding-left: 40px;">(b) Observership 509</p> <p style="padding-left: 20px;">2. Article 7.2 509</p> <p>IX. ARTICLE 8 510</p> <p>A. TEXT OF ARTICLE 8 510</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE VIII 510</p>	<p>X. ARTICLE 9 510</p> <p>A. TEXT OF ARTICLE 9 510</p> <p>B. INTERPRETATION AND APPLICATION OF ARTICLE 9 510</p> <p>XI. RELATIONSHIP WITH OTHER WTO AGREEMENTS 510</p> <p>A. GATT 1994 510</p> <p style="padding-left: 20px;">1. Whether conflict exists 510</p> <p style="padding-left: 20px;">2. Relationship between Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement 511</p> <p>B. SCM AGREEMENT 515</p> <p>XII. ANNEX I 516</p> <p>A. TEXT OF ANNEX I 516</p> <p>B. INTERPRETATION AND APPLICATION OF ANNEX I 516</p> <hr style="border: 1px solid black; margin-top: 10px;"/> <p>I. PREAMBLE</p> <p>A. TEXT OF THE PREAMBLE</p> <p style="padding-left: 40px;"><i>Members,</i></p> <p style="padding-left: 40px;"><i>Considering</i> that Ministers agreed in the Punta del Este Declaration that “Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade”;</p> <p style="padding-left: 40px;"><i>Desiring</i> to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;</p> <p style="padding-left: 40px;"><i>Taking into account</i> the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country Members;</p> <p style="padding-left: 40px;"><i>Recognizing</i> that certain investment measures can cause trade-restrictive and distorting effects;</p> <p style="padding-left: 40px;">Hereby <i>agree</i> as follows:</p> <p>B. INTERPRETATION AND APPLICATION OF THE PREAMBLE</p> <p style="padding-left: 40px;"><i>No jurisprudence or decision of a competent WTO body.</i></p>
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II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1 Coverage

This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as “TRIMs”).

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. “Investment measures”

1. In *Indonesia – Autos*, the Panel examined the consistency of an Indonesian subsidy programme with the *TRIMs Agreement*. Indonesia, arguing that the measures at issue were not trade-related investment measures, stated that while its subsidies may, at times, indirectly affect investment decisions of the recipient of the subsidy or other parties, these decisions are not the object, but rather the unintended result, of the subsidy. Also, Indonesia argued that the *TRIMs Agreement* is basically designed to govern and provide a level playing field for foreign investment, and that therefore measures relating to internal taxes or subsidies cannot be trade-related investment measures. The Panel rejected this view, stating that the term “investment measures” was not limited to measures applying specifically to *foreign* investment:

“We note that the use of the broad term ‘investment measures’ indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to *foreign* investment. . . . [N]othing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to a particular measure is an element in deciding whether that measure is covered by the Agreement. We therefore find without textual support in the TRIMs Agreement the argument that since the TRIMs Agreement is basically designed to govern and provide a level playing field for foreign investment, measures relating to internal taxes or subsidies cannot be construed to be a trade-related investment measure. We recall in this context that internal tax advantages or subsidies are only one of many types of advantages which may be tied to a local content requirement which is a principal focus of the TRIMs Agreement. The TRIMs Agreement is not concerned with subsidies and internal taxes as such but rather with local content requirements, compliance with which may be encouraged through providing any type of advantage. Nor, in any case, do we see why an internal measure would necessarily not govern the treatment of foreign investment.”¹

2. In examining whether the measures in question were “investment measures”, the Panel on *Indonesia – Autos* reviewed the legislative provisions relating to these measures. The Panel concluded that the measures

were “aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia” and that “that there is nothing in the text of the *TRIMs Agreement* to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation”:

“On the basis of our reading of these measures applied by Indonesia under the 1993 and the 1996 car programmes, which have investment objectives and investment features and which refer to investment programmes, we find that these measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term ‘investment measures’. We do not intend to provide an overall definition of what constitutes an investment measure. We emphasize that our characterization of the measures as ‘investment measures’ is based on an examination of the manner in which the measures at issue in this case relate to investment. There may be other measures which qualify as investment measures within the meaning of the TRIMs Agreement because they relate to investment in a different manner.

With respect to the arguments of Indonesia that the measures at issue are not investment measures because the Indonesian Government does not regard the programmes as investment programmes and because the measures have not been adopted by the authorities responsible for investment policy, we believe that there is nothing in the text of the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation. In any event, we note that some of the regulations and decisions adopted pursuant to these car programmes were adopted by investment bodies.”²

2. “related to trade”

3. In examining whether the measures at issue in the dispute before it were “trade-related”, the Panel on *Indonesia – Autos* held that local content requirements were necessarily trade-related:

“[I]f these measures are local content requirements, they would necessarily be ‘trade-related’ because such requirements, by definition, always favour the use of

¹ Panel Report on *Indonesia – Autos*, para. 14.73.

² Panel Report on *Indonesia – Autos*, paras. 14.80–14.81.

domestic products over imported products, and therefore affect trade.

An examination of whether these measures are covered by Item (1) of the Illustrative List of TRIMs annexed to the TRIMs Agreement, which refers amongst other situations to measures with local content requirements, will not only indicate whether they are trade-related but also whether they are inconsistent with Article III:4 and thus in violation of Article 2.1 of the TRIMs Agreement.”³

3. Necessity of separate analysis on whether a measure is a trade-related investment measure

4. In *Indonesia – Autos*, the Panel noted that differing views had been expressed by the parties to that dispute on the question “whether any requirement by an enterprise to purchase or use a domestic product in order to obtain an advantage, by definition falls within the Illustrative List or whether the *TRIMs Agreement* requires a separate analysis of the nature of a measure as a trade-related investment measure before proceeding to an examination of whether the measure is covered by the Illustrative List.”⁴ The Panel considered that it was not necessary for it to decide this question, and noted in this regard:

“[I]f we were to consider that the measures in dispute in this case are in any event trade-related investment measures, it would not be necessary to decide this basic issue of interpretation. We note in this regard that the United States and the European Communities have also argued in the alternative that, even if it is necessary to show a relationship of a measure to investment, any such requirement would be satisfied in the case under consideration.

Therefore, we will first determine whether the Indonesian measures are TRIMs. To this end, we address initially the issue of whether the measures at issue are ‘investment measures’. Next, we consider whether they are ‘trade-related’. Finally, we shall examine whether any measure found to be a TRIM is inconsistent with the provisions of Article III and thus violates the TRIMs Agreement.”⁵

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex⁶ to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Illustrative List

(a) Paragraph 1(a)

5. The Panel on *Indonesia – Autos* concluded from its analysis of the measures in question that “under these measures compliance with the provisions for the purchase and use of particular products of domestic origin is necessary to obtain the tax and customs duty benefits on these car programmes, as referred to in Item 1(a) of the Illustrative List of TRIMs.”⁷ The Panel then concluded that the tax and customs duty benefits were “advantages” within the meaning of the chapeau of paragraph 1 of the Illustrative List:

“In the context of the claims under Article III:4 of GATT, Indonesia has argued that the reduced customs duties are not internal regulations and as such cannot be covered by the wording of Article III:4. We do not consider that the matter before us in connection with Indonesia’s obligations under the TRIMs Agreement is the customs duty relief as such but rather the internal regulations, i.e. the provisions on purchase and use of domestic products, compliance with which is necessary to obtain an advantage, which advantage here is the customs duty relief. The lower duty rates are clearly ‘advantages’ in the meaning of the chapeau of the Illustrative List to the TRIMs Agreement and as such, we find that the Indonesian measures fall within the scope of the Item 1 of the Illustrative List of TRIMs.

Indonesia also argues that the local content requirements of its car programmes do not constitute classic local content requirements within the meaning of the *FIRA* panel (which involved a binding contract between the investor and the Government of Canada) because they leave companies free to decide from which source to purchase parts and components. We note that the Indonesian producers or assemblers of motor vehicles (or motor vehicle parts) must satisfy the local content targets of the relevant measures in order to take advantage of the customs duty and tax benefits offered by the Government. The wording of the Illustrative List of the TRIMs Agreement makes it clear that a simple advantage conditional on the use of domestic goods is considered to

³ Panel Report on *Indonesia – Autos*, paras. 14.82–14.83.

⁴ Panel Report on *Indonesia – Autos*, para. 14.71.

⁵ Panel Report on *Indonesia – Autos*, paras. 14.71–14.72.

⁶ See Section XII.

⁷ Panel Report on *Indonesia – Autos*, para. 14.88.

be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such. We note in addition that this argument has also been rejected in the Panel Report on *Parts and Components*.⁸

We thus find that the tax and tariff benefits contingent on meeting local requirements under these car programmes constitute 'advantages'.⁹

6. In *Canada – Wheat Exports and Grain Imports* the question arose, whether Section 87 of the Canada Grain Act was an investment measure inconsistent with Article 2.1 of the *TRIMs Agreement*. With respect to this issue, the Panel made reference to its previous findings¹⁰ that the United States had not established that Section 87 is, as such, inconsistent with Article III:4 of the *GATT 1994*. Since a violation of Article III:4 of the *GATT 1994* was not established, the Panel concluded that no inconsistency with Article 2.1 of the *TRIMs Agreement* could be found.

"The United States has not established that Section 87 is inconsistent with Article III:4 of the *GATT 1994*. In view of these findings, it is clear that, even if Section 87 could be considered an investment measure related to trade in goods within the meaning of the *TRIMs Agreement*, the United States has not established that Section 87 is, as such, inconsistent with Article 2.1 of the *TRIMs Agreement*. Moreover, since the United States has not established that Section 87 of the *Canada Grain Act* legally precludes producers of foreign grain or foreign producers of grain from gaining access to producer railway cars, the United States has also failed to establish that Section 87 requires the use by an enterprise of products of domestic origin or from any domestic source within the meaning of paragraph 1(a) of the Annex to the *TRIMs Agreement*."¹¹

2. Relationship with GATT 1994

7. With respect to the relationship between Article III.4 of the *GATT 1994* and Article 2 of the *TRIMs Agreement*, see paragraphs 25–36 below.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3 *Exceptions*

All exceptions under *GATT 1994* shall apply, as appropriate, to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

8. In *Indonesia – Autos*, the Panel referred to Article 3 in discussing the relationship between the *TRIMs Agreement* and *GATT 1994*. See excerpts from the report of the Panel referenced in paragraphs 28–30 below.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4 *Developing Country Members*

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of *GATT 1994*, the Understanding on the Balance-of-Payments Provisions of *GATT 1994*, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205–209) permit the Member to deviate from the provisions of Articles III and XI of *GATT 1994*.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5 *Notification and Transitional Arrangements*

1. Members, within 90 days of the date of entry into force of the *WTO Agreement*, shall notify the Council for Trade in Goods of all TRIMs they are applying that are not in conformity with the provisions of this Agreement. Such TRIMs of general or specific application shall be notified, along with their principal features.¹

(*footnote original*)¹ In the case of TRIMs applied under discretionary authority, each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.

2. Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the *WTO Agreement* in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.

⁸ (*footnote original*) In *Parts and Components*, the panel recognized that requirements that an enterprise voluntarily accepts to gain government-provided advantages are nonetheless "requirements" (*italics in original*): "5.21 The Panel noted that Article III:4 refers to 'all laws, regulations or requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use.' The Panel considered that the comprehensive coverage of 'all laws, regulations or requirements affecting' the internal sale, etc. of imported products suggests that not only requirements which an enterprise is legally bound to carry out, but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute 'requirements' within the meaning of that provision . . ." Panel Report on *EEC – Parts and Components*.

⁹ Panel Report on *Indonesia – Autos*, paras. 14.88–14.91.

¹⁰ Panel Report on *Canada – Wheat*, para. 6.375

¹¹ Panel Report on *Canada – Wheat*, para. 6.381.

3. On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under paragraph 1 for a developing country Member, including a least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

4. During the transition period, a Member shall not modify the terms of any TRIM which it notifies under paragraph 1 from those prevailing at the date of entry into force of the WTO Agreement so as to increase the degree of inconsistency with the provisions of Article 2. TRIMs introduced less than 180 days before the date of entry into force of the WTO Agreement shall not benefit from the transitional arrangements provided in paragraph 2.

5. Notwithstanding the provisions of Article 2, a Member, in order not to disadvantage established enterprises which are subject to a TRIM notified under paragraph 1, may apply during the transition period the same TRIM to a new investment (i) where the products of such investment are like products to those of the established enterprises, and (ii) where necessary to avoid distorting the conditions of competition between the new investment and the established enterprises. Any TRIM so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

9. At its meeting of 20 February 1995, the Council for Trade in Goods adopted a standard format for notifications required under Article 5.1¹², which had been recommended by the Preparatory Committee for the World Trade Organization.¹³

10. With respect to Article 5.1 notifications, at its meeting on 3 April 1995, the General Council adopted the recommendation of the TRIMs Committee relating to notifications required under Article 5.1.¹⁴

2. Article 5.3

11. At its meeting of 3 and 8 May 2000, the General Council agreed to “direct the Council for Trade in Goods to give positive consideration to individual requests presented in accordance with Article 5.3 by developing countries for extension of transition periods for implementation of the TRIMs Agreement.”¹⁵

12. At its meeting of 31 July 2001, the Council for Trade in Goods adopted an extension of the transitional

period for the elimination of TRIMs for seven developing countries at their request.¹⁶ The extension lasted until the end of 2001. At its meeting of 5 November 2001, the Council for Trade in Goods adopted an additional extension of the transition period for six of these Members and for Thailand.¹⁷ The length of the extension varied depending on the Member concerned.¹⁸

13. At its meeting of 20 December 2001 Colombia was granted by the General Council a waiver of its TRIMs obligations for certain bean products until 31 December 2003.¹⁹

14. On 22 December 2003, Pakistan made a request to the Council for Trade in Goods for a three-year extension of the transition period in which to eliminate its remaining TRIMs. As of December 2004, a decision on this request is still pending.²⁰

3. Article 5.5

15. A standard format has been adopted for notifications made pursuant to this provision.²¹ However, to date no such notifications have been made to the Council for Trade in Goods,

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6 *Transparency*

1. Members reaffirm, with respect to TRIMs, their commitment to obligations on transparency and notification in Article X of GATT 1994, in the undertaking on “Notification” contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and

¹² G/C/M/1, Section 2(A).

¹³ PC/IPL/8.

¹⁴ WT/GC/M/3, Section 5. The text of the decision can be found in WT/L/64.

¹⁵ WT/GC/M/55, Annex II, the third bullet point.

¹⁶ These seven countries were: Argentina (G/L/460), Colombia (G/L/461), Malaysia (G/L/462), Mexico (G/L/463), Philippines (G/L/464), Romania (G/L/465), Pakistan (G/L/466).

¹⁷ The first extension to Thailand was granted in a waiver, adopted by the General Council at its meeting of 31 July 2001 (WT/L/410). The waiver expired the 31 December 2002. The waiver stated that after this period, if another extension proved necessary, it would be granted by a decision of the Council of Trade in Goods. This new extension was adopted by the Council for Trade in Goods at its meeting of 5 November 2001 (G/L/504).

¹⁸ Argentina – G/L/497 (31 December 2003), Malaysia – G/L/499 (31 December 2003), Mexico – G/L/500 (31 December 2003), Pakistan – G/L/501 (31 December 2003), Philippines – G/L/502 (31 June 2003), Romania – G/L/503 (31 May 2003), Thailand – G/L/504 (31 December 2003).

¹⁹ G/L/441. The waiver confirmed the decision to extend the transitional period for the elimination of TRIMs for Colombia that the Council of Trade in Goods had adopted at its meeting of 5 November 2001. G/L/498.

²⁰ G/C/W/501.

²¹ G/TRIMS/3.

Surveillance adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

2. Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories.

3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member. In conformity with Article X of GATT 1994 no Member is required to disclose information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.2

16. At its meeting of 30 September and 1 November 1996, the TRIMs Committee decided that Members would provide the Secretariat with the name(s) of publication(s) in which TRIMs may be found.²²

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

Committee on Trade-Related Investment Measures

1. A Committee on Trade-Related Investment Measures (referred to in this Agreement as the "Committee") is hereby established, and shall be open to all Members. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any Member.

2. The Committee shall carry out responsibilities assigned to it by the Council for Trade in Goods and shall afford Members the opportunity to consult on any matters relating to the operation and implementation of this Agreement.

3. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to the Council for Trade in Goods.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

(a) Rules of procedure

17. At its meeting on 1 December 1995, the Council for Trade in Goods approved the rules of procedure for the TRIMs Committee.²³

18. The TRIMs Committee reports to the Council for Trade in Goods on an annual basis.²⁴

(b) Observership

19. With respect to the observership for the TRIMs Committee, see Chapter on *WTO Agreement*, Section XII.B.1(b) and Section XXVI.²⁵

2. Article 7.2

20. At its meeting on 20 February 1995 the Council for Trade in Goods, in approving the standard format for notifications specified under Article 5.1 and 5.5 of the Agreement, agreed to a proposal made by the Chairman of the Committee to the effect that the TRIMs Committee would carry out the task assigned to the Council for Trade in Goods with respect to notifications of TRIMs.²⁶

21. At its meeting of 7 May 2002, the Council for Trade in Goods adopted a decision in order to assign to the Committee on TRIMs the work for continued discussion on implementation issues, relating to special treatment for developing countries. The decision stated that:

"Members agree in accordance with Article 7.2 of the TRIMs Agreement, the CTG will assign to the Committee on TRIMs the responsibility for conducting the work on the outstanding implementation issues contained in paragraphs 37–40 of the document JOB(01)152/Rev.1. The TRIMs committee shall report regularly on the progress of its work to the CTG, which will report to the Trade Negotiating Committee in accordance with paragraph 12 of the Doha Ministerial Declaration."²⁷

22. In its report to the General Council, the TRIMs Committee noted that it had considered two proposals on special and differential treatment submitted by the African Group²⁸ with respect to Article 4 and Article 5.3 of the TRIMs Agreement.

²² G/TRIMS/M/5, Section B. The text of the decision can be found in G/TRIMS/5.

²³ G/C/M/7, Section 2.

²⁴ The reports are contained in documents G/L/37, 133, 193, 259, 319, 390, 589, 649, 705 and 705/Corr.1.

²⁵ On 17 March 1999, the TRIMs Committee granted regular observer status to those organizations which had observer status on an ad hoc basis, see G/TRIMS/M/6.

²⁶ G/C/M/1, para. 2.1.

²⁷ G/C/M/60, Section VI.

²⁸ TN/CTD/W/3/Rev.2.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

23. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *TRIMs Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>EC – Bananas III</i>	WT/DS27	Articles 2.1 and 5
2 <i>Indonesia – Autos</i>	WT/DS54, WT/DS55, WT/DS59, WT/DS64	Articles 2.1 and 5.4
3 <i>Canada – Autos</i>	WT/DS139, WT/DS142	Article 2
4 <i>India – Autos</i>	WT/DS146, WT/DS175	Articles 2.1 and 2.2
5 <i>Canada – Wheat Exports and Grain Imports</i>	WT/DS276	Article 2.1

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

Review by the Council for Trade in Goods

Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

24. In accordance with Article 9, at its meeting of 15 October 1999, the Council for Trade in Goods launched the review of the operation of the *TRIMs Agreement*.²⁹ Upon request by Members, a study on the use and effects of TRIMs and other performance requirements was jointly prepared by the WTO and UNCTAD Secretariats, which served as input for discussions under the Article 9 review of the *TRIMs Agreement*.³⁰

XI. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. GATT 1994

1. Whether conflict exists

25. The Panel on *EC – Bananas III*, the Panel examined the import licensing procedures of the European Communities under GATT 1994, the Licensing Agreement and the *TRIMs Agreement*. After determining that the Licensing Agreement applied to tariff quotas, the Panel addressed the question whether GATT 1994 as well as the Licensing Agreement and the *TRIMs Agreement* applied to the European Communities import licensing procedures. The Panel defined the term “conflict” between WTO agreements, as laid down in the General Interpretative Note to Annex 1A; it held that a conflict exists when two obligations are mutually exclusive and where a rule in one agreement prohibits what a rule in another agreement explicitly permits:

“As a preliminary issue, it is necessary to define the notion of ‘conflict’ laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.³¹

However, we are of the view that the concept of ‘conflict’ as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for

²⁹ G/C/M/41, Section 7.

³⁰ G/C/W/307 and G/C/W/307/Add.1.

³¹ (*footnote original*) For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing (“ATC”) authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1–21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement."³²

26. Based on its reading of the term "conflict" contained in the General Interpretative Note to Annex 1A, as referenced in paragraph 25 above, the Panel on *EC – Bananas III* went on to examine whether such conflict existed between the *Licensing Agreement* and the *TRIMs Agreement*, on the one hand, and provisions of the *GATT 1994*, on the other. The Panel concluded that this was not the case and that, consequently, "the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMs Agreement all apply to the EC's import licensing procedures for bananas":

"Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing.

In the light of the foregoing discussion, we find that the provisions of GATT 1994, the Licensing Agreement and Article 2 of the TRIMs Agreement all apply to the EC's import licensing procedures for bananas."³³

2. Relationship between Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement

27. The Panel on *EC – Bananas III* found that the allocation of import licences to a particular category of

operators was inconsistent with Article III:4 of *GATT 1994*.³⁴ With respect to the claim that this measure was also inconsistent with Article 2 of the *TRIMs Agreement*, the Panel, further to noting that the *TRIMs Agreement* essentially interprets and clarifies the provisions of Article III where trade-related investment measures are concerned, decided to resort to judicial economy:

"[W]e first examine the relationship of the TRIMs Agreement to the provisions of GATT. We note that with the exception of its transition provisions³⁵ the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.

We emphasize that in view of the importance of the TRIMs Agreement in the framework of the agreements covered by the WTO, we have examined the claims and legal arguments advanced by the parties under the TRIMs Agreement carefully. However, for the reasons stated in the previous paragraph, we do not consider it necessary to make a specific ruling under the TRIMs Agreement with respect to the eligibility criteria for the different categories of operators and the allocation of certain percentages of import licences based on operator categories. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement."³⁶

28. In *Indonesia – Autos*, the European Communities and the United States claimed that the Indonesian 1993 car programme, by providing for tax benefits for finished cars incorporating a certain percentage value of domestic parts and components, and for customs duty benefits for imported parts and components used in cars incorporating a certain percentage value of domestic products, violated the provisions of Article 2 of the *TRIMs Agreement*, and Article III:4 of the *GATT 1994*. Japan, the European Communities and the United States also claimed that the Indonesian 1996 car programme, by providing for local content requirements

³² Panel Report on *EC – Bananas III*, paras. 7.159–7.160.

³³ Panel Report on *EC – Bananas III*, paras. 7.161–7.163.

³⁴ Panel Report on *EC – Bananas III*, para. 7.182.

³⁵ (*footnote original*) We have already dismissed the Complainants' claim under the transition provisions of Article 5 of the TRIMs Agreement because Article 5 was not listed in the request for the establishment of the Panel as required by Article 6.2 of the DSU.

³⁶ Panel Report on *EC – Bananas III*, paras. 7.185–7.186.

linked to tax benefits for National Cars (which by definition incorporated a certain percentage value of domestic products), and to customs duty benefits for imported parts and components used in National Cars, violated the provisions of Article 2 of the *TRIMs Agreement* and Article III:4 of the *GATT 1994*. In response to these claims, the Panel analysed the relationship between the *TRIMs Agreement* and Article III of *GATT 1994*, holding that “on its face the TRIMs Agreement is a fully fledged agreement in the WTO system”:

“Since the complainants have raised claims that the local content requirements of the car programmes violate both the provisions of Article III:4 of GATT and Article 2 of the TRIMs Agreement, we must consider which claims to examine first. In deciding which claims to examine first, we must, initially, address the relationship between Article III of GATT and the TRIMs Agreement.

In this regard, we note first that on its face the TRIMs Agreement is a fully fledged agreement in the WTO system. The TRIMs Agreement is not an ‘Understanding to GATT 1994’, unlike the six Understandings which form part of the GATT 1994. The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter. But when the TRIMs Agreement refers to ‘the provisions of Article III’, it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMs Agreement, and not the application of Article III in the WTO context as such. Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions.³⁷”³⁸

29. The Panel on *Indonesia – Autos* found confirmation for its finding that the *TRIMs Agreement* was “a fully fledged agreement in the WTO system” in the fact that the *TRIMs Agreement* had introduced “special transitional provisions including notification requirements”. Subsequently, referring to the Appellate Body Report in *EC – Bananas III*, the Panel then held that it would begin its analysis with the *TRIMs Agreement*, because “the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned”:

“Moreover, it has to be recognized that the TRIMs Agreement, in addition to interpreting and clarifying the provisions of Article III where trade-related investment

measures are concerned, has introduced special transitional provisions including notification requirements.³⁹ This reinforces the conclusion that the TRIMs Agreement has an autonomous legal existence, independent from that of Article III. Consequently, since the TRIMs Agreement and Article III remain two legally distinct and independent sets of provisions of the WTO Agreement, we find that even if either of the two sets of provisions were not applicable the other one would remain applicable. And to the extent that complainants have raised separate and distinct claims under Article III:4 of GATT and the TRIMs Agreement, each claim must be addressed separately.

As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned. A similar issue was presented in *Bananas III*, where the Appellate Body discussed the relationship between Article X of GATT and Article 1.3 of the Licensing Agreement and concluded that the Licensing Agreement being more specific it should have been applied first.⁴⁰ This is also in line with the approach of the panel and the Appellate Body in the *Hormones* dispute, where the measure at issue was examined first under the SPS Agreement since the measure was alleged to be an SPS measure.”⁴¹

30. The Panel on *Indonesia – Autos* found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programmes constituted “advantages” within the meaning of the chapeau of paragraph 1 of the Illustrative List of TRIMs, and as a result were inconsistent with Article 2.1 of the *TRIMs Agreement*.⁴² The Panel then decided that it was unrec-

³⁷ (footnote original) We note that a similar drafting technique was used with the TRIPS Agreement which cross-refers to provisions of other international treaties.

³⁸ Panel Report on *Indonesia – Autos*, paras. 14.60–14.61.

³⁹ (footnote original) We note that Indonesia has put emphasis on a particular statement of the *Bananas III* panel concerning the relationship between Article III of GATT and the TRIMs Agreement. We consider that that statement has to be understood in the particular context of that dispute between two developed countries (no transition period was therefore applicable) where the panel had already reached a conclusion that the measure at issue violated Article III:4 of GATT. Therefore there was no need to further discuss the TRIMs Agreement since any action to remedy the inconsistency found under Article III:4 of GATT would necessarily remedy inconsistencies under the TRIMs Agreement. In the present case, we have to address the legal relationship between these two agreements.

⁴⁰ (footnote original) The Appellate Body in *EC – Bananas III* stated in paragraph 204: “Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.”

⁴¹ Panel Report on *Indonesia – Autos*, paras. 14.62–14.63.

⁴² Panel Report on *Indonesia – Autos*, paras. 14.91–14.92.

essary to consider claims raised with respect to these measures under Article III:4 of *GATT 1994*:

“The complainants have claimed that the local content requirements under examination, and which we find are inconsistent with the TRIMs Agreement, also violate the provisions of Article III:4 of GATT. Under the principle of judicial economy,⁴³ a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the WTO Agreement. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMs Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia’s obligations under the TRIMs Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT. We recall our conclusion that non applicability of Article III would not affect as such the application of the TRIMs Agreement. We consider therefore that we do not have to address the claims under Article III:4, nor any claim of conflict between Article III:4 of GATT and the provisions of the SCM Agreement.”⁴⁴

31. In *Canada – Autos*, the complainants raised claims pertaining to conditions concerning the level of Canadian value added and the maintenance of a certain ratio between the net sales value of vehicles produced in Canada and the net sales value of vehicles sold for consumption in Canada. These claims were based upon both Article III:4 of the *GATT 1994* and the *TRIMs Agreement*. The Panel, in noting that claims were raised under both Article III:4 of *GATT 1994* and the *TRIMs Agreement*, decided to examine first the claims raised under Article III:4 of *GATT 1994*. The Panel first took note of the findings of the previous two panels on the issue of the relationship between Article III:4 of the *GATT 1994* and the *TRIMs Agreement*:

“We note that, in two recent dispute settlement proceedings, consideration has been given to the issue of the sequence of the examination of claims raised with respect to the same measure under Article III:4 of the GATT and the TRIMs Agreement.

In *EC – Bananas III* (ECU), claims were raised under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement regarding aspects of the European Communities import licensing procedures for bananas. The panel in that dispute decided to treat the claims under Article 2.1 of the TRIMs Agreement together with its consideration of the claims under Article III:4 of the GATT. The panel found that the allocation to certain operators of a percentage of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with the requirements of Article III:4 of the GATT. In light of that finding, the panel did not consider it necessary to make a specific ruling on whether this aspect of these import licensing

procedures was also inconsistent with Article 2.1 of the TRIMs Agreement.

In *Indonesia – Autos*, claims under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement were raised with respect to certain local content measures applied by Indonesia regarding automobiles. The panel in that dispute decided that it should first examine the claims under the TRIMs Agreement on the grounds that ‘the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned’. After finding that the measures at issue were inconsistent with Article 2.1 of the TRIMs Agreement, the panel determined that it was not necessary to make a finding on the question of whether these measures were inconsistent with Article III:4 of the GATT.”⁴⁵

32. After reviewing previous panel findings on the relationship between Article III:4 of the *GATT 1994* and the *TRIMs Agreement*, the Panel on *Canada – Autos* held that it was not “persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case”.

“In the present dispute, the parties have not explicitly addressed this question of which of the claims raised under Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement should be examined first. Implicit in the order in which they have presented their claims is the view that these claims should be addressed first under Article III:4 of the GATT. While we are aware of the statement made by the Appellate Body in *EC – Bananas III*, and referred to by the panel in *Indonesia – Autos*, that a claim should be examined first under the agreement which is the most specific with respect to that claim, we are not persuaded that the TRIMs Agreement can be properly characterized as being more specific than Article III:4 in respect of the claims raised by the complainants in the present case. Thus, we note that there is disagreement between the parties not only on whether the measures at issue can be considered to be ‘trade-related investment measures’ but also on whether the Canadian value added requirements and ratio requirements are explicitly covered by the Illustrative List annexed to the TRIMs Agreement. It would thus appear that, assuming that the measures at issue are ‘trade-related investment measures’, their consistency with Article III:4 of the GATT may not be able to be determined simply on the basis of the text of the Illustrative List but may require an analysis based on the wording of Article III:4. Consequently, we doubt that examining the claims first under the TRIMs Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4.

⁴³ (*footnote original*) As defined by the Appellate Body in *US – Wool Shirts and Blouses*, pp. 17–20.

⁴⁴ Panel Report on *Indonesia – Autos*, para. 14.93.

⁴⁵ Panel Report on *Canada – Autos*, paras. 10.60–10.62.

In light of the foregoing considerations, we decide that, consistent with the approach of the panel in *EC – Bananas III*, we will examine the claims in question first under Article III:4 of the GATT.⁴⁶

33. After finding that certain requirements concerning domestic value added were inconsistent with Article III:4 of the *GATT 1994*,⁴⁷ the Panel on *Canada – Autos* addressed the issue of why it considered that it was not necessary to address claims that had been raised with respect to these requirements under the *TRIMs Agreement*. The Panel stated:

“In light of the finding in the preceding paragraph, we do not consider it necessary to make a specific ruling on whether the CVA requirements provided for in the MVTO 1998 and the SROs are inconsistent with Article 2.1 of the *TRIMs Agreement*. We believe that the Panel’s reasoning in *EC – Bananas III* as to why it did not make a finding under the *TRIMs Agreement* after it had found that certain aspects of the EC’ licensing procedures were inconsistent with Article III:4 of the GATT also applies to the present case. Thus, on the one hand, a finding in the present case that the CVA requirements are not trade-related investment measures for the purposes of the *TRIMs Agreement* would not affect our finding in respect of the inconsistency of these requirements with Article III:4 of the GATT since the scope of that provision is not limited to trade-related investment measures. On the other hand, steps taken by Canada to bring these measures into conformity with Article III:4 would also eliminate the alleged inconsistency with obligations under the *TRIMs Agreement*.”⁴⁸

34. The Panel on *Canada – Autos* rejected a claim that the application of certain requirements regarding the ratio of sales of vehicles produced by a manufacturer in Canada to the net sales value of vehicles of the same class sold for consumption in Canada by the manufacturer was in violation of Article III:4 of the *GATT 1994*. In view of that finding, the Panel considered that it also had to dismiss the claim raised under Article 2.1 of the *TRIMs Agreement* with respect to this measure. The Panel noted:

“In light of the foregoing considerations, we find that the European Communities has failed to demonstrate that, by applying ratio requirements under the MVTO 1998 and the SROs as one of the conditions determining the eligibility of duty-free importation of motor vehicles, Canada is according to motor vehicles imported duty free less favourable treatment with respect to their internal sale than to like domestic motor vehicles. The claim of the European Communities regarding the inconsistency of the ratio requirements with Article III:4 must therefore be rejected. Because of this finding with respect to the claim of the European Communities regarding the consistency of the ratio requirements with Article III:4 of the GATT, we must also reject the claim of

the European Communities that these requirements are inconsistent with Article 2.1 of the *TRIMs Agreement*. We note in this regard that the European Communities claims that these ratio requirements are trade-related investment measures which are inconsistent with Article 2.1 of the *TRIMs Agreement* because they violate Article III:4 of the GATT.”⁴⁹

35. In *India – Autos*, the United States and the European Communities alleged violations of Articles III:4 and XI:1 of the *GATT 1994* and Article 2 of the *TRIMs Agreement* in relation to certain Indian measures affecting trade and investment in the automotive industry, that India maintained on balance-of-payment grounds. The Panel, in noting that the measures at issue could violate both the *GATT 1994* and the *TRIMs Agreement*, decided to first examine *GATT 1994* provisions. The Panel, commenced its analysis of the relationship between the *GATT 1994* and the *TRIMs Agreement* in the light of the Panel Report on *Canada – Autos*⁵⁰ and held that it was “not convinced that, as a general matter, the *TRIMs Agreement* could inherently be characterised as more specific than the relevant *GATT* provisions”:

“As a general matter, even if there was some guiding principle to the effect that a specific covered Agreement might appropriately be examined before a general one where both may apply to the same measure, it might be difficult to characterize the *TRIMs Agreement* as necessarily more “specific” than the relevant *GATT* provisions. Although the *TRIMs Agreement* “has an autonomous legal existence”, independent from the relevant *GATT* provisions, as noted by the *Indonesia – Autos* panel, the substance of its obligations refers directly to Articles III and XI of the *GATT*, and clarifies their meaning, *inter alia*, through an illustrative list. On one view, it simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Articles III:4 and XI:1 of the *GATT 1994*. On the other hand, the *TRIMs Agreement* also introduces rights and obligations that are specific to it, through its notification mechanism and related provisions. An interpretative question also arises in relation to the *TRIMs Agreement* as to whether a complainant must separately prove that the measure in issue is a “trade-related investment measure”. For either of these reasons, the *TRIMs Agreement* might be arguably more specific in that it provides additional rules concerning the specific measures it covers. The Panel is therefore not convinced that, as a general matter, the *TRIMs Agreement* could inherently be characterized as more specific than the relevant *GATT* provisions.”⁵¹

⁴⁶ Panel Report on *Canada – Autos*, paras. 10.63–10.64.

⁴⁷ Panel Report on *Canada – Autos*, paras. 10.90 and 10.130.

⁴⁸ Panel Report on *Canada – Autos*, para. 10.91. See also para. 10.131.

⁴⁹ Panel Report on *Canada – Autos*, para. 10.150.

⁵⁰ See para. 32 of this Chapter.

⁵¹ Panel Report on *India – Autos*, para. 7.157.

36. After noticing that this case was not one of those in which the order of examination of claims could have any practical significance, the Panel in *India – Autos* took into consideration the order given by the complainants in their replies to specific questions from the Panel on the proper order of the examination of their claims and the impact that the order selected could have on the potential application of the principle of judicial economy in the case. As a result, the Panel decided first to examine the *GATT 1994* provisions⁵² After finding that both the indigenization and the neutralization conditions were inconsistent with Articles III:4 and XI:1 of the *GATT 1994*, the Panel in *India – Autos* applied the principle of judicial economy and did not separately consider whether such conditions also violated the provisions of the *TRIMs Agreement*⁵³

B. SCM AGREEMENT

37. In *Indonesia – Autos*, claims regarding various Indonesian measures adopted pursuant to the Indonesian National Car programmes were raised under the *GATT 1994*, the *SCM Agreement* and the *TRIMs Agreement*. In considering an argument advanced by Indonesia that the measures in dispute were covered only by the *SCM Agreement*, the Panel discussed *inter alia* whether a measure can be covered at the same time by the provisions of the *TRIMs Agreement* and those of the *SCM Agreement*. The Panel began by considering whether there was a conflict between the *SCM Agreement* and the *TRIMs Agreement*. The Panel first noted that the *General Interpretative Note to Annex IA* did not apply to the relationship between these two agreements and that this relationship would have to be considered “in the light of the general international law presumption against conflicts”:

“In considering this issue . . . we need to examine whether there is a general conflict between the *SCM Agreement* and the *TRIMs Agreement*. We note first that the interpretative note to Annex IA of the *WTO Agreement* is not applicable to the relationship between the *SCM Agreement* and the *TRIMs Agreement*. The issue of whether there might be a general conflict between the *SCM Agreement* and the *TRIMs Agreement* would therefore need to be examined in the light of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter.”⁵⁴

38. The Panel on *Indonesia – Autos* then went on to hold that “the *SCM Agreement* and the *TRIMs Agreement* are concerned with different types of obligations and cover different subject matters”:

“In this context the fact that the drafters included an express provision governing conflicts between *GATT* and the other Annex 1A Agreements, but did not include any such provision regarding the relationship between the other Annex 1A Agreements, at a minimum reinforces the presumption in public international law against conflicts. With respect to the nature of obligations, we consider that, with regard to local content requirements, the *SCM Agreement* and the *TRIMs Agreement* are concerned with different types of obligations and cover different subject matters. In the case of the *SCM Agreement*, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the *TRIMs Agreement*, what is prohibited are *TRIMs* in the form of local content requirements, not the grant of an advantage, such as a subsidy.

A finding of inconsistency with Article 3.1(b) of the *SCM Agreement* can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the *TRIMs Agreement* can be remedied by a removal of the *TRIM* that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a *TRIM* (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the *TRIMs Agreement* if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the *SCM Agreement*, although the nature of the relevant discipline under the *SCM Agreement* might be affected. Clearly, the two agreements prohibit different measures. We note also that under the *TRIMs Agreement*, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies. There is no provision contained in the *SCM Agreement* that obliges a Member to violate the *TRIMs Agreement*, or vice versa.

We consider that the *SCM* and *TRIMs Agreements* cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The *TRIMs Agreement* and the *SCM Agreement* may have overlapping coverage in that they may both apply to a single legislative act, but they have different focus, and they impose different types of obligations.”⁵⁵

39. The Panel on *Indonesia – Autos* found support for its finding referenced in paragraphs 37 and 38 above in the Appellate Body Reports in *Canada – Periodicals* and *EC – Bananas III*:

⁵² Panel Report *India – Autos*, paras. 7.158–7.162.

⁵³ Panel Report *India – Autos*, paras. 7.323–7.324.

⁵⁴ Panel Report on *Indonesia – Autos*, para. 14.49.

⁵⁵ Panel Report on *Indonesia – Autos*, paras. 14.50–14.52.

"In support of this finding, we agree with the principles developed in the *Periodicals*⁵⁶ and *Bananas III*⁵⁷ cases concerning the relationship between two WTO agreements at the same level within the structure of WTO agreements. It was made clear that, while the same measure could be scrutinized both under GATT and under GATS, the specific aspects of that measure to be examined under each agreement would be different. In the present case, there are in fact two different, albeit linked, aspects of the car programmes for which the complainants have raised claims. Some claims relate to the existence of local content requirements, alleged to be in violation of the TRIMs Agreement, and the other claims relate to the existence of subsidies, alleged to cause serious prejudice within the meaning of the SCM Agreement.

[W]e do not consider that the application of the TRIMs Agreement to this dispute would reduce the SCM Agreement, and Article 27.3 thereof, to 'inutility'. On the contrary, with Article 27.3 of the SCM Agreement, those subsidy measures of developing countries that are contingent on compliance with TRIMs (in the form of local content requirement) and that are permitted during the transition period provided under Article 5 of the TRIMs Agreement, are not prohibited by Article 3.1(b) of the SCM Agreement, for the transition period specified in Article 27.3 of the SCM Agreement.

We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the Indonesian car programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute."⁵⁸

XII. ANNEX I

A. TEXT OF ANNEX I

ILLUSTRATIVE LIST

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

- (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of

a proportion of volume or value of its local production; or

- (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

- (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
- (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

B. INTERPRETATION AND APPLICATION OF ANNEX I

40. With respect to references to the Illustrative List contained in Annex I, see paragraphs 5 and 30 above.

⁵⁶ (*footnote original*) In *Canada – Periodicals*, the Appellate Body stated at page 19: "The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994".

⁵⁷ (*footnote original*) In *EC – Bananas III*, the Appellate Body stated in paragraph 221: "The second issue is whether the GATS and the GATT are mutually exclusive agreements. (...) Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods. certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. (...) [W]hile the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different."

⁵⁸ Panel Report on *Indonesia – Autos*, paras. 14.49–14.55.

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PART I

I. ARTICLE 1

A. TEXT OF ARTICLE 1

Members hereby agree as follows:

Article 1¹
Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

(footnote original) ¹ The term “initiated” as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. General

(a) “anti-dumping measure”

1. The Appellate Body in *US – 1916 Act* rejected the argument that, based on the history of Article 1, “the phrase ‘anti-dumping measure’ refers *only* to definitive anti-dumping duties, price undertakings and provisional measures.”² The Appellate Body stated that “the ordinary meaning of the phrase ‘anti-dumping measure’ seems to encompass all measures taken against dumping. We do not see in the words ‘an anti-dumping measure’ any explicit limitation to particular types of measures.”³

(b) “initiated and conducted in accordance with the provisions of this Agreement”

2. Regarding a claim raised under Article 1, the Panel on *US – 1916 Act (EC)* noted that “if we find a violation of other provisions of the *Anti-Dumping Agreement*, it will be demonstrated that the anti-dumping investigation ... is not ‘initiated and conducted in accordance with the provisions of this Agreement’ and a breach of Article 1 will be established.”⁴

3. The Panel on *EC – Tube or Pipe Fittings* rejected the assertion that in case of a devaluation in the fourth quarter of the period of investigation, Article 1 of the *Anti-Dumping Agreement* and Article VI of the *GATT*

¹ In Marrakesh, the Ministers adopted the Decision on Anti-Circumvention, see Section XXIV.

² Appellate Body Report on *US – 1916 Act*, para. 119.

³ Appellate Body Report on *US – 1916 Act*, para. 119.

⁴ Panel Report on *US – 1916 Act (EC)*, para. 6.208.

1994 require the investigating authority to base its determination only on the period following the devaluation to examine whether there was present dumping causing injury. The Panel stated that “Article 1 of the *Anti-Dumping Agreement* does not require an investigating authority to re-assess its own determination made on the basis of an examination of data pertaining to the IP prior to the imposition of an anti-dumping measure in the light of an event that occurred during the IP”⁵

(c) Relationship with other Articles

4. In *EC – Bed Linen*, the Panel touched on the relationship between Articles 1 and 15 in interpreting Article 15. See paragraph 585 below.

5. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico’s claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement.”⁶ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims.

6. In *US – Stainless Steel*, addressing Korea’s claim that “because certain provisions of the *AD Agreement* have been violated, Article VI of the GATT 1994 and Article 1 of the *AD Agreement* are consequently violated”⁷, the Panel also stated: “[b]ecause of their dependent nature, we can perceive of no useful purpose that would be served by ruling on these claims. Accordingly, we do not consider it necessary to address them.”⁸

7. The relationship between Article 1 and other provisions of the *Anti-Dumping Agreement* was discussed in *Guatemala – Cement II* and *US – Stainless Steel*. See paragraphs 5–6 above.

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from

one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country², such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

(*footnote original*)² Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities³ determine that such sales are made within an extended period of time⁴ in substantial quantities⁵ and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

(*footnote original*)³ When in this Agreement the term “authorities” is used, it shall be interpreted as meaning authorities at an appropriate senior level.

(*footnote original*)⁴ The extended period of time should normally be one year but shall in no case be less than six months.

(*footnote original*)⁵ Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales

⁵ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.107.

⁶ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁷ Panel Report on *US – Stainless Steel*, para. 6.138.

⁸ Panel Report on *US – Stainless Steel*, para. 6.138.

below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.⁶

*(footnote original)*⁶ The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production

and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.⁷ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

*(footnote original)*⁷ It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate

of exchange on the date of sale⁸, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

(footnote original) ⁸ Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Period of data collection

(i) *Recommendation by the Committee on Anti-Dumping Practices*

8. At its meeting of 4–5 May 2000, regarding appropriate periods of data collection, the Committee on Anti-Dumping Practices recommended with respect to original investigations to determine the existence of dumping and consequent injury:

"1. As a general rule:

- (a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;
- (b) the period of data collection for investigating sales below cost, and the period of data collection for dumping investigations, normally should coincide in a particular investigation;
- (c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation;
- (d) In all cases the investigating authorities should set and make known in advance to interested parties the periods of time covered by the data collection, and may also set dates certain for completing collection and/or submission of data. If such dates are set, they should be made known to interested parties.

2. In establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data. Other factors that may be considered include the characteristics of the product in question, including seasonality and cyclicity, and the existence of special order or customized sales.

3. In order to increase transparency of proceedings, investigating authorities should include in public notices or in the separate reports provided pursuant to Article 12.2 of the Agreement, an explanation of the reason for the selection of a particular period for data collection if it differs from that provided for in: paragraph 1 of this recommendation, national legislation, regulation, or established national guidelines."⁹

⁹ G/ADP/M/16, Section I, in particular, para. 84. The text of the recommendation can be found in G/ADP/6, para. 3.

(ii) *The role of the investigation period*

9. The Appellate Body on *EC – Tube or Pipe Fittings* rejected an argument made by Brazil that the investigating authority was obliged to base its export price determination on data relating to only that part of the period of investigation that followed an important devaluation of the Brazilian currency. According to the Appellate Body “certain anomalous results would flow from Brazil’s assertion that when a major change, such as in this case a steep and lasting devaluation, occurs at a late stage of the POI, the dumping determination should be confined to and based on the data following that major change. If such a change were to take place at the very end of the POI, Brazil’s approach would imply that the determination would have to be based on the data of a very short period.”¹⁰ The Appellate Body reached the following conclusion with regard to the role of the period of investigation:

“Permitting such discretionary selection of data from a period of time within the POI would defeat the objectives underlying investigating authorities’ reliance on a POI for the purposes of a dumping determination. As the Panel correctly noted, the POI ‘form[s] the basis for an objective and unbiased determination by the investigating authority.’ Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation. We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the *Anti-Dumping Agreement*, assures the investigating authority and exporters of ‘a consistent and reasonable methodology for determining present dumping’, which anti-dumping duties are intended to offset. In contrast to this consistency and reliability, Brazil’s approach would introduce a significant level of subjectivity on the part of the investigating authority to determine when data from a subset of the POI may be a reliable indicator of an exporter’s future pricing behaviour. As the European Communities points out, the ‘broad judgmental role’ accorded investigating authorities by Brazil’s approach is not consistent with the detailed nature of the rules and obligations of the *Anti-Dumping Agreement* governing various aspects of the dumping determination.”¹¹

10. The Appellate Body in *EC – Tube or Pipe Fittings* further considered that “the *Anti-Dumping Agreement* takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms.”¹²

(b) Relationship with other paragraphs of Article 2

11. In *US – Stainless Steel*, the Panel found the United States treatment of unpaid export sales as direct selling costs to be inconsistent with Article 2.4. In the context of this finding, the Panel explained the relationship between Articles 2.1, 2.3 and 2.4, as follows:

“In our view, both Article 2.3 and Article 2.4 play an important role in respect of the construction of export prices. When determining whether dumping exists, Article 2.1 usually requires a comparison of the *export price* with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article 2.3, however, authorizes a Member to *construct* the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and the importer. As discussed in section VI.C.2.(b)(i), it was pursuant to this authorization that the DOC disregarded the export price charged by POSCO to its affiliated importer POSAM in these investigations and instead constructed the export price.

Further, Article 2.3 specifies that the export price may be constructed *on the basis of* the price at which the imported products are first resold to an independent buyer. It is clear from this language that, while the price charged to the first independent buyer is a starting-point for the construction of an export price, it is not *itself* the constructed export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. Rather, the only rules governing the methodology for construction of an export price are set forth in Article 2.4 of the *AD Agreement*, which provides that, ‘[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.’ Although the United States repeatedly refers to these allowances as ‘Article 2.3 adjustments’, the provision governing these allowances is found in Article 2.4 and it is therefore evident to us that a claim regarding the appropriateness of allowances made to construct an export price may be made pursuant to that Article.¹³¹⁴

¹⁰ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 78

¹¹ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 80.

¹² Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 81.

¹³ (*footnote original*) The United States’ perception seems to be based on the assumption that there is a watertight separation between the provision relating to construction of the export price (Article 2.3) and that relating to comparison between export price/constructed export price and normal value (Article 2.4). It is evident from the face of the text, however, that the rules regarding allowances related to construction of the export price are found in the paragraph relating to comparison.

¹⁴ Panel Report on *US – Stainless Steel*, paras. 6.90–6.91.

2. Article 2.1

(a) Conditions on sales transactions for the calculation of normal value

12. In *US – Hot-Rolled Steel*, the Appellate Body considered that “[t]he text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be “in the ordinary course of trade”; second, it must be of the “like product”; third, the product must be “destined for consumption in the exporting country”; and, fourth, the price must be “comparable”.¹⁵

(i) Use of downstream sales

13. In *US – Hot-Rolled Steel*, the United States authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not “in the ordinary course of trade”. The authorities replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made “in the ordinary course of trade”. Japan objected to the use of these sales in calculating normal value, under Article 2.1, because, according to it, it is implicit in that Article that the exporter must be the seller in order that a sales transaction may properly be used to calculate normal value and this was not the case here. The Appellate Body, reversing the Panel’s finding, considered that Article 2.1 is silent in that respect and that, provided all four explicit conditions (see paragraph 12 above) in Article 2.1 are satisfied, the identity of the “seller of the “like product” is not a ground for precluding the use of a downstream sales transaction when calculating normal value”. However, the Appellate Body stressed that the identity of the seller is not irrelevant when calculating normal value since it may affect comparability, although that aspect is taken care by Article 2.4:

“The text of Article 2.1 is, however, silent as to *who* the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-Dumping Agreement* are satisfied, the *identity* of the seller of the “like product” is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.

We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the *Anti-Dumping Agreement*. However, to ensure

that prices are “comparable”, the *Anti-Dumping Agreement* provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party . . .

. . .

. . . the use of downstream sales prices may necessitate the provision of appropriate ‘allowances’, under Article 2.4, which take into account any differences demonstrated to affect price comparability. We will explore this issue further below.”¹⁶

(b) Sales “in the ordinary course of trade”

(i) Definition of sales “in the ordinary course of trade”

14. In *US – Hot-Rolled Steel*, the Appellate Body confirmed that the *Anti-Dumping Agreement* does not define the term “in the ordinary course of trade”.¹⁷ In this dispute, Japan, the complainant, had agreed with the definition of this term given by the United States authorities, namely: “[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product.”¹⁸ The Appellate Body considered that for the purpose of the appeal, it was content with that definition.¹⁹

15. The Appellate Body in *US – Hot-Rolled Steel*, when looking into the meaning of “sales in the ordinary course of trade” under Article 2.1 of the *Anti-Dumping Agreement*, noted that Article 2.2.1 does provide for a method to determine whether “sales below cost” are “in the ordinary course of trade”. However, the Appellate Body considered that the said provision does not purport to exhaust the range of methods for determining whether sales are “in the ordinary course of trade” and it does not cover the more specific issue of sales between affiliated parties:

“We note that Article 2.2.1 of the *Anti-Dumping Agreement* itself provides for a method for determining whether *sales below cost* are “in the ordinary course of trade”. However, that provision does not purport to exhaust the range of methods for determining whether sales are “in the ordinary course of trade”, nor even the

¹⁵ Appellate Body Report on *US – Hot-Rolled Steel*, para. 165.

¹⁶ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 166, 167 and 169. The Appellate Body could not, however, continue the analysis of whether the United States authorities had made any specific allowances in this case so as to make a fair comparison under Article 2.4 because it found that there was not an adequate factual record for it to complete the analysis. Para. 180.

¹⁷ Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.

¹⁸ Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.

¹⁹ Appellate Body Report on *US – Hot-Rolled Steel*, para. 139.

range of possible methods for determining whether low-priced sales are “in the ordinary course of trade”. Article 2.2.1 sets forth a method for determining whether sales between any two parties are “in the ordinary course of trade”; it does *not* address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that sales above cost, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities.”²⁰

(ii) *Investigating authorities’ discretion under Article 2.1*

16. The Appellate Body in *US – Hot-Rolled Steel* noted that the investigating authorities’ discretion under Article 2.1 to determine how to avoid distortions in the normal value should be exercised in an even-handed way that is fair to all parties:

“Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not “in the ordinary course of trade”, that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation. If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be “in the ordinary course of trade”.”²¹

(iii) *Sales not in the ordinary course of trade*

Purpose of excluding sales not in the ordinary course of trade

17. In *US – Hot-Rolled Steel*, the Appellate Body explained that the exclusion of sales not in the ordinary course of trade from the calculation of the normal value is mandated by Article 2.1 in order to ensure that the normal value is indeed “normal”:

“Article 2.1 requires investigating authorities to exclude sales not made ‘in the ordinary course of trade’, from the calculation of normal value, precisely to ensure that normal value is, indeed, the ‘normal’ price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with “normal” commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating ‘normal’ value.”²²

Prices above or below the ordinary course of trade price

18. In *US – Hot-Rolled Steel*, Japan had challenged the so-called “arm’s length” test which allowed the United

States authorities to automatically disregard the sales of a given exporter to individual affiliated parties as not being in the ordinary course of trade when the weighted average selling price to that affiliated party is below 99.5 percent of the weighted average price of sales to all non-affiliated parties. Japan claimed that the application of this test was inconsistent with Article 2.1 of the *Anti-Dumping Agreement* because, first, the test excluded only low-priced affiliated sales, thereby inflating normal value, and, second, the test operated on the basis of an arbitrary threshold that did not take account of usual variation of prices in the marketplace. The Panel found that the application of the 99.5 percent test “does not rest on a permissible interpretation of the term ‘sales in the ordinary course of trade.’”²³ The Appellate Body upheld the Panel’s finding, although it followed a different reasoning.²⁴

19. The Appellate Body in *US – Hot-Rolled Steel* considered that determining “whether a sales price is higher or lower than the “ordinary course” price is not simply a question of comparing prices” and that the other

²⁰ Appellate Body Report on *US – Hot-Rolled Steel*, para. 147.

²¹ Appellate Body Report on *US – Hot-Rolled Steel*, para. 148.

²² Appellate Body Report on *US – Hot-Rolled Steel*, para. 140. The Appellate Body also gives some examples of what it could be considered as sales not in the ordinary course of trade: “We can envisage many reasons for which transactions might not be “in the ordinary course of trade”. For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be *lower* than the “ordinary course” price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the “ordinary course” price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise.” Para. 141.

²³ Panel Report on *US – Hot-Rolled Steel*, para. 7.112.

²⁴ Appellate Body Report on *US – Hot-Rolled Steel*, para. 158. The Appellate Body also looked at another method used by the authorities, although not used in this case, which regards *high-priced* sales between affiliates. This so-called “aberrationally high” test excludes *high-priced* sales between affiliates from the calculation of normal value only if they were “*aberrationally*” or “*artificially*” high. The Appellate Body conclude that “[i]n our view, there is a lack of *even-handedness* in the two tests applied by the United States, in this case, to establish whether sales made to affiliates were “in the ordinary course of trade”. The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters.” Para. 154. As regards the Appellate Body’s conclusions as to the investigating authorities’ duty to exercise their discretion in an even-handed way, see para. 16 of this Chapter.

terms and conditions of the transaction must be taken into account:

"We note that determining whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price."²⁵

20. The Appellate Body in *US – Hot-Rolled Steel* further considered that nothing excludes that, even in the absence of any common ownership, "a sales transaction *might* not be "in the ordinary course of trade", either because the sales price is higher than the "ordinary course" price, or because it is lower than that price":

"Clearly, the lower the degree of common ownership, implying common control, between the parties to a sales transaction, the less likely it is that the transaction will not be "in the ordinary course of trade". However, even where the parties to a sales transaction are entirely independent, a transaction might not be "in the ordinary course of trade".²⁶ In this appeal, we do not need to define all the circumstances in which transactions might not be "in the ordinary course of trade". It suffices to recognize that, *as between affiliates*, a sales transaction *might* not be "in the ordinary course of trade", either because the sales price is higher than the "ordinary course" price, or because it is lower than that price."²⁷

Scope of the investigating authorities' duties under Article 2.1

21. The Appellate Body in *US – Hot-Rolled Steel* described the duties of the investigating authorities under Article 2.1 as follows:

"In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "*normal value*".

In view of the many different types of transaction not "in the ordinary course of trade" – some including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical*

rules, *each and every* category of sale that is potentially not "in the ordinary course of trade".²⁸

Sales between affiliated companies

22. In *US – Hot-Rolled Steel*, the Appellate Body upheld the Panel's findings (albeit for different reasons) that the application by the United States authorities of its 99.5 per cent test to determine whether the sales between affiliated companies were in the ordinary course of trade did not rest upon a permissible interpretation of Article 2.1. See paragraphs 18–20 above.

23. In *US – Hot-Rolled Steel*, the United States authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade". The authorities had replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made "in the ordinary course of trade". See paragraph 13 above.

(c) *Request for information*

24. In *Guatemala – Cement II*, the Panel rejected Mexico's argument that the request for cost data was not justified under Articles 2.1 and 2.2 because the application did not contain any allegation that Mexican producers were selling below cost, and stated that "[n]othing in those provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost."²⁹

(d) Relationship with other paragraphs of Article 2

(i) *Article 2.2.1*

25. See paragraph 15 above.

(ii) *Article 2.4*

26. See paragraph 13 above.

3. Article 2.2

(a) Request for cost information

27. With respect to the request for cost information by investigating authorities, see paragraph 24 above.

(b) *Article 2.2.1*

28. In *US – Hot-Rolled Steel*, the Appellate Body, when looking into the meaning of "sales in the ordinary

²⁵ Appellate Body Report on *US – Hot-Rolled Steel*, para. 142.

²⁶ (*footnote original*) One example of such a transaction is a liquidation sale by an enterprise to an independent buyer, which may not reflect "normal" commercial principles.

²⁷ Appellate Body Report on *US – Hot-Rolled Steel*, para. 143.

²⁸ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 145–146.

²⁹ Panel Report on *Guatemala – Cement II*, para. 8.183.

course of trade” under Article 2.1, noted that Article 2.2.1 of the *Anti-Dumping Agreement* “itself provides for a method for determining whether *sales below cost* are ‘in the ordinary course of trade’. However, that provision does not purport to exhaust the range of methods for determining whether sales are ‘in the ordinary course of trade’, nor even the range of possible methods for determining whether low-priced sales are ‘in the ordinary course of trade.’” See paragraph 15 above.

(i) *Article 2.2.1.1*

Cost data requirements or elements

29. The Panel on *US – DRAMS* addressed Korea’s claim that the United States’ authority had acted inconsistently with the first sentence of Article 2.2.1.1 by disregarding cost data which met with the two requirements set forth in the proviso of that Article, namely, “in accordance with generally accepted accounting principles” and “reasonably reflect costs”. The Panel considered that the first sentence is only applicable to “records kept by the exporter or producer under investigation”, and thus refused to apply this Article to cost data prepared by an outside consultant on behalf of the producer.³⁰

30. In *Egypt – Steel Rebar*, the Panel noted that both Articles 2.2.1.1 and 2.2.2 “emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration”.³¹

Positive obligations on investigating authorities

31. The Panel on *US – Lumber V* considered that Article 2.2.1.1 contained only a limited obligation to base the cost on the records of the exporter or producer under investigation under certain circumstances. The Panel was of the view that Article 2.2.1.1 does not require that costs be calculated in accordance with Generally Accepted Accounting Principles (GAAP) nor that they reasonably reflect the costs associated with the production and sale of the product under consideration:

“In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if (*‘provided’*) certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations

on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer’s records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada’s arguments relating to Article 2.2.1.1.”³²

Consider all available evidence on the proper allocation of costs

32. The Appellate Body on *US – Lumber V* considered that the requirement to consider all available evidence on the proper allocation of costs may in certain circumstances require the authorities to compare advantages and disadvantages of alternative cost allocation methodologies:

“In our view, the parameters of the obligation to ‘consider all available evidence’ will vary case-by-case. It may well be that, in the light of the facts of a particular case, the requirement to ‘consider all available evidence’ may be satisfied by the investigating authority without comparing allocation methodologies or aspects thereof. However, in other instances – such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs – the investigating authority may be required to ‘reflect on’ and ‘weigh the merits of’ evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to ‘consider all available evidence’. Thus, although the second sentence of Article 2.2.1.1 does not, as a general rule, require investigating authorities to compare allocation methodologies to assess their respective advantages and disadvantages in each and every case, there may be particular instances in which the investigating authority may be required to compare them in order to satisfy the explicit requirement of the second sentence of Article 2.2.1.1 to ‘consider all available evidence on the proper allocation of costs’.”³³

³⁰ Panel Report on *US – DRAMS*, para. 6.66.

³¹ Panel Report on *Egypt – Steel Rebar*, para. 7.393.

³² Panel Report on *US – Lumber V*, para. 7.237.

³³ Appellate Body Report on *US – Lumber V*, para. 138.

Burden of proof

33. Referring to *EC – Hormones*³⁴, the Panel on *US – DRAMS* noted that the burden of establishing a prima facie case of inconsistency with Article 2.2.1.1 was on the complaining party.³⁵

(c) Article 2.2.2

(i) Amounts based on actual data pertaining to production and sales of the like product

34. The Panel on *US – Lumber V* was of the view that amounts for general and administrative expenses *pertain* to the production and sale of the like product unless it can be demonstrated that the product under investigation did not benefit from a particular General and Administrative costs (G&A) cost item³⁶:

“We next examine the term “pertain to” within the meaning of the chapeau of Article 2.2.2. “Pertain” is defined as “1 a relate or have reference to”.³⁷ In our view, a meaningful interpretation of the term “pertain[ing] to” must take into account the nature of those costs because, as Canada acknowledges, they “are not directly attributable to the product under investigation or [to] any particular product”. Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada’s argument that G&A costs “benefit all products that a company (or division within a company) may produce rather than specific products” supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation.”³⁸

(ii) Use of low volume sales Selling, General and Administrative costs (SG&A) and profits data in constructing normal value

35. In its report on *EC – Tube or Pipe Fittings*, the Appellate Body was asked to examine whether an investigating authority must exclude data from low-volume sales when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2. The Appellate Body reasoned as follows:

“Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation (‘shall’) on an investigating authority to use ‘actual data pertaining to production and sales in the ordinary course of trade’ when determining amounts for SG&A and profits. Only ‘[w]hen such amounts cannot be deter-

mined on this basis’ may an investigating authority proceed to employ one of the other three methods provided in sub-paragraphs (i)–(iii). In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the ‘actual data pertaining to production and sales in the ordinary course of trade’. If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.

As the Panel correctly observed, it is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2.”³⁹

36. The Appellate Body in *EC – Tube or Pipe Fittings* concluded that it is “significant that Article 2.2.2 specifies the data to be used by an investigating authority when constructing normal value. The text of that provision excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales. The negotiators’ express reference to sales outside the ordinary course of trade *and* to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits.”⁴⁰ Thus, the Appellate Body found that in cases where low-volume sales are in the ordinary course of trade, an investigating authority does not act inconsistently with the chapeau of Article 2.2.2 by including actual data from those sales to derive SG&A and profits for the construction of normal value.

(iii) Priority of options

37. In response to the argument that the order of methodological options for calculating reasonable amount for profit set out in Article 2.2.2 reflects a pref-

³⁴ Appellate Body Report on *EC – Hormones*, para. 98.

³⁵ Panel Report on *US – DRAMS*, paras. 6.68–6.69.

³⁶ Panel Report on *US – Lumber V*, para. 7.267.

³⁷ (footnote original) *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 1021.

³⁸ Panel Report on *US – Lumber V*, para. 7.265.

³⁹ Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 97–98.

⁴⁰ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 101.

erence for one option over another, the Panel on *EC – Bed Linen*, in a finding subsequently not addressed by the Appellate Body, concluded that “the order in which the three options are set out in Article 2.2.2(i)–(iii) is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations.”⁴¹ The Panel set out the following reasoning:

“Looking first at the text of Article 2.2.2, we see nothing that would indicate that there is a hierarchy among the methodological options listed in subparagraphs (i) to (iii). Of course, they are listed in a sequence, but this is an inherent characteristic of any list, and does not in and of itself entail any preference of one option over others. Moreover, we note that where the drafters intended an order of preference, the text clearly specifies it. . . . Had the drafters wished to indicate a hierarchy among the three options, surely they would have done so in a manner that made that hierarchy explicit. Certainly, we would have expected something more than simply a numbered listing. Thus, in context, it seems clear to us that the mere order in which the options appear in Article 2.2.2 has no preferential significance.

. . . Paragraphs (i)–(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule . . .

In our view, there is no basis on which to judge which of these three options is ‘better’. Certainly, there were differing views during the negotiations as to how this issue was to be resolved, and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense ‘imperfect’ in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text.”⁴²

(iv) *Relationship with Article 2.2.2*

38. See paragraph 30 above.

(v) *Article 2.2.2(i) – “same general category of products”*

39. In *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, the Panel rejected Poland’s argu-

ment that the Thai authority had, for the purpose of calculating profit in constructed normal value, adopted too narrow a definition of the term “same general category of products”. The Panel stated:

“[W]e note that the text of Article 2.2.2 (i) simply refers without elaboration to ‘the same general category of products’ produced by the producer or exporter under investigation. Thus, the text of this subparagraph provides no precise guidance as to the required breadth or narrowness of the product category, and therefore provides no support for Poland’s argument that a broader rather than a narrower definition is *required*.”⁴³

40. The Panel on *Thailand – H-Beams* went on to explain the contextual bases for its interpretation of Article 2.2.2(i) quoted in paragraph 39 above. The Panel first opined that the context of Article 2.2.2(i) supports a narrow rather than a broad interpretation of the term “same general category of products”:

“We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however. In particular, we note that, in general, Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price ‘of the like product in the ordinary course of trade in the domestic market of the exporting country’ when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use *actual* data of the exporter or producer under investigation for the *like product*. Where this is not possible, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

This context indicates to us that the use under subparagraph (i) of a *narrower* rather than a *broader* ‘same general category of products’ certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.”⁴⁴

⁴¹ Panel Report on *EC – Bed Linen*, para. 6.62.

⁴² Panel Report on *EC – Bed Linen*, paras. 6.59–6.61.

⁴³ Panel Report on *Thailand – H-Beams*, para. 7.111.

⁴⁴ Panel Report on *Thailand – H-Beams*, paras. 7.112–7.113.

41. The Panel on *Thailand – H-Beams* found additional contextual support in Article 3.6 for its finding that the term “same general category of products” under Article 2.2.2 (i) permits a narrower rather than a broader approach:

“Additional contextual support can be found in Article 3.6 (a provision related to data concerning injury), which provides that when available data on ‘criteria such as the production process, producers’ sales and profits’ do not permit the separate identification of production of the like product, ‘the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided’ (emphasis supplied). Although this provision concerns information relevant to injury rather than dumping, and although we do not mean to suggest that use of the narrowest possible category including the like product is *required* under Article 2.2.2(i), in our view Article 3.6 provides contextual support for the conclusion that use of a narrow rather than a broader category is permitted.

We note Poland’s argument that a broader category is more likely than a narrower one to yield ‘representative’ results (by which we presume Poland to mean representative of the price of the like product in the ordinary course of trade in the domestic market of the exporting country), but we believe that as a matter of logic the opposite more often is likely to be true. The broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. We therefore disagree with Poland that Article 2.2.2(i) requires the use of broader rather than narrower categories, and believe to the contrary that the use even of the narrowest general category that includes the like product is permitted.”⁴⁵

(vi) *Article 2.2.2(ii) – “weighted average” and data from “other exporters or producers”*

42. In *EC – Bed Linen*, the Appellate Body reversed the Panel’s finding under Article 2.2.2(ii) that the existence of data for more than one other exporter or producer is not a necessary prerequisite for application of the approach using “weighted average” in calculating the amount for administrative, selling and general costs (“SG&A”) to determine the constructed normal value of subject products. The Appellate Body stated:

“In our view, the phrase ‘weighted average’ in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase ‘other exporters or producers’ in the plural as including the singular case. To us, the use of the phrase ‘weighted average’ in Article 2.2.2(ii) makes it impossible to read ‘other exporters or producers’ as ‘one

exporter or producer’. First of all, and obviously, an ‘average’ of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer. Moreover, the textual directive to ‘weight’ the average further supports this view because the ‘average’ which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the ‘weighted average’ relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase ‘weighted average’ envisages a situation where there is more than one exporter or producer.

The requirement to calculate a ‘weighted average’ in Article 2.2.2(ii) is, in our view, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is indispensable to the entire provision – which deals only with the mechanics of that calculation. We disagree with the Panel that ‘the concept of weighted averaging is relevant only *when there is information from more than one other producer or exporter* available to be considered.’ (emphasis in the original) We see no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average *some* of the time but not *all* of the time. In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a ‘weighted average’ out of the text in some circumstances. In those circumstances, this would substantially empty the phrase ‘weighted average’ of meaning.⁴⁶

In our view, then, the use of the phrase ‘weighted average’, combined with the use of the words ‘amounts’ and ‘exporters or producers’ in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from *more than one* exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available.”⁴⁷

(vii) *Article 2.2.2(ii) – production and sales amounts “incurred and realized”*

43. In *EC – Bed Linen*, the Appellate Body reversed the Panel’s conclusion that “an interpretation of Article

⁴⁵ Panel Report on *Thailand – H-Beams*, paras. 7.114–7.115.

⁴⁶ (footnote original) We note that in a case where there is data relating to only one other exporter or producer, a Member may have recourse to the calculation method set forth in Article 2.2.2(iii), provided, of course, that the specific requirements for the use of this calculation method are met. We recall that Article 2.2.2(iii) states that amounts for SG&A and profits may be calculated on the basis of: “any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.”

⁴⁷ Appellate Body Report on *EC – Bed Linen*, paras. 74–75.

2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible”.⁴⁸ The Appellate Body emphasized that Article 2.2.2(ii) refers to “actual amounts incurred and realized by other exporters and producers” and concluded that, in the light of this wording, in the calculation of weighted average all of the actual amounts have to be included, regardless of whether the underlying sales were made in the ordinary course of trade or not:

“Here, we note especially that Article 2.2.2(ii) refers to ‘the weighted average of *the actual amounts incurred and realized* by other exporters or producers’. (emphasis added) In referring to ‘the actual amounts incurred and realized’, this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase ‘*actual amounts incurred and realized*’ includes the *SG&A actually incurred*, and the *profits or losses actually realized*⁴⁹ by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the ‘actual amounts incurred or realized’. It follows that, in the calculation of the ‘weighted average’, *all* of ‘the actual amounts incurred and realized’ by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the ‘weighted average’ under Article 2.2.2(ii).”⁵⁰

44. The Appellate Body in *EC – Bed Linen* also discussed the first sentence of the chapeau of Article 2.2.2 as part of the context supporting its interpretation of Article 2.2.2(ii) quoted in paragraph 43 above. The Appellate Body stated:

“In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to ‘actual data pertaining to production and sales *in the ordinary course of trade*’. (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.

The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements

do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii).”⁵¹

(viii) *Article 2.2.2(ii) – should “weighted” average be based on the value or the volume of sales?*

45. The Panel on *EC – Bed Linen (Article 21.5 – India)* rejected India’s claim that the weighting of averages under Article 2.2.2 (ii) was to be performed on the basis of sales volume rather than value data. According to the Panel,

“It is clear from the text of Article 2.2.2(ii) that the amounts for SG&A and for profits to be used in constructing normal value must be weighted averages. However, nothing in the text specifies the factor to be used in calculating those weighted averages. There is clearly no specific direction requiring that the averages be weighted on the basis of volume, rather than value. Article 2.2.2(ii) is simply silent on this issue. Article 2.2.2 (ii) does not specify the factor, volume or value, to be used in calculating weighted averages.”⁵²

46. The Panel on *EC – Bed Linen (Article 21.5 – India)* further explained that, in its view, “either volume or value may be relevant in the context of Article 2.2.2(ii), and both are “neutral” in the sense that the weighted average will reflect the relative importance of the companies with respect to that factor”.⁵³ According to the Panel, “the fact that the choice of the factor used in calculating the weighted average will affect the outcome is simply irrelevant to the question whether Article 2.2.2(ii) requires the use of one volume rather than value as the weighting factor.”⁵⁴

(ix) *No separate “reasonability” test*

47. The Panel on *EC – Bed Linen*, in a finding subsequently not addressed by the Appellate Body, rejected the argument by India that “the results of a proper calculation under Article 2.2.2(ii) are subject to a separate test of ‘reasonability’ before they may be used in constructing a normal value for other producers”⁵⁵. The Panel was unable to find a basis for such a separate reasonability test in the wording of Article 2.2.2:

⁴⁸ (footnote original) Panel Report on *EC – Bed Linen*, para. 6.87.

⁴⁹ (footnote original) It is worthwhile noting that “realized” is a word used with respect to both gains (profits) and losses. See *Black’s Law Dictionary* (West Group, 1999), p. 1271, which speaks of both “realized gain” and “realized loss”.

⁵⁰ Appellate Body Report on *EC – Bed Linen*, para. 80.

⁵¹ Appellate Body Report on *EC – Bed Linen*, paras. 82–83.

Following the excerpted paragraphs, the Appellate Body cited its Report on *India – Patents*, para. 45.

⁵² Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.81.

⁵³ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.

⁵⁴ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.

⁵⁵ Panel Report on *EC – Bed Linen*, para. 6.94.

"The text . . . indicates that the methodologies set out in Article 2.2.2 are outlined 'for the purpose' of calculating a *reasonable* profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition 'reasonable' as required by Article 2.2.

Further, we note that Article 2.2.2(iii) provides for the use of 'any *other* reasonable method', without specifying such method, subject to a cap, defined as 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. To us, the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).

Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision."⁵⁶

48. Similarly to the Panel on *EC – Bed Linen*, the Panel on *Thailand – H-Beams* also considered that no separate "reasonability" test is required under Article 2.2.2, and rejected Poland's argument that the results of applying any of the specified methodologies are at best rebuttably presumed to be reasonable. The Panel stated:

"We find no trace in the texts of the relevant provisions of such a rebuttable presumption, however. To the contrary, the ordinary meaning of the text seems rather to indicate that, if one of the methodologies is applied, the result is by definition reasonable. First, as noted, the phrase 'for the purpose of paragraph 2' is without qualification in the text. In our view, this phrase is straightforward and means that Article 2.2.2 gives the specific instructions as to how to fulfil the basic but unelaborated requirement in Article 2.2 to use no more than a 'reasonable' amount for profit.

Second, we note that the chapeau of Article 2.2.2 provides that where the methodology in the chapeau 'cannot' be used, one of the methodologies in subparagraphs (i), (ii) or (iii) 'may' be used. Poland argues that

the word 'may' only provides for the possibility of using such methodologies and implies that any results derived thereby would be subject to a reasonability test arising under Article 2.2. We disagree, as in our view the word 'may' constitutes authorization to use the methodologies in the subparagraphs where the methodology in the chapeau, which is the preferred methodology, 'cannot' be used. We note that the text of Article 2.2.2 establishes no hierarchy among the subparagraphs and that there is no disagreement between the parties concerning this issue."⁵⁷

49. The Panel on *Thailand – H-Beams*, similarly to the Panel on *EC – Bed Linen*, went on to find that the existence of a "cap" under subparagraph (iii) of Article 2.2.2, with respect to "any other reasonable method" implied that the methodologies under subparagraphs (i) and (ii) *ipso facto* yielded "reasonable" results, such that no separate constraint existed in respect of these paragraphs.⁵⁸ The Panel, in a finding subsequently not reviewed by the Appellate Body, then also noted the requirement to use "actual data" under the Article 2.2.2 chapeau and subparagraphs (i) and (ii):

"We note also the requirement in the chapeau of Article 2.2.2 as well as in subparagraphs (i) and (ii) that *actual data* be used. In our view, the notion of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of specific types of actual data. That is, where actual data are used and the other requirements of the relevant provision(s) are fulfilled (e.g., that the 'same general category of products' is defined in a permissible way where 2.2.2(i) is applied), a *correct* or *accurate* result is obtained, and the requirement to use actual data *is itself* the mechanism that ensures reasonability in the sense of Article 2.2 of that (correct) result. By contrast, under subparagraph (iii) where no specific methodology or data source is required, and the use of 'any other reasonable method' is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or producers. Thus, in our view, Article 2.2.2's requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the outcome that Poland seeks, namely subjective judgements by national authorities as to the 'reasonability' of given amounts used in constructed value calculations."⁵⁹

(d) Relationship with other paragraphs of Article 2

50. In *Egypt – Steel Rebar*, the Panel indicated that, in its view, what might be necessary to take into account by

⁵⁶ Panel Report on *EC – Bed Linen*, paras. 6.96–6.98.

⁵⁷ Panel Report on *Thailand – H-Beams*, paras. 7.122–7.123.

⁵⁸ Panel Report on *Thailand – H-Beams*, para. 7.124.

⁵⁹ Panel Report on *Thailand – H-Beams*, paras. 7.122–7.125.

way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 could not be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2:

“[W]e do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, “built up” by adding costs of production, administrative, selling and other costs, and a profit. In any given case, such a built-up price might or might not reflect credit costs. Thus, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 cannot be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2.”⁶⁰

51. The Panel on *EC – Tube or Pipe Fittings* found that the definition of “like product” in Article 2.6 governs how an investigating authority identifies the scope of the “like product” for the purposes of the investigation and of the Agreement. The Panel considered that, since the chapeau of Article 2.2.2 requires the use of actual data from all relevant sales of the like product, “actual data from relevant transactions relating to sales of the ‘like product’ – as a whole – may be taken into account to construct normal value. There is no provision to the effect that constructed normal value is to be based only on a limited subset of data relating to sales of certain selective product types falling within the definition of like product, but excluding data relating to sales of other such types.”⁶¹

4. Article 2.3

52. In *US – Stainless Steel*, the Panel explained the status of paragraph 3 in Article 2. See paragraph 11 above.

5. Article 2.4

(a) First sentence

(i) *Fair comparison of export price and normal value*

53. In *Egypt – Steel Rebar*, the Panel considered that “Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.”⁶² The Panel indicated that the ordinary meaning of this provision confirms that it has to do with the nature of the comparison of export price and normal value. In the Panel’s view, “the immediate

context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to . . . the calculation of the dumping margin”. The Panel thus found that this provision did not apply to the investigating authority’s establishment of normal value as such:

“Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be ‘fair’. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions)⁶³, but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the *fairness* of the *comparison*. The next sentence, which starts with the words ‘[t]his comparison’, clearly refers back to the ‘fair comparison’ that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the ‘comparison’, namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for ‘differences which affect *price comparability*’, and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring ‘price comparability’ in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with ‘ensur[ing] a fair comparison’. In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.

The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where ‘the *comparison* under paragraph 4 requires a conversion of currencies’ (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as ‘the provisions governing fair comparison’, and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis).”⁶⁴

⁶⁰ Panel Report on *Egypt – Steel Rebar*, para. 7.388.

⁶¹ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.150.

⁶² Panel Report on *Egypt – Steel Rebar*, para. 7.335.

⁶³ (*footnote original*) In this regard, we note that earlier provisions in Article 2, namely Article 2.2 including all of its sub-paragraphs, and Article 2.3, have to do exclusively and in some detail with the establishment of normal value and export price, and in addition that Article 2.1 has to do in part with the establishment of the export price.

⁶⁴ Panel Report on *Egypt – Steel Rebar*, paras. 7.333–7.334.

(ii) *Relationship with other sentences*

54. In *US – Stainless Steel*, having found a violation of the third and fourth sentence of Article 2.4 in respect of certain allowances, the Panel considered that it was “not . . . necessary to examine Korea’s claims that the United States’ treatment of bad debt breached a more general ‘fair comparison’ requirement under Article 2.4 of the AD Agreement.”⁶⁵

(b) *Second sentence*(i) *“sales made at as nearly as possible the same time”*

55. The Panel on *US – Stainless Steel* rejected the United States argument that the “same time” requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods when calculating the dumping margin pursuant to the weighted average/weighted average method in Article 2.4.2, first sentence. See paragraph 86 below.

(c) *Third sentence: “Due allowance”*(i) *“in each case, on its merits”*

56. In *Argentina – Ceramic Tiles*, the Panel analysed the meaning of the requirement to make “due allowance in each case, on its merits” for differences in physical characteristics affecting price comparability. The Panel concluded that this requirement “means at a minimum that the authority has to evaluate identified differences in physical characteristics” and not only the most important ones:

“Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability, including differences in physical characteristics. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. We believe that the requirement to make due allowance for such differences, *in each case on its merits*, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to adjust where necessary.

...

... We do not agree with Argentina’s view that Article 2.4, through the qualifying language that due allowance shall be made ‘in each case’ ‘on its merits’, permits an investigating authority to adjust only for the most important of the physical differences that affect price comparability, even if making the remaining adjustments would have been, as the parties agree, complex. The

DCD chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability. It did not do so.”⁶⁶

57. In *Egypt – Steel Rebar*, the Panel read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability:

“[W]e read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirement in Article 2.4 that ‘[d]ue allowance shall be made *in each case, on its merits*, for differences which affect price comparability’ (emphasis added). We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for ‘any other differences which are also *demonstrated* to affect price comparability’ (emphasis added). Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it ‘shall indicate to the parties in question *what information is necessary* to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties’ (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence.”⁶⁷

58. The Panel on *EC – Tube or Pipe Fittings* considered that Article 2.4 did not set forth any particular methodology for calculating adjustments and that a Panel could therefore only examine whether the investigating authority acted in an unbiased and even-handed manner when calculating the adjustments made:

⁶⁵ Panel Report on *US – Stainless Steel*, para. 6.104.

⁶⁶ Panel Report on *Argentina – Ceramic Tiles*, paras. 6.113 and 6.116. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings* which considered that “the requirement to make due allowance for such differences, in each case on its merits, means that the authority must at least evaluate identified differences in taxation with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4 of the *Anti-Dumping Agreement*, and then to make an adjustment where it determines this to be necessary on the basis of this evaluation”. Panel Report on *EC – Tube or Pipe Fittings*, para. 7.157. See also Panel Report on *US – Lumber V*, paras. 7.165–7.167.

⁶⁷ Panel Report on *Egypt – Steel Rebar*, para. 7.352.

"An investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner. This obligation also applies where an investigating authority confronts practical difficulties and time constraints. We do not find, in Article 2.4, or in any other relevant provision in the Agreement, any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments. In the absence of any precise textual guidance in the Agreement concerning how adjustments are to be calculated, and in the absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison, we consider that an unbiased and objective authority could have applied this methodology applied by the European Communities and calculated this adjustment on the basis of the actual data in the record of this investigation. Moreover, Tupy had an opportunity to substantiate its claimed adjustment."⁶⁸

(ii) "differences which affect price comparability"

59. In *US – Hot-Rolled Steel*, the Appellate Body ruled that the investigating authorities cannot exclude any differences affecting price comparability from being the object of an allowance:

"Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are "differences" between export price and normal value, which affect the "comparability" of these prices, "[d]ue allowance shall be made" for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "any other differences which are also demonstrated to affect price comparability." (emphasis added) There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance".⁶⁹

60. The Panel on *US – Lumber V* considered that there is no requirement to adjust for any and all differences but rather only those differences demonstrated to have affected the price comparability:

"We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term "which affect price comparability" nugatory. Further, such an interpretation would make little sense in practice, as not all differences in physical characteristics necessarily affect price comparability."⁷⁰

61. Reflecting further on the meaning of the term *comparability* in Article 2.4, the Panel on *US – Lumber V* concluded that an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability:

"The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black."⁷¹

(iii) Differences in "terms and conditions of sale"

62. In *US – Stainless Steel*, the Panel examined Korea's argument that in violation of the third sentence of Article 2.4, which permits an adjustment "for differences affecting price comparability, including differences in conditions and terms of sales . . .", the United States treated export sales which had not been paid because the customer had gone bankrupt later, as "direct selling expenses", and allocated these direct selling expenses over all United States' sales. The Panel rejected the United States' argument that bad debts are expenses directly related to the payment terms of the contract, and stated:

"We do not consider that the phrase 'differences in conditions and terms of sale', interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales. In this respect, we note that Article 2.4 refers to the 'terms and conditions

⁶⁸ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.178.

⁶⁹ Appellate Body Report on *US – Hot-Rolled Steel*, para. 177.

⁷⁰ Panel Report on *US – Lumber V*, para. 7.165

⁷¹ Panel Report on *US – Lumber V*, para. 7.357.

of sale'. Although of course both words – 'term' and 'condition' – have many meanings, both are commonly used in relation to contracts and agreements. Thus, 'term' is defined, *inter alia*, to mean 'conditions with regard to payment for goods or services', while 'condition' is defined, *inter alia*, as 'a provision in a will, contract, etc., on which the force or effect of the document depends'. Thus, we consider that, read as a whole, the phrase 'conditions and terms of sale' refers to the bundle of rights and obligations created by the sales agreement, and 'differences in conditions and terms of sale' refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the conditions and terms of sale exists. The failure of a customer to pay is not a condition or term of sale in this sense, however. Rather, non-payment involves a situation where the purchaser has violated the 'conditions and terms of sale' by breaching its obligation to pay for the merchandise in question.⁷²

63. The Panel on *US – Stainless Steel* specifically responded to the United States' argument that unpaid export sales were to be treated as "direct selling expenses" in distinguishing between "differences in conditions and terms of sale" and the "mode or state of being" of such sales:

"We perceive no textual basis for the United States' effort to characterize all differences in costs associated with the terms of the contract and expenses directly related to the sale as 'differences in terms and conditions of sale'. The United States contends that 'conditions' of sale can be read in this context to mean the 'mode or state of being' of sales, such that 'differences in conditions and terms of sale' include the 'mode or circumstances' under which sales are made. Assuming this interpretation to be a permissible one, it might allow for adjustments for 'differences in conditions and terms of sale' in cases where the contractual provisions governing sales in the two markets were identical but the seller was aware from circumstances existing at the time of sale that those provisions would likely entail different costs.⁷³ Thus to take an example often cited by the United States in this dispute, a seller might extend identical warranties in different markets or to different customers, knowing in advance that the costs related to those warranties in one market would likely be higher than in the other. Similarly, a seller might extend sales on the same credit terms in two different markets or to two different customers in the awareness that the risk of default – and thus the likely costs associated with the extension of credit – would be higher in one case than in the other. However, we fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed a 'circumstance under which sales are made', at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.

We consider that an examination of the context in which the phrase 'differences in conditions and terms of sale' is used supports our understanding of the ordinary meaning of this phrase. We recall that Article 2.4 identifies 'differences in conditions and terms of sale' as one of several 'differences which affect price comparability'. Thus, the notion of price comparability informs our interpretation of 'differences in conditions and terms of sale'. In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4. This reinforces our view that the phrase 'differences in conditions and terms of sale' cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for certain sales.⁷⁴

64. Further, the Panel on *US – Stainless Steel* rejected the United States' argument that its methodology for the treatment of bad debt was simply a practical way to address differing levels of risks between markets in cases where sales are made on credit. The Panel opined that differences in risk of non-payment might be a difference relevant for the purposes of Article 2.4 and that actual bad debt could be evidence for establishing such different levels of risk of non-payment. However, it found that the United States' methodology did not base its determination on these factors:

"[W]e agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4. Nor do we preclude that actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a difference.⁷⁵ The United States did not however treat actual experience with respect to levels of unpaid sales as *evidence* of different levels of risk in the two markets in these investigations. Rather, it stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise. Thus, even assuming that the US methodology was somehow intended to address differences in *risk* of non-payment, we do not accept the proposition that the exist-

⁷² Panel Report on *US – Stainless Steel*, para. 6.75.

⁷³ (*footnote original*) We note however that such a situation might more properly be considered to be an "other difference . . . affecting price comparability".

⁷⁴ Panel Report on *US – Stainless Steel*, paras. 6.76–6.77.

⁷⁵ (*footnote original*) Although in our view the existence of different levels of non-payment during prior periods would appear to be much more relevant.

tence of a higher level of non-payment in one market than in another during the period of investigation may be *deemed* to demonstrate the existence of such differences in risk and thus represent a permissible adjustment for ‘differences in conditions and terms of sale’.⁷⁶”⁷⁷

(d) Fourth sentence

(i) Legal effect

65. In *US – Stainless Steel*, the United States argued that the fourth sentence of Article 2.4 is not mandatory since it provides that allowances for costs and profits “should” be made in constructing an export price. The Panel agreed that the *Anti-Dumping Agreement* permits, but does not require such allowances, but opined that a Member may not make allowances other than those authorized by Article 2.4:

“The term ‘should’ in its ordinary meaning generally is non-mandatory, i.e., its use in this sentence indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price.⁷⁸ We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the *AD Agreement* merely permits, but does not require, that such allowances be made.⁷⁹

... In our view, that the *AD Agreement* does not require such allowances does not mean that a Member is free to make any allowances it desires, including allowances not specified in this provision. To the contrary, we view this sentence as providing an *authorization* to make certain specific allowances. We therefore consider that allowances not within the scope of that authorization cannot be made.⁸⁰ If a Member were free to make any additional allowances it desired, there would be no effective disciplines on the methodology for construction of an export price and the provision in question would in our view be reduced to inutility.⁸¹ Thus, we conclude that it would be inconsistent with Article 2.4 of the *AD Agreement* to make allowances in the construction of the export price that are not within the scope of the authorization found in that Article.

Our conclusion that Article 2.4 contains binding obligations regarding the scope of the permissible allowances that can be made in constructing an export price does not mean that we equate allowances for differences which affect price comparability with allowances relating to the construction of the export price. Rather, the third sentence of Article 2.4 requires due allowance to be made for differences affecting price comparability, while the fourth sentence provides that in the cases referred to in paragraph 3 – i.e., when constructing an export price – allowance for certain costs and profits should *also* be made. Finally, the fifth sentence of Article 2.4 makes clear that allowances relating to the construction of the export price could in fact *reduce* price

comparability, such that one of several compensating steps should be taken. For all these reasons, it is clear to us that allowances in respect of construction of the export price are separate and distinct from allowances for differences which affect price comparability and are governed by different substantive rules.”⁸²

(ii) “costs . . . incurred between importation and resale”

66. In *US – Stainless Steel*, the Panel agreed with Korea’s argument that it was inconsistent with Article 2.4 to treat export sales unpaid as a result of the bankruptcy of a customer as direct selling costs, because the related costs were not “incurred between importation and resale” mentioned in the fourth sentence of Article 2.4. The Panel established the “foreseeability” of costs as the decisive factor:

“[W]e note that Article 2.4 uses the word ‘between’. That term is defined to mean, *inter alia*, ‘[i]n the interval separating two points of time, events, etc.’. Thus, the phrase costs ‘incurred between importation and resale’ in its ordinary meaning is most naturally read to refer to costs that were incurred between the date of importation and the date of resale. Under this reading, it might be difficult to conclude that a cost incurred after the date

⁷⁶ (*footnote original*) The United States contends that, “during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market. This evidence would indicate that POSCO should be charging higher prices in the US market than in the Korean market.” In the absence of any evidence in the record that the level of non-payment in the US market was foreseeable or that the historical risk of non-payment was higher in the US than the Korean market, the conclusion that POSCO *should* have been charging higher prices in the US than in the Korean market seems unwarranted.

⁷⁷ Panel Report on *US – Stainless Steel*, para. 6.78.

⁷⁸ (*footnote original*) *But see* Appellate Body Report on *US – FSC*, fn. 124.

⁷⁹ (*footnote original*) It can be assumed that a Member will use this authorization where appropriate without being legally constrained to do so. By contrast, the *AD Agreement* provides that due allowance “shall” be made for differences affecting price comparability. Mandatory language is used here because the failure to make such allowances could generate or inflate dumping margins to the detriment of the interests of other Members.

⁸⁰ (*footnote original*) That the use of the non-mandatory phrase “should” does not support the conclusion advanced by the United States can be confirmed by replacing “should” with another non-mandatory term, “may”. That a Member “may” make certain allowances would indicate that the Member was authorized but not required to make those allowances. It does not follow, however, that the Member was free also to make any other allowances not within the scope of the authorization. *Cf.* Appellate Body Report on *US – 1916 Act*, paras. 112–117 (that Article VI:2 of GATT 1994 makes imposition of anti-dumping duties permissive does not mean that a Member may impose measures other than anti-dumping duties to counteract dumping).

⁸¹ (*footnote original*) As the Appellate Body stated in *United States – Standards for Reformulated and Conventional Gasoline*, “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to inutility.” Appellate Body Report on *US – Gasoline*, p. 23.

⁸² Panel Report on *US – Stainless Steel*, paras. 6.93–6.95.

of resale was a cost incurred 'between importation and resale'.

We are cognizant, however, that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.⁸³ As discussed above, it is clear that the purpose of allowances to construct an export price is not to insure price comparability *per se*. Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.

Read in light of this object and purpose, we recognize that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be 'incurred between importation and resale' and thus deducted in order to construct an export price. Nor do we preclude that an amount to cover the risk of non-payment might be considered to be such a cost. We do not believe, however, that this interpretation of costs 'incurred between importation and resale' can be stretched to include costs that not only were not incurred in an accounting sense until after the date of resale but which were entirely unforeseen at that time. In this regard, we observe that, while we agree with the United States that as a general principle a related importer may be expected to establish price based on costs plus profit, a price certainly cannot be expected to reflect an amount for costs that were entirely unforeseen at the time the price was set. To deduct costs which not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a 'reliable' export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis."⁸⁴

(e) Fifth sentence

67. In *US – Hot-Rolled Steel*, the Appellate Body considered that "the obligation to ensure a "fair comparison"" under Article 2.4 "lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."⁸⁵

(f) Article 2.4.1

(i) Scope of Article 2.4.1

68. In *US – Stainless Steel*, the complainant, Korea, argued that Article 2.4.1 is the only provision of the *Anti-Dumping Agreement* that addresses exchange rates and the permissible modification to the dumping calculation methodology to account for exchange rate fluctuations, and thus, that the use of multiple averaging periods to account for the depreciation of the Korean won during the period of investigation was inconsistent with Article 2.4.1. The Panel responded as follows:

"In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates. We note Korea's view that the requirements of the second sentence of Article 2.4.1 prescribe specific results, rather than describing a method for selecting exchange rates. It appears to us, however, that, read in context, these special rules also relate to the selection of exchange rates, and not to the construction of averages. Rather, the permissibility of the use of multiple averaging is an issue addressed by Article 2.4.2.

Even if Article 2.4.1 were not restricted to the issue of the selection of exchange rates, we find nothing in that Article that would prohibit a Member from addressing, through multiple averaging, a situation arising from a currency depreciation. Korea contends, and the United States does not dispute, that the provision of Article 2.4.1 requiring Members to allow exporters sixty days to adjust their export prices to sustained movements in exchange rates applies only in the case of currency appreciation, and not in the case of currency depreciation. Assuming that the parties are correct in this regard, the requirement that a Member take certain actions in the case of currency appreciation does not in our view mean that Members are prohibited from taking any action to address a situation arising from a currency depreciation."⁸⁶⁸⁷

⁸³ (*footnote original*) As the Appellate Body has noted, "dictionary meanings leave many interpretive questions open." Appellate Body Report on *Canada – Aircraft*, para. 153.

⁸⁴ Panel Report on *US – Stainless Steel*, paras. 6.98–6.100.

⁸⁵ Appellate Body Report on *US – Hot-Rolled Steel*, para. 178.

⁸⁶ (*footnote original*) The provision relied upon by Korea is the language in Article 2.4.1 stating that, "in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation." Korea is in effect asking us to read this provision to further say that "in an investigation the authorities shall take no actions to address currency depreciations." We can perceive no textual basis to imply such an additional rule into Article 2.4.1.

⁸⁷ Panel Report on *US – Stainless Steel*, paras. 6.129–6.130.

(ii) “required”

69. In *US – Stainless Steel*, the complainant, Korea, argued that while Article 2.4.1 permits currency conversions only when such conversions are “required”, i.e., when there is no other reasonable alternative, the United States’ authority had performed an unnecessary “double conversion” of Korean local sales by converting the dollar amounts appearing in their invoices into won at one exchange rate and converting them back into dollars at a different exchange rate, in order to compare the prices of the local sales with those of exports to the United States. The Panel found that the conversions were not required because the prices being compared were in the same currency (dollars), and thus concluded that the currency conversions were inconsistent with Article 2.4.1:

“While Article 2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, we consider that it does establish a general – and in our view, self-evident – principle that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. We note that a contrary interpretation would call into doubt the utility of the introductory clause of Article 2.4.1. If the drafters had not intended to establish a rule that currency conversions be performed only when required, they could easily have drafted Article 2.4.1 to provide that ‘Currency conversions should be made using the rate of exchange on the date of sale’ Further, such an interpretation could result in the unusual situation where currency conversions that were required in order to perform a comparison under Article 2.4 would be subject to the rules set forth in Article 2.4.1, but unnecessary currency conversions could be performed without regard to the rules of Article 2.4.1.

We need not here arrive at any general understanding as to when currency conversions are or are not required within the meaning of Article 2.4.1, nor do we express any view regarding Korea’s ‘reasonable alternative’ test. . . .”⁸⁸

70. In *US – Stainless Steel*, one of the issues in the context of Article 2.4.1 was whether the Korean local sales had been made for United States dollars or Korean won. The Panel stated that “if the amount of won actually paid was based on the dollar amount identified in the invoice at the market rate of exchange on the date of payment (which, because the local sales in question were letter of credit sales, came some months after the date of invoice), then the controlling amount would be the dollar amount appearing in the invoice.”⁸⁹

(iii) Relationship with Article 2.4

71. In *US – Stainless Steel*, the complainant, Korea, argued that certain factual determinations of the United

States’ authority on currency conversion were inconsistent with Article 2.4 as well as Article 2.4.1. The Panel held that the United States’ determination which it found consistent with Article 2.4.1 was also consistent with Article 2.4⁹⁰, but that with respect to the other determination, which it found in violation of Article 2.4.1, “we do not consider it necessary to examine Korea’s claim that those double conversions breached a more general ‘fair comparison’ requirement under Article 2.4 of the AD Agreement.”⁹¹

72. In *EC – Tube or Pipe Fittings*, the Panel found that Article 2.4.1 “refers to currency conversion in connection with the prices of export sales, rather than to any conversion that may occur in the calculation of specific adjustments to either the normal value or the export price.”⁹² It thus concluded that “the obligations concerning currency conversions in Article 2.4.1 do not apply to all conversions made in order to calculate adjustments under Article 2.4.1 – we can conceive of certain situations in which differences affecting price comparability that might lead to an adjustment under Article 2.4 might not correspond precisely with the date of the export sale (e.g. credit and warranty expenses), and where conversion of all currency data as at the date of export sale might therefore distort a fair comparison.”⁹³

(g) Article 2.4.2

(i) “margins”

73. In *EC – Bed Linen*, the Panel interpreted the word “margins” in Article 2.4.2 as meaning the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. The Appellate Body agreed with this interpretation.⁹⁴

74. In *EC – Bed Linen*, the Appellate Body stated with reference to the text of Article 2.4.2, that “[f]rom the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.”⁹⁵

⁸⁸ Panel Report on *US – Stainless Steel*, paras. 6.11–6.12.

⁸⁹ Panel Report on *US – Stainless Steel*, para. 6.25. However, pursuant to Article 17.6(i), the Panel did not find one factual determination of the US authority on this issue in violation of Article 2.4.1. See para. 636 of this Chapter.

⁹⁰ Panel Report on *US – Stainless Steel*, para. 6.44.

⁹¹ Panel Report on *US – Stainless Steel*, para. 6.45.

⁹² Panel Report on *EC – Tube or Pipe Fittings*, para. 7.198.

⁹³ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.199.

⁹⁴ Panel Report on *EC – Bed Linen*, para. 6.118. Appellate Body Report on *EC – Bed Linen*, para. 53. This interpretation was also confirmed by the Appellate Body in *US – Hot-Rolled Steel*, para. 118.

⁹⁵ (footnote original) Appellate Body Report on *EC – Bed Linen*, para. 51.

75. In *US – Lumber V*, the Appellate Body further clarified its position that “‘margins of dumping’ can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product”.⁹⁶ On this basis, the Appellate Body rejected the argument that zeroing would be allowed as long as all comparable transactions had been taken into consideration at the model or type level:

“It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not “margins of dumping” within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these “intermediate values” that an investigating authority can establish margins of dumping for the product under investigation as a whole.

We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the “results” of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the “results” of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other “results”. If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons.”⁹⁷

(ii) *Weighted average normal value / weighted average export price*

76. In *EC – Bed Linen* the Appellate Body examined the first method under Article 2.4.2 for establishing the existence of margins of dumping, i.e. the comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body found the European Communities’ practice of “zeroing”⁹⁸ inconsistent with this method because by, *inter alia*, zeroing the negative dumping margins, the European Communities had not taken fully into account the entirety of the prices of some export transactions:

“[W]e recall that Article 2.4.2, first sentence, provides that ‘the existence of margins of dumping’ for the product under investigation shall normally be established according to one of two methods. At issue in this case is

the first method set out in that provision, under which ‘the existence of margins of dumping’ must be established:

‘... on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions ...’

Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of ‘all’ comparable export transactions. As explained above, when ‘zeroing’, the European Communities counted as zero the ‘dumping margins’ for those models where the ‘dumping margin’ was ‘negative’. As the Panel correctly noted, for those models, the European Communities counted ‘the weighted average export price to be equal to the weighted average normal value ... despite the fact that it was, in reality, higher than the weighted average normal value.’⁹⁹ By ‘zeroing’ the ‘negative dumping margins’, the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where ‘negative dumping margins’ were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish ‘the existence of margins of dumping’ for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not*

⁹⁶ Appellate Body Report, *US – Lumber V*, para. 96

⁹⁷ Appellate Body Report, *US – Lumber V*, paras. 97 – 98.

⁹⁸ The European Communities practice of “zeroing” was summarized in the Panel Report on *EC – Bed Linen* as follows: first, the European Communities identified with respect to the product under investigation – cotton-type bed linen – a certain number of different “models” or “types” of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a “*positive* dumping margin” for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a “*negative* dumping margin” for each model. For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*. The European Communities then calculated the overall dumping margin by averaging the individually calculated results for the different models, but counting “*negative* dumping margins” as zero in the process. The Panel found that this practice was inconsistent with Article 2.4.2. Panel Report on *EC – Bed Linen*, para. 7.1(g).

⁹⁹ (footnote original) Panel Report on *EC – Bed Linen*, para. 6.115.

take fully into account the prices of *all* comparable export transactions – such as the practice of ‘zeroing’ at issue in this dispute – is *not* a ‘fair comparison’ between export price and normal value, as required by Article 2.4 and by Article 2.4.2.”¹⁰⁰

77. In *US – Lumber V*, the Appellate Body confirmed its view that an authority is not allowed to practice zeroing when using the weighted-average to weighted-average comparison methodology for calculating the margin of dumping:

“Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price.¹⁰¹ Zeroing thus inflates the margin of dumping for the product as a whole.”¹⁰²

“comparable export transactions”

78. In *EC – Bed Linen*, the Appellate Body specifically addressed the term “comparable” used in Article 2.4.2, which the European Communities referred to as a basis for its appeal. More specifically, the European Communities claimed that Article 2.4.2 requires a comparison with a “weighted average of prices of all *comparable* export transactions” which, in the view of the European Communities, was not the same as requiring a comparison with a weighted average of *all* export transactions:

“In our view, the word ‘comparable’ in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of ‘a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions’. (emphasis added)

The ordinary meaning of the word ‘comparable’ is ‘able to be compared’. ‘Comparable export transactions’ within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. . . .

. . .

. . . All types or models falling within the scope of a ‘like’ product must necessarily be ‘comparable’, and export transactions involving those types or models must therefore be considered ‘comparable export transactions’ within the meaning of Article 2.4.2.”¹⁰³

79. In support of its proposition that the term “comparable” in Article 2.4.2 did not detract from the obligation of investigating authorities to consider *all* relevant transactions, the Appellate Body in *EC – Bed Linen* referred to Article 2.4 as part of the context of Article 2.4.2:

“Article 2.4 sets forth a general obligation to make a ‘fair comparison’ between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made ‘subject to the provisions governing fair comparison in [Article 2.4]’. Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that ‘due allowance’ be made for differences affecting ‘price comparability’. We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for ‘differences in . . . physical characteristics’.

We note that, while the word ‘comparable’ in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a ‘fair comparison’ between export price and normal value and ‘price comparability’. Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word ‘comparable’ in Article 2.4.2. In our view, the word ‘comparable’ in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the ‘due allowance’ required by Article 2.4 for ‘differences in physical characteristics’ that distinctions can be made among different types or models of cotton-type bed linen when determining ‘comparability’. But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.”¹⁰⁴

Non-comparable types

80. In *EC – Bed Linen*, the Panel found that the European Communities “zeroing” practice was inconsistent with Article 2.4.2.¹⁰⁵ The European Communities appealed this finding on the ground that the word “comparable” in Article 2.4.2 indicates that, where the product under investigation consists of various “non-comparable” types or models, the investigating authorities should first calculate “margins of dumping” for each of the “non-comparable” types or models, and, then, at a subsequent stage, combine those “margins” in order to calculate an overall margin of dumping for the product under investigation. The Appellate Body disagreed with the European Communities:

¹⁰⁰ Appellate Body Report on *EC – Bed Linen*, paras. 54–55.

¹⁰¹ (*footnote original*) We note that the Panel reached the same conclusion in para. 7.216 of its Report.

¹⁰² Appellate Body Report on *US – Lumber V*, para. 101.

¹⁰³ Appellate Body Report on *EC – Bed Linen*, paras. 56–58.

¹⁰⁴ Appellate Body Report on *EC – Bed Linen*, paras. 59–60.

¹⁰⁵ Panel Report on *EC – Bed Linen*, para. 7.1(g). For the description of the zeroing practice, see footnote 98.

"We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of 'the existence of margins of dumping' for *types or models* of the product under investigation; to the contrary, all references to the establishment of 'the existence of margins of dumping' are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these 'two stages'. Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation."¹⁰⁶

81. In *US – Lumber V*, the Appellate Body clearly stated that multiple averaging, using models or types, is as such permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation:

"We agree with the participants in this dispute that multiple averaging is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. We disagree with those who suggest that the Appellate Body Report in *EC – Bed Linen* is premised on an assumption that multiple averaging is prohibited. The issue of multiple averaging was not before the Appellate Body in *EC – Bed Linen* and the reasoning of the Appellate Body in that case should therefore not be read as prohibiting that practice. This is not to say that *EC – Bed Linen* is not relevant in this appeal. Indeed, there are a number of relevant findings to which we refer to below. However, the Appellate Body did not rule on multiple averaging in that case and therefore it is incorrect to argue, as the United States does, that '[t]he agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise' of the Appellate Body Report in *EC – Bed Linen*."¹⁰⁷

Sampling of domestic transactions

82. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the issue of whether or not a Member must include all domestic sales transactions when establishing "a weighted average normal value" for the purpose of Article 2.4.2:

"In examining what is meant by 'a weighted average normal value', we attach particular importance to the meaning of the term 'normal value'. We note that Article 2.1 of the *AD Agreement* refers to normal value as "the

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.1 therefore defines normal value in terms of domestic sales transactions in the exporting Member (although Article 2.2 provides that alternative methods to establish normal value may be used in certain circumstances).¹⁰⁸ Article 2.1 does not specify, however, whether or not all domestic sales transactions need be included. This issue is addressed by Article 2.2.1, which sets out the conditions to be met before domestic sales may be treated as not in 'the ordinary course of trade', and therefore excluded for the purpose of establishing normal value in accordance with Article 2.1. Article 2.2.1 states that domestic sales 'may be disregarded in determining normal value only if' the relevant conditions are met. We understand these provisions to mean that there are only specific circumstances in which domestic sales transactions may be excluded from normal value. We consider that these provisions constitute relevant context for interpreting the phrase "a weighted average normal value", since they indicate that "a weighted average normal value" is a weighted average of all domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the *AD Agreement*."¹⁰⁹

83. The Panel on *Argentina – Poultry Anti-Dumping Duties* thus came to the conclusion that "the strict rules in Article 2 regarding the determination of normal value require that, in the usual case, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade."¹¹⁰

Multiple averages

84. In *US – Stainless Steel*, the Panel examined Korea's argument that Article 2.4.2 prohibits the following method used by the United States authorities: (i) dividing a period of investigation into two sub-periods corresponding to the pre- and post-devaluation periods; (ii) calculating a weighted average margin of dumping for each sub-period; and (iii) combining these weighted averages of margin of dumping, however, treating sub-periods where the average export price was higher than the average normal value as sub-periods of zero dumping. In this regard, the Panel rejected Korea's claim that Article 2.4.2 prohibits the use of multiple averaging *per se*:

"Article 2.4.2 provides that the existence of dumping shall normally be established 'on the basis of a compar-

¹⁰⁶ Appellate Body Report on *EC – Bed Linen*, para. 53.

¹⁰⁷ Appellate Body Report on *US – Lumber V*, para. 81.

¹⁰⁸ (*footnote original*) These methods are not relevant in the present proceedings, since the DCD established normal value on the basis of domestic sales transactions.

¹⁰⁹ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para.7.272.

¹¹⁰ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para.7.274.

ison of a weighted average normal value with a weighted average of all *comparable* export transactions' (emphasis added). The inclusion of the word 'comparable' is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions.¹¹¹ It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.

We recall Korea's view that the reference in the singular to 'a weighted average normal value' means that the use of multiple averages is prohibited. In our view, however, the reference in the singular to 'a weighted average normal value' means simply that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value.

An examination of the context of the provision in question and of its object and purpose in our view provide further support for the above conclusion. The chapeau of Article 2.4 states that '[a] fair comparison shall be made between the export price and the normal value.' Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties – it is evident to us that the provisions of Article 2.4.2 must be read against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are 'subject to the provisions governing fair comparison in paragraph 4.' An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle.

Accordingly, we conclude – and by the later phases of this dispute the parties agreed – that Article 2.4.2 does not preclude the use of multiple averages *per se*. Rather, Article 2.4.2 requires a Member to compare a single weighted average normal value to a single weighted average export price in respect of all *comparable* transactions. A Member may however use multiple averages in cases where it has determined that non-comparable transactions are involved."¹¹²

85. Despite rejecting Korea's argument in *US – Stainless Steel*, that Article 2.4.2 precludes the use of multiple averages *per se* (see paragraph 84 above), the Panel found a violation of Article 2.4.2 by the United States investigating authorities. The Panel examined whether the existence of significant differences in normal value over the course of an investigation is, in and of itself, a

sufficient basis to conclude – as the United States authorities had done – that export and home market transactions at different points in the period of investigation are not "comparable":

"In examining this question, we first note that the term 'comparable' has been defined to mean 'able to be compared (with)'. This definition however does not cast great light on the meaning of the term as used in Article 2 of the *AD Agreement*. Thus, we consider it useful to turn to the context in which this term appears. In this respect, we agree with the parties that the meaning of the term 'comparable' as used in Article 2.4.2 can best be established by an examination of other provisions of Article 2 of the *AD Agreement* that address the issue of comparability. We further note that the chapeau to Article 2.4 provides that the comparison between the export price and the normal value shall be made 'in respect of sales made at as nearly as possible the same time'. Thus, we consider it clear that the timing of sales may have implications in respect of the comparability of export and home market transactions."¹¹³

This does not mean, however, that where an average to average comparison methodology is used, individual home market and export sales that are not made at the same time necessarily are not comparable and thus cannot be included in the weighted averages. To the contrary, it is in the very nature of an average to average comparison that, for example, transactions made at the beginning of the averaging period in the export market will be made at a different moment in time than sales in the home market made at the end of averaging period. If the drafters had considered that this situation would necessarily give rise to a problem of comparability, surely they would not have explicitly authorized the use of averaging in Article 2.4.2. Thus we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same

¹¹¹ (*footnote original*) We note that insertion of the word "comparable" into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991. This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters.

¹¹² Panel Report on *US – Stainless Steel*, paras. 6.111–6.114.

¹¹³ (*footnote original*) As an additional contextual argument, Korea argues that devaluation cannot be considered to affect comparability because there is no provision in the *AD Agreement* specifying that sales made at one exchange rate cannot be compared with sales at another exchange rate. Rather, the only provision of the *AD Agreement* that addresses exchange rates is Article 2.4.1, which the United States concedes does not establish a limit on what sales may be considered comparable. We do not however place any weight on Korea's argument in this respect. In our view – and absent the unusual situation of multiple exchange rates – there will at any given moment in time be only one exchange rate. Thus, any problem of comparability does not relate to exchange rates *per se*, but rather to differences in timing of sales. Thus it is on this issue that we focus.

time requires as a *general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same.”¹¹⁴

Length of averaging periods

86. The Panel on *US – Stainless Steel* rejected the United States’ argument that the “same time” requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods, and stated:

“... If the requirement to compare sales at ‘as nearly as possible the same time’ means that sales within an averaging period covering a [period of investigation (‘POI’)] are not comparable, then a Member presumably would be *obligated* to break a POI into as many sub-periods as possible. Yet to interpret the word ‘comparable’, when combined with the requirement that sales be compared ‘at as nearly as possible the same time’, to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 authorization to perform average to average comparisons out of the *AD Agreement*, leaving Members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis.”¹¹⁵¹¹⁶

87. Having found that Members are not obliged to divide a period of investigation into as many sub-periods as possible, the Panel on *US – Stainless Steel* nevertheless placed the following caveat:

“We do not preclude that there may be factual circumstances where the use of multiple averaging periods could be appropriate in order to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets. We note that, where changes in normal value, export price or constructed export price during the course of the POI are combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the POI.¹¹⁷ In this situation a Member might in our view be justified in concluding that differences in timing of sales in the home and export markets give rise to a problem of comparability that could be addressed through multiple averaging periods.¹¹⁸ We recall however that this situation only arises where two elements – a change in prices *and* differences in the relative weights by volume within the POI of sales in the home market as compared to the export market – exist. Thus, while a change in normal value, export price or constructed export price may be a *necessary* condition for the conclusion that the passage of time affects comparability in the case of an average-to-average comparison, the existence of such a change is not in itself a *sufficient* condition to conclude

that the export transactions are not comparable to the normal value.”¹¹⁹

(iii) *Weighted average / individual transactions*

Targeted dumping

88. The Appellate Body in *EC – Bed Linen* rejected the European Communities appeal that the Panel’s interpretation would not allow Members to counter dumping “targeted” to certain types of the product under investigation. With respect to the notion of “targeted” dumping, the Appellate Body referred to Article 2.4.2, second sentence, and stated:

“This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of ‘targeted’ dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping ‘targeted’ to certain ‘models’ or ‘types’ of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of ‘targeted’ dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that

¹¹⁴ Panel Report on *US – Stainless Steel*, paras. 6.120–6.121.

¹¹⁵ (*footnote original*) The United States’ argument seems to be posited on its view that the best comparison for measuring dumping is a transaction-to-transaction comparison, and that average-to-average comparisons are a second-best approach allowed because of practical problems with the transaction-to-transaction methodology. See US answer to question 2 from the Panel posed at the second meeting of the Panel with the parties. We perceive no valid textual basis for such a conclusion, however. To the contrary, the *AD Agreement* sets forth two options for a comparison methodology – average-to-average and transaction-to-transaction – and expresses no preference between them.

¹¹⁶ Panel Report on *US – Stainless Steel*, para. 6.122.

¹¹⁷ (*footnote original*) A particularly dramatic example of this situation would arise where, during a substantial portion of the POI, there were *no* sales in one of the two markets.

¹¹⁸ (*footnote original*) The combination of these two factors could even result in a situation where, although at any given moment in time throughout the POI, the exporter was charging an identical price (after all appropriate allowances had been made), a margin of dumping could nevertheless be found to exist. For example, imagine that there were two home market sales (HM-1 and HM-2) and two export sales (EX-1 and EX-2) during the POI. HM-1 and EX-1 occurred on day 1 and were both at a price of \$10. HM-2 and EX-2 occurred on day 90 and were both at a price of \$15. Thus, neither of the individual export transactions was dumped when compared to the simultaneous home market transactions. If all these sales were in the same volumes, then a weighted average to weighted average would also show no dumping. Assume however that HM-1 and EX-1 involved a volume of ten units, while HM-2 and EX-1 involved a volume of twenty units. In this case, the weighted average normal value would be (10 units × \$10/unit) + (20 units × \$15/unit) = \$400/30 units = \$13.33/unit. The weighted average export price would be (20 units × \$10/unit) + (10 units × \$15/unit) = \$350/30 units = \$11.27/unit. Thus, the weighted average margin of dumping would be 18 per cent.

¹¹⁹ Panel Report on *US – Stainless Steel*, para. 6.123.

targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.¹²⁰¹²¹

(h) Relationship between subparagraphs of Article 2.4

89. With respect to the relationship between Article 2.4 and Article 2.4.1, see paragraph 71 above.

90. With respect to the relationship between Article 2.4 and Article 2.4.2, see paragraph 86 above.

(i) Relationship with other paragraphs of Article 2

91. With respect to the relationship between Article 2.4 and Article 2.2, see paragraph 50 above.

6. Article 2.6

92. The Panel on *US – Lumber V* considered that the “like product” to the product under consideration has to be determined on the basis of Article 2.6, but that this provision does not provide any guidance on the way in which the “product under investigation” is to be determined:

“Article 2.6 therefore defines the basis on which the product to be compared to the ‘product under consideration’ is to be determined, that is, a product which is either identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of ‘like product’ implies a comparison with another product, it seems clear to us that the starting point can only be the ‘other product’, being the allegedly dumped product. Therefore, once the product under consideration is defined, the ‘like product’ to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the ‘product under consideration’ should be determined.”¹²²

7. Relationship with other Articles

93. With respect to the relationship between Article 2 and Articles 6.1, 6.2 and 6.9, see paragraph 441 below.

94. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, the Panel on *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 2.4 (and Article 9.3, and Articles VI:1 and 2 of GATT 1994). In the Panel’s view, findings on these

claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated. The Panel also declined to rule on India’s claim under Article 2.2.¹²³

95. With respect to the relationship between Article 2.4 and Article 6.10, see paragraph 443 below.

96. With respect to the relationship between Articles 2.4.1 and 12, see paragraph 564 below.

8. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

97. The Panel on *US – 1916 Act (EC)* found that where the complainant had not established a *prima facie* case of violation of Article 2.1 and 2.2, “[t]he fact that we found a violation of Article VI:1 of the *GATT 1994* is not as such sufficient to conclude that Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* have been breached, in the absence of more specific arguments and evidence.”¹²⁴

98. The Appellate Body on *EC – Tube or Pipe Fittings* considered that the “precise rules relating to the determination as to whether there is dumping and, if dumping exists, how the dumping margin is to be calculated, are set out, not in Article VI:2 of the *GATT 1994*, but rather in Article 2 of the *Anti-Dumping Agreement*, which is the agreement on the implementation of Article VI of the *GATT 1994*.” The Appellate Body in this case rejected the argument that the opening sentence of Article VI:2 of *GATT 1994*, “in order to offset or prevent dumping” imposed an obligation on an investigating authority to select a particular comparison methodology under Article 2.4.2 of the *Anti-Dumping Agreement*:

“In our view, therefore, Article 2 is a more appropriate source than the opening phrase ‘[i]n order to offset or prevent dumping’ of Article VI:2, for ascertaining specifically

¹²⁰ (*footnote original*) The European Communities also argues in its appellant’s submission, paras. 42–45, that the Panel’s interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a “prospective” basis when compared to those importing Members which collect anti-dumping duties on a “retrospective” basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of “the existence of margins of dumping”. Rules relating to the “prospective” and “retrospective” collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the “prospective” and “retrospective” collection of anti-dumping duties bear on the issue of the establishment of “the existence of dumping margins” under Article 2.4.2.

¹²¹ Appellate Body Report on *EC – Bed Linen*, para. 62.

¹²² Panel Report on *US – Lumber V*, para. 7.153.

¹²³ Panel Report on *US – Steel Plate*, para. 7.103.

¹²⁴ Panel Report on *US – 1916 Act (EC)*, para. 6.209.

what is required for the proper determination of dumping by an investigating authority. We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a 'reasonable assumption for the future', or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2."¹²⁵

(b) Article X of the GATT 1994

99. The Panel on *US – Stainless Steel* touched on the relationship between Article X:3(a) of the *GATT 1994* and Article 2.4.1 of the *Anti-Dumping Agreement*. See the Chapter on the *GATT 1994*, Section XI.B.D.2.

III. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3 *Determination of Injury*⁹

(footnote original) ⁹ Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible

and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.¹⁰ In making a determination regarding the exist-

¹²⁵ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 76.

tence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(footnote original)¹⁰ One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Relationship with other paragraphs of Article 3

100. In *Thailand – H-Beams*, the Appellate Body explained the relationship between the paragraphs of Article 3:

"Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus

of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination."¹²⁶

101. In *Egypt – Steel Rebar*, the Panel confirmed the role of Article 3.1 and explained the relationship between paragraph 5 and paragraphs 2 and 4:

"... It is clear that Article 3.1 provides overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority. Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the AD Agreement on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry, respectively..."¹²⁷

(b) Period of data collection

(i) Jurisprudence

102. In *Egypt – Steel Rebar*, Turkey claimed that because the period of investigation for dumping ended on 31 December 1998, and most of the injury found by the investigating authorities occurred in the first quarter of 1999, the investigating authorities had failed to demonstrate that dumping and injury occurred at the same point in time and that there was a link between the imports that were specifically found to be dumped and the injury found, violating Articles 3.5 and 3.1.¹²⁸ The Panel disagreed:

"... neither of the articles cited in this claim [Articles 3.1 and 3.5], nor any other provision of the AD Agreement, contains any specific rule as to the time periods to be covered by the injury or dumping investigations, or any overlap of those time periods."¹²⁹

In fact, the only provisions that provide guidance as to how the price effects and effects on the domestic industry of the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses..."¹³⁰

103. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that "there is a *prima facie* case that an investigating authority fails to conduct an "objective" examination if it examines different injury factors using different periods. Such a *prima facie* case may be

¹²⁶ Appellate Body Report on *Thailand – H-Beams*, para. 106.

¹²⁷ Panel Report on *Egypt – Steel Rebar*, para. 7.102.

¹²⁸ Panel Report on *Egypt – Steel Rebar*, para. 7.127.

¹²⁹ (footnote original) See *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted 5 May 2000 by the Committee on Anti-Dumping Practices.

¹³⁰ Panel Report on *Egypt – Steel Rebar*, paras. 7.130–7.131.

rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors).¹³¹

104. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that the periods of review used for the separate dumping and injury determination must end at the same time, and considered that “there is nothing in the *AD Agreement* to suggest that the periods of review for dumping and injury must necessarily end at the same point in time. Indeed, since there may be a time-lag between the entry of dumped imports and the injury caused by them, it may not be appropriate to use identical periods of review for the dumping and injury analyses in all cases.”¹³²

(ii) *Recommendation by the Committee on Anti-Dumping Practices*

105. With respect to the recommendation by the Committee on Anti-Dumping Practices on the period of data collection, see paragraph 8 above.

2. Footnote 9

106. Referring to footnote 9 to Article 3 and to Article 4.1, the Panel on *Mexico – Corn Syrup* stated: “These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1.”¹³³

3. Article 3.1

(a) Significance of paragraph 1 within the context of Article 3

107. In *Thailand – H-Beams*, the Appellate Body explained the legal status of paragraph 1 in the provisions of Article 3. See paragraph 100 above.¹³⁴ See also paragraph 101 above

108. The Panel on *US – Softwood Lumber VI* considered that in the absence of independent argument supporting overarching claims under Article 3.1, the resolution of these claims is substantively dependent on the resolution of the specific claims under the other paragraphs of Article 3:

“Thus, in the absence of any additional arguments supporting the allegations of violation of Articles 3.1 and 15.1, if we find that the facts give rise to a conclusion of no violation under one of Canada’s specific claims, we will also consider that those facts give rise to the same conclusion, no violation, with respect to the overarching claims under Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*. With respect to any aspect of the determination that is found to be inconsis-

tent with any other provision of Articles 3 and 15 of the *Agreements* asserted by Canada, we can see no reason to conclude, in addition, that it also violates Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*. In the absence of additional arguments in support of these claims, to say that a violation of a specific provision of the *Agreements* also violates the overarching obligations in Articles 3.1 and 15.1 does not clarify the obligation set out in Articles 3.1 of the *AD Agreement* and 15.1 of the *SCM Agreement*. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to these claims.”¹³⁵

(b) Investigating authorities’ obligation under Article 3.1

109. In *US – Hot-Rolled Steel*, the Appellate Body ruled that “the thrust of the investigating authorities’ obligation, in Article 3.1, lies in the requirement that they base their determination on ‘positive evidence’ and conduct an ‘objective examination’”¹³⁶

(i) “positive evidence”

Meaning of positive evidence

110. In *US – Hot-Rolled Steel*, the Appellate Body ruled that “the term “positive evidence” relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination.” It further explained that “[t]he word “positive” means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”¹³⁷

Scope of positive evidence

111. In *Thailand – H-Beams*, the Appellate Body reversed the Panel’s finding that an injury determination must be based only upon evidence disclosed to, or discernible by, the parties to the investigation, and concluded that “Article 3.1 . . . permits an investigating authority making an injury determination to base its

¹³¹ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.283.

¹³² Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.

¹³³ Panel Report on *Mexico – Corn Syrup*, para. 7.147.

¹³⁴ See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.

¹³⁵ Panel Report on *US – Softwood Lumber VI*, para. 7.26.

¹³⁶ Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.

¹³⁷ Appellate Body Report on *US – Hot-Rolled Steel*, para. 192. In *Egypt – Steel Rebar*, Turkey had argued that for a price undercutting analysis to be based on positive evidence as required by Article 3.1, an investigating authority must justify its choice of the basis for the price comparison it makes. The Panel considered that it did not need to opine on the exact nature of the “positive evidence” requirement of Article 3.2 (see para. 134 of this Chapter) and dismissed Turkey’s claim. The Panel found that Turkey had not established that an objective and unbiased investigating authority could not have found price undercutting on the basis of the evidence of record. Panel Report on *Egypt – Steel Rebar*, paras. 7.70 and 7.75.

determination on *all* relevant reasoning and facts before it.”¹³⁸ The Appellate Body explained:

“Even if we accept that the ordinary meaning of these terms is reflected in the dictionary definitions cited by the Panel, in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the totality of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information.”¹³⁹

112. In *Thailand – H-Beams*, the Appellate Body provided the following contextual support for its finding that a determination of injury pursuant to Article 3.1 need not be based exclusively on evidence which has been disclosed to the parties to the investigation:

“Contextual support for this interpretation of Article 3.1 can be found in Article 3.7, which states that a threat of material injury must be ‘based on facts and not merely on allegation, conjecture or remote possibility’. This choice of words shows that, as in Article 3.1, which over-arches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7. A similar requirement for an investigating authority can be found in Article 5.2, which requires that an application for initiation of an anti-dumping investigation may not be based on ‘[s]imple assertion, unsubstantiated by relevant evidence’. Article 5.3 requires an investigating authority to ‘examine the accuracy and adequacy’ of the evidence provided in such an application.

Further contextual support for this reading of Article 3.1 is provided by other provisions of the *Anti-Dumping Agreement*. Article 6 (entitled ‘Evidence’) establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation ‘shall have a full opportunity for the defence of their interests’. Article 6.9 requires that, before a final determination is made, authorities shall ‘inform all interested parties of the essential facts under consideration which form the basis for the decision’. There is no justification for reading these obligations, which appear in Article 6, into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination by the Thai authorities in this case necessarily met the requirements of Article 6. As the Panel found that Poland’s claim under Article 6 did not meet the requirements of Article

6.2 of the DSU, the issue was not considered by the Panel.

Article 12 (entitled ‘Public Notice and Explanation of Determinations’) also provides contextual support for our interpretation of the meaning of ‘positive evidence’ and ‘objective examination’ in Article 3.1. In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination. Article 12.2.2 requires, in particular, that a final determination contain ‘all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures’, and ‘the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers’. Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision.”¹⁴⁰

113. Further, in *Thailand – H-Beams*, the Appellate Body rejected the Panel’s reasoning that in reviewing the determination of injury by the investigating authority under Article 3, the Panel “is required, under Article 17.6(i), in assessing whether the *establishment of facts* is proper, to ascertain whether the ‘factual basis’ of the determination is ‘discernible’ from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in assessing whether the *evaluation of the facts* is unbiased and objective, to examine the ‘analysis and reasoning’ in only those documents ‘to ascertain the connection between the disclosed factual basis and the findings.’”¹⁴¹ The Panel had linked the obligation of national authorities under Article 3.1 to base the determination of injury on positive evidence, i.e. excluding confidential information not disclosed to the parties to the investigation, to the Panel’s obligation under Articles 17.5 and 17.6, stating that “we as a panel should base our review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination”. The Appellate Body had already found that under Article 3.1, contrary to the Panel’s finding, the investigating authority was

¹³⁸ Appellate Body Report on *Thailand – H-Beams*, para. 111.

¹³⁹ Appellate Body Report on *Thailand – H-Beams*, para. 107. With respect to the treatment of confidential information in the context of Panel and Appellate Body proceedings, see Chapter on DSU, Section XVIII.B(d).

¹⁴⁰ Appellate Body Report on *Thailand – H-Beams*, paras. 108–110.

¹⁴¹ Appellate Body Report on *Thailand – H-Beams*, para. 119.

not precluded from basing its determination of injury on information not disclosed to the parties to the investigation. The Appellate Body then also disagreed with the link, established by the Panel, between Article 3.1 on the one hand and Articles 17.5 and 17.6 on the other:

“[W]hile the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members, those in Articles 17.5 and 17.6 apply only when an injury determination is examined by a WTO panel. The obligations in Articles 17.5 and 17.6 are distinct from those in Article 3.1.”¹⁴²

114. In *Thailand – H-Beams*, the Appellate Body then also reversed the Panel’s findings that the Panel was precluded from examining facts not disclosed to interested parties in the national investigation:

“Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination.”¹⁴³

(ii) “Objective examination”

Concept of objective examination

115. In *US – Hot-Rolled Steel*, the Appellate Body analysed the concept of “objective assessment” as compared to “positive evidence”, indicating that the latter is concerned with the investigating process itself as opposed to the facts justifying the injury determination:

“The term “objective examination” aims at a different aspect of the investigating authorities’ determination. While the term “positive evidence” focuses on the facts underpinning and justifying the injury determination, the term “objective examination” is concerned with the investigative process itself. The word “examination” relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word “objective”, which qualifies the word “examination”, indicates essentially that the “examination” process must conform to the dictates of the basic principles of good faith and fundamental fairness.¹⁴⁴ In short, an “objective examination” requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an “objective examination” recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.”¹⁴⁵¹⁴⁶

Extent of the objective examination

116. In *US – Hot-Rolled Steel*, Japan had challenged Section 771(7)(C)(iv) of the United States Tariff Act of

1930, as amended, (the so-called “captive production provision”) which provided that, in certain statutorily defined circumstances, the investigating authorities when conducting an injury determination “shall focus primarily” on a particular segment of the “domestic industry”, when “determining market share and the factors affecting financial performance”. The Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry when conducting an injury determination under Article 3.1. As indicated in paragraph 144 below the Appellate Body concluded by reference to Article 3.4 that it may be highly pertinent to examine the domestic industry by part, sector or segment provided that such an examination be conducted in an “objective” manner as mandated by Article 3.1. The Appellate Body interprets the obligation to make an “objective” assessment in this regard as meaning that “where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole” or, “in the alternative,” provide “a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts. . .”. It therefore found that an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of “objectiv[ity]” in Article 3.1 of the *Anti-Dumping Agreement*:

“. . . it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an “objective” manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should

¹⁴² Appellate Body Report on *Thailand – H-Beams*, para. 114.

¹⁴³ Appellate Body Report on *Thailand – H-Beams*, para. 118.

¹⁴⁴ (*footnote original*) This provision is yet another expression of the general principle of good faith in the *Anti-Dumping Agreement*. See, *supra*, para. 101.

¹⁴⁵ (*footnote original*) In this respect, we recall that panels are under a similar duty, under Article 11 of the DSU, to make an “objective assessment of the matter . . . including an objective assessment of the facts”. In our Report in *EC Measures Concerning Meat and Meat Products (Hormones)*, we indicated that the obligation to make an “objective assessment” includes an obligation to act in “good faith”, respecting “fundamental fairness”. (Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 133)

¹⁴⁶ Appellate Body Report on *US – Hot-Rolled Steel*, para. 193.

provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of “objectivity” in Article 3.1 of the *Anti-Dumping Agreement*.¹⁴⁷

Relationship with Article 3.4

117. In *US – Hot-Rolled Steel*, the Appellate Body explained that “an important aspect of the ‘objective examination’ required by Article 3.1 is further elaborated in Article 3.4 as an obligation to ‘examin[e] the impact of the dumped imports on the domestic industry’ through ‘an evaluation of all relevant economic factors and indices having a bearing on the state of the industry.’” See also paragraphs 116 above and 144 below.

118. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that “to the extent that a Member failed to conduct a proper ‘examination of the impact of dumped imports’ for the purpose of Article 3.4, that Member also failed to conduct an ‘objective examination of ... the consequent impact of the[] imports’ within the meaning of Article 3.1(b).”¹⁴⁸

(c) An objective examination based on positive evidence of “dumped imports”

119. The Panel on *EC – Bed Linen*, in a finding subsequently not reviewed by the Appellate Body, rejected the argument advanced by India that the term “dumped imports” must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. Rather, the Panel endorsed the argument by the European Communities that once a determination has been made that a product in question from particular producers is being dumped, this conclusion will then apply to *all* imports of that product from that source:

“[W]e consider that dumping is a determination made with reference to a *product* from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of ‘dumped imports’ under Articles 3.1, 3.4, and 3.5 of the AD Agreement.”¹⁴⁹

120. The Panel on *EC – Bed Linen* also indicated some practical reasons for why the phrase “dumped imports” could not refer only to those imports attributable to transactions in which export price was below normal value:

“Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as ‘dumped imports’ ‘or purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion that the phrase ‘dumped imports’ refers *only* to those imports attributable to *transactions* in which export price is below normal value, would lead to an unworkable result in certain cases. One of the objects and purposes of the AD Agreement is to establish the conditions under which Members may impose anti-dumping duties in cases of

¹⁴⁷ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 204–206.

¹⁴⁸ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.325.

¹⁴⁹ Panel Report on *EC – Bed Linen*, para. 6.136. The Panel on *Argentina – Poultry Anti-Dumping Duties* also considered that “the term “dumped imports” refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated. The term “dumped imports” excludes imports from producers / exporters found in the course of the investigation not to have dumped.” Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

injurious dumping. An interpretation which would, in many cases, make it impossible to assess one of the necessary elements, injury, is not consistent with that object and purpose.

An assessment of the volume, price effects, and consequent impact, only of imports attributable to transactions for which a positive margin was calculated would be, in many cases, impossible, or at least impracticable. Attempting to segregate individual transactions as to whether they were 'dumped' or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the AD Agreement, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to 'dumped' transactions. Similarly, if dumping is determined on the basis of a comparison of weighted average normal value to weighted average export price, there would be no comparisons concerning individual transactions which could serve as the basis for segregating imports in 'dumped' and 'not-dumped' categories.¹⁵⁰

121. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body reversed the finding by the Panel that in case of an investigation based on a sample, an investigating authority is entitled to consider the total volume of imports from non-examined producers and exporters as being dumped for the purposes of an Article 3 injury analysis, as long as a dumping margin had been established for any of the examined producers or exporters.¹⁵¹ Contrary to the Panel, the Appellate Body considered that Article 9.4 does not provide justification for considering *all* imports from *non-examined* producers as *dumped* for purposes of Article 3. According to the Appellate Body:

"Article 9.4 provides no guidance for determining the volume of dumped imports from producers that were *not* individually examined on the basis of 'positive evidence' and an 'objective examination' under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel."¹⁵²

122. In the view of the Appellate Body on *EC – Bed Linen (Article 21.5 – India)*, while paragraphs 1 and 2 of Article 3 do not set forth a specific methodology for

examining the volume of dumped imports in case the investigating authority carries out its investigation on the basis of a sample, they do "require investigating authorities to make a determination of injury on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination" of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of "positive evidence" and involves an "objective examination" of *dumped* imports – rather than imports that are found *not* to be dumped – it is not consistent with paragraphs 1 and 2 of Article 3."¹⁵³

123. The Appellate Body on *EC – Bed Linen (Article 21.5 – India)* thus came to the conclusion that the European Communities' approach whereby it had considered all imports from non-examined exporters or producers as dumped because a number of exporters included in the sample were found to have been dumping was inconsistent with the obligation to conduct an "objective examination":

"The examination was not 'objective' because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers – as they are entitled to do under Article 6.10 – *all* imports from *all non-examined* producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the 'all others' duty rate on imports from *non-examined* producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non-examined* producers are simply *presumed*, in all circumstances, to

¹⁵⁰ Panel Report on *EC – Bed Linen*, paras. 6.139–140.

¹⁵¹ The Panel had considered highly relevant that "Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping, based on the calculation of a dumping margin under Article 2, was not made. It also establishes an upper limit for any such duties. In our view, the fact that an anti-dumping duty may properly be collected on imports from producers for which an individual calculation of dumping was not made, necessarily entails that such producers are properly considered to be dumping. Consequently, we consider inescapable the conclusion that the imports from those producers are properly considered as "dumped imports" for the purposes of Articles 3.1 and 3.2." Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.137.

¹⁵² Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 126.

¹⁵³ Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, para. 113.

be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it 'more likely [that the investigating authorities] will determine that the domestic industry is injured', and, therefore, it cannot be 'objective'. Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non-examined* producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.

For these reasons, we conclude that the European Communities' determination that *all* imports attributable to *non-examined* producers were dumped – even though the evidence from *examined* producers showed that producers accounting for 53 percent of imports attributed to examined producers were *not* dumping – did not lead to a result that was *unbiased, even-handed, and fair*. Therefore, the European Communities did not satisfy the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is '*objective*'.¹⁵⁴

(d) "the effect of dumped imports"

124. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority had violated Articles 3.1 and 3.2 by not considering at all, in its investigation, certain other cement imports. The Panel understood the Mexican claim to be that the Guatemalan authorities considered the type of cement under the not scrutinized imports as being "unlike" the cement under the imports subject to investigation, an assessment which Mexico considered erroneous. Mexico further claimed that the erroneous exclusion of certain imports from the investigation resulted in the following consequences: (i) the resulting volume of total imports of the product under investigation was lower; (ii) the share of allegedly dumped imports in total imports of the product under investigation was artificially inflated; (iii) the consideration of a faulty and incomplete figure for total imports of the product under investigation yielded a distorted figure for apparent domestic consumption; and (iv) because of this incorrect figure for apparent domestic consumption, the relationship between the increase in dumped imports and consumption was ultimately incorrect.¹⁵⁵ The Panel considered that consequences (i) through (iv), if proven, would constitute a violation of Articles

3.1 and 3.2, in that an exclusion of the imports at issue from the figures for domestic consumption of the like product affected the comparison that was made with the figures for volume of dumped imports for purposes of determining that there had been a significant increase in dumped imports relative to domestic consumption in the importing Member.¹⁵⁶ After reviewing the evidence submitted by Mexico and inconsistencies in Guatemala's replies in this regard, the Panel ultimately found that Mexico had established a *prima facie* case of inconsistency with respect to Articles 3.1 and 3.2.¹⁵⁷

(e) Relationship with other paragraphs of Article 3

125. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 as well as Articles 5.2, 5.3, 6 and 12 in interpreting Article 3.1. See paragraph 112 above.

4. Article 3.2

(a) Choice of analytical methodology

(i) General

126. With respect to Article 3.2, the Panel on *Thailand – H-Beams* stated that "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodology to be used."¹⁵⁸

127. In *Egypt – Steel Rebar*, the Panel did not find on the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted at any particular level of trade. See paragraph 134 below.

(ii) Frequency of analysis

128. The Panel on *Thailand – H-Beams* considered that a quarterly analysis of the trend in import volume is not required under Article 3.2, and went on to state that "[g]iven that on an annual basis over a multi-year period, imports from Poland increased in every period examined, we do not believe that quarter-to-quarter fluctuation in import volumes during one of the twelve-month periods examined invalidates the Thai authorities' finding that the import volume of the subject imports 'increased continuously'."¹⁵⁹

¹⁵⁴ Appellate Body Report on *EC – Bed Linen (Article 21.5 – India)*, paras. 132–133.

¹⁵⁵ Panel Report on *Guatemala – Cement II*, paras. 8.268–8.272. The Panel also found a violation of Article 3.5 with respect to the failure by Guatemala's authority to take into account certain non-dumped imports. See paras. 124 and 131 of this Chapter.

¹⁵⁶ Panel Report on *Guatemala – Cement II*, para. 8.269.

¹⁵⁷ Panel Report on *Guatemala – Cement II*, para. 8.272.

¹⁵⁸ Panel Report on *Thailand – H-Beams*, para. 7.159.

¹⁵⁹ Panel Report on *Thailand – H-Beams*, para. 7.168.

(iii) Length of period of investigation

129. In *Guatemala – Cement II*, the Panel did not agree with Mexico’s argument that Guatemala’s authority had acted inconsistently with Article 3.2 by examining import data only for the one-year period of investigation. The Panel explained:

“A recent recommendation of the Committee on Anti-Dumping Practices calls on Members to use a data collection period of at least three years. This recommendation reflects the common practice of Members.¹⁶⁰ That said, there is no provision in the Agreement which specifies the precise duration of the period of data collection. Thus, it cannot be said *a priori* that the use of a one-year period of data collection would not be consistent with the requirement of Article 3.2 to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case. In this case, Guatemala argues that the reason for the short period of data collection was that exports by Cruz Azul did not become significant until 1995. The record of the investigation supports this conclusion.”¹⁶¹

With respect to the recommendation by the Committee on Anti-Dumping Practices on this topic, see paragraph 8 above.

(b) “a significant increase in dumped imports”

130. In *Thailand – H-Beams*, the Panel considered that Article 3.2 does not require that the term “significant” be used to characterize a subject increase in imports in the determination of an investigating authority. The Panel explained:

“We note that the text of Article 3.2 requires that the investigating authorities ‘consider whether there has been a significant increase in dumped imports’. The *Concise Oxford Dictionary* defines ‘consider’ as, *inter alia*: ‘contemplate mentally, especially in order to reach a conclusion’; ‘give attention to’; and ‘reckon with; take into account’. We therefore do not read the textual term ‘consider’ in Article 3.2 to require an explicit ‘finding’ or ‘determination’ by the investigating authorities as to whether the increase in dumped imports is ‘significant’. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as ‘significant’, and to give a reasoned explanation of that characterization, we believe that the word ‘significant’ does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.”¹⁶²

131. In *Guatemala – Cement II*, the Panel agreed with Mexico that Guatemala’s authority had acted inconsistently with Articles 3.1 and 3.2 by not taking into account imports other than those from the supplier under investigation. See paragraph 124 above.¹⁶³

(c) “the effect of the dumped imports on prices”

132. In *Guatemala – Cement II*, disagreeing with Mexico’s claim that in violation of Article 3.2, Guatemala’s authority did not properly examined the effect of dumped imports on the price of domestic sales, the Panel stated that “[b]ased on the evidence of declining prices and inability to achieve established price levels, coinciding with imports at lower prices we find that an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect on the prices of the domestic industry.”¹⁶⁴

133. In *Guatemala – Cement II*, the Panel also rejected Mexico’s argument that Guatemala’s authority conducted the examination of the price effect of dumped imports at the regional level only and not also at the national level and therefore acted inconsistently with Article 3.2. Rather, the Panel found that Guatemala had not limited its analysis to a particular region. The Panel also added that there was only one cement producer in Guatemala, and thus, even if the negative effect of the dumped imports on the prices of the domestic like product was only evidenced in one particular region (where that producer was located), this could still be viewed as causing injury to that producer.¹⁶⁵

(d) “price undercutting”

134. In *Egypt – Steel Rebar*, Turkey had argued that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the-customer basis, as, in its view, it is only at that level that

¹⁶⁰ (footnote original) The recommendation provides that:

“(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation;” (Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the ADP Committee on 5 May 2000, G/ADP/6).”

We note that this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation.

¹⁶¹ Panel Report on *Guatemala – Cement II*, para. 8.266.

¹⁶² Panel Report on *Thailand – H-Beams*, para. 7.161.

¹⁶³ The Panel also found a violation of Article 3.5 with respect to the failure by Guatemala’s authority to take into account certain non-dumped imports. See paras. 124 and 131 of this Chapter.

¹⁶⁴ Panel Report on *Guatemala – Cement II*, para. 8.276.

¹⁶⁵ Panel Report on *Guatemala – Cement II*, para. 8.277.

any such undercutting can influence customers' purchasing decisions. The Panel did not find on the basis of the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade.¹⁶⁶

135. The Panel on *EC – Tube or Pipe Fittings* similarly stated that “unlike Article 2 (in particular Article 2.4.2) of the *Anti-Dumping Agreement*, which contains specific requirements relating to the calculation of the dumping margin, Article 3.2 requires the investigating authorities to consider whether price undercutting is “significant” but does not set out any specific requirement relating to the calculation of a margin of undercutting, or provide a particular methodology to be followed in this consideration”¹⁶⁷ The Panel reasoned as follows:

“The text of Article 3.2 refers to domestic ‘prices’ (in the plural rather than singular). This textual element supports our view that there is no requirement under Article 3.2 to establish one single margin of undercutting on the basis of an examination of every transaction involving the product concerned and the like product. In addition, the text of Article 3.2 refers to the ‘dumped imports’, that is, the imports of the product concerned from an exporting producer that has been determined to be dumping. Thus, investigating authorities may treat any imports from producers/exporters for which an affirmative determination of dumping is made as ‘dumped imports’ for purposes of injury analysis under Article 3. There is, however, no requirement to take each and every transaction involving the ‘dumped imports’ into account, nor that the ‘dumped imports’ examined under Article 3.2 are limited to those precise transactions subject to the dumping determination. This view is supported by the absence of a specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation period which may be different than the IP for dumping. These considerations do not, of course, diminish the obligation of an investigating authority to conduct an unbiased and even-handed price undercutting analysis.

We take note of the shared view of the parties that ‘the Panel should accord a considerable discretion to the investigating authorities to choose a methodology which produces a meaningful result while avoiding unfairness’. One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry. In this part of an anti-dumping investigation, an investigating authority is trying to discern whether the prices of dumped imports have had an impact on the domestic industry. The interaction of two variables would essentially determine the extent of impact of price undercut-

ting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales. Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at ‘non-underselling prices’ does not eradicate the effects in the importing market of sales that were made at underselling prices. Thus, a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with ‘overcutting’ prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry.”¹⁶⁸

(e) Relationship with other paragraphs of Article 3

136. With respect to the relationship of paragraph 2 with paragraphs 1, 3, 4 and 5 of Article 3, see paragraphs 100–101 above.

5. Article 3.3

(a) Relationship with other paragraphs of Article 3

137. With respect to the relationship of paragraph 3 with paragraphs 1, 2, 4 and 5 of Article 3, see paragraph 100 above.

138. In its report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that in case of a cumulated injury analysis, there is no indication in the text of Article 3.2 that the analyses of volume and prices must be performed on a country-by-country basis where an investigation involves imports from several countries.¹⁶⁹ The Appellate Body thus confirmed the Panel’s position in this case that it is possible for the analyses of volume and prices envisaged under Article 3.2 to be done on a cumulative basis, as opposed to an individual country basis, when dumped imports originate from more than one country.¹⁷⁰

(b) Conditions for cumulation – general

139. The Panel on *EC – Tube or Pipe Fittings* came to the conclusion, on the basis of the text in Article 3.3, and citing contextual support in Articles 3.4 and 3.5, that the conditions identified in Article 3.3 are the *sole* conditions that must be satisfied by an investigating authority in order to undertake a cumulative assessment of the

¹⁶⁶ Panel Report on *Egypt – Steel Rebar*, paras. 7.70 and 7.73.

¹⁶⁷ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.281.

¹⁶⁸ Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.276–7.277.

¹⁶⁹ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 111.

¹⁷⁰ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.231.

effects of dumped imports.¹⁷¹ In particular, the Panel rejected Brazil's allegation that an investigating authority must first consider whether country-specific import volumes have significantly increased before cumulating them.¹⁷² The Appellate Body agreed with the Panel and reached the following conclusion:

"The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the *Anti-Dumping Agreement* to assess cumulatively the effects of imports from several countries. These conditions are:

- (a) the dumping margin from each individual country must be more than *de minimis*;
- (b) the volume of imports from each individual country must not be negligible; and
- (c) cumulation must be appropriate in the light of the conditions of competition
 - (i) between the imported products; and
 - (ii) between the imported products and the like domestic product.

By the terms of Article 3.3, it is 'only if' the above conditions are established that an investigating authority 'may' make a cumulative assessment of the effects of dumped imports from several countries.

We find no basis in the text of Article 3.3 for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a pre-condition for a cumulative assessment of the effects of all dumped imports. Article 3.3 sets out expressly the conditions that must be fulfilled before the investigating authorities may cumulatively assess the effects of dumped imports from more than one country. There is no reference to the country-by-country volume and price analyses that Brazil contends are pre-conditions to cumulation. In fact, Article 3.3 expressly requires an investigating authority to examine country-specific volumes, not in the manner suggested by Brazil, but for purposes of determining whether the 'volume of imports from each country is not negligible'.¹⁷³

140. In support of its finding, the Appellate Body in *EC – Tube or Pipe Fittings* further elaborated on the rationale behind the practice of cumulation:

"The apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as 'effects' that may be cumulatively assessed under Article 3.3. A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the

causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.¹⁷⁴"¹⁷⁵

(c) Conditions for cumulation – appropriate in light of the "conditions of competition"

141. The Panel on *EC – Tube or Pipe Fittings* examined the nature and scope of the requirement in Article 3.3(b) that a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the like domestic product. It considered that, "[I]n light of the general wording of the provision and the nature of the term "appropriate", an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it. However, it is clear to us that cumulation must be suitable or fitting in the particular circumstances of a given case in light of the particular conditions of competition extant in the marketplace."¹⁷⁶

¹⁷¹ Panel Report on *EC – Tube or Pipe Fittings*, paras. 7.234–7.235.

¹⁷² Panel Report on *EC – Tube or Pipe Fittings*, para. 7.234.

¹⁷³ Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 109–110.

¹⁷⁴ (*footnote original*) We do not suggest that trends in country-specific volumes are always irrelevant for an investigating authority's consideration. For example, such trends may be relevant in the context of an investigating authority's evaluation of the conditions of competition between imported products, and between imported products and the domestic like product, as provided for in Article 3.3(b). Brazil raised the relationship between import volumes and conditions of competition as the basis for a claim under that provision before the Panel. (Panel Report, para. 7.252) The Panel found that the divergences in volume trends between Brazilian imports and those of other countries did not compel a finding by the European Commission that the effects of Brazilian imports could not be appropriately assessed on a cumulated basis with the effects of imports from other countries. (*Ibid.*, paras. 7.253–7.256) Brazil has not appealed the Panel's finding in this respect.

¹⁷⁵ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 116.

¹⁷⁶ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.241.

142. The Panel on *EC – Tube or Pipe Fittings* understood the phrase “conditions of competition” to refer to the dynamic relationship between products in the marketplace and added that this phrase is not accompanied by any sort of qualifier such as “identical” or “similar”. It concluded that Article 3.3 contains no express indicators by which to assess the “conditions of competition”, much less any fixed rules dictating precisely the relative percentages or levels of such indicators that must be present:

“While we note that a broadly parallel evolution and a broadly similar volume and price trend might well indicate that imports may appropriately be cumulated, we find no basis in the text of the Agreement for Brazil’s assertion that ‘only a comparable evolution and a similarity of the significantly increased import volumes and/or the significant price effects . . . would indicate that these imports might have a joint impact on the situation of the domestic industry and may be assessed cumulatively’. Moreover, the provision contains no express indicators by which to assess the ‘conditions of competition’, much less any fixed rules dictating precisely and exhaustively the relative percentages or levels of such indicators that must be present. Unlike the lists of factors that guide an authority’s examination under, for example, Articles 3.2, 3.4 and 3.5, Article 3.3 does not provide even an indicative list of factors that might be relevant in the assessment called for under that provision, in particular, the assessment of ‘conditions of competition’.¹⁷⁷ We note that Article 3.2 explicitly concentrates on volume and price trends, and that Article 3.3 is neither specific nor limited in this way. Thus, while price and volume considerations may well be relevant in this context, we find no explicit reference thereto in Article 3.3(b).”¹⁷⁸

6. Article 3.4

(a) “dumped imports”

143. In *EC – Bed Linen*, the Panel rejected the argument that “dumped imports” must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See paragraph 119 above.

(b) “domestic industry”

(i) Sectoral analysis

144. The Appellate Body in *US – Hot-Rolled Steel* ruled that investigating authorities can undertake “an evaluation of particular parts, sectors or segments within a domestic industry”, provided they respect the fundamental obligation in Article 3.1 to conduct an “objective assessment”¹⁷⁹:

“. . . it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to under-

take, an evaluation of particular parts, sectors or segments within a domestic industry.¹⁸⁰ Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.

However, the investigating authorities’ evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an ‘objective examination’. If an examination is to be “objective”, the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

Instead, Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the ‘bearing’ that the relevant factors have ‘on the state of the [domestic] industry’.”¹⁸¹

(ii) Domestic producers outside the “sample”

145. In *EC – Bed Linen*, the Panel examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry.¹⁸² The Panel, in a finding subsequently not addressed by the Appellate Body, resolved the issue whether “consideration of evidence for domestic producers outside the selected sample *but within the domestic industry* constitutes, *ipso facto*, a violation of Article 3.4”¹⁸³, as follows:

¹⁷⁷ (*footnote original*) In this regard, we take note of Exhibits EC-8 through 11 containing submissions made by certain Members as part of discussions in the Ad Hoc Group on Implementation within the ADP Committee, which we observe reflect somewhat divergent practices of Members. These discussions show, at a minimum, that price and volume are not accepted by all Members as appropriate indicators of the “conditions of competition” (as they arguably reflect the outcome of competition and not whether competition is occurring). It appears, therefore, that Members themselves have not yet arrived at a common understanding of the content of these terms. Indeed, we note that this is a topic which has been proposed for negotiations and it is not our task to presuppose the outcome of those negotiations.

¹⁷⁸ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.242.

¹⁷⁹ As regards the meaning of the term “objective examination” under Article 3.1, see paras. 115–116.

¹⁸⁰ (*footnote original*) We note that the panel in *Mexico – High Fructose Corn Syrup*, *supra*, footnote 30, para. 7.154, took a similar view.

¹⁸¹ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 195–197.

¹⁸² The Panel also indicated that “[they] express no opinion as to the correctness *vel non* of the European Communities’ interpretation of Article 4 of the AD Agreement or its application in this case”. Panel Report on *EC – Bed Linen*, para. 6.175.

¹⁸³ Panel Report on *EC – Bed Linen*, para. 6.180.

"[I]t is clear from the language of the AD Agreement, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the *domestic industry* that is the subject of the investigation. . . . In our view, it would be anomalous to conclude that, because the [investigating Member] chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Thus, we consider that the [investigating authority] did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by taking into account in its analysis information regarding the . . . industry as a whole, including information pertaining to companies that were not included in the sample."¹⁸⁴

(iii) *Companies outside the domestic industry*

146. Regarding the issue of information concerning Article 3.4 factors for companies outside the domestic industry, the Panel on *EC – Bed Linen* held that information about companies which are not part of the domestic industry "provides no basis for conclusions about the impact of dumped imports on the domestic industry":

"In our view, information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry' required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself."¹⁸⁵

147. The Panel on *EC – Tube or Pipe Fittings* held that if like product-specific information was not available, investigating authorities could use other broader data:

"[W]hile data and information pertaining specifically to the 'like product' is to be used to the extent possible, the Agreement also envisages resort to a broader spectrum of data where separate identification of like product specific data is not possible. It is therefore permissible for an investigating authority to assess the effects of the dumped imports by the examination of the production of a broader range of products, which includes the like product, for which the necessary information can be provided if like-product-specific information is not available."¹⁸⁶

(c) "all relevant economic factors and indices having a bearing on the state of the industry"

(i) *Mandatory or illustrative nature of the list of factors*

148. The Panel on *EC – Bed Linen*, in a finding not addressed by the Appellate Body¹⁸⁷, considered whether the list of factors in Article 3.4 is illustrative or mandatory. Further to concluding that the list is mandatory, the Panel addressed the issue of whether only the four groups of "factors" represented by the subgroups separated by semicolons in Article 3.4 must be evaluated, or whether each individual factor listed must be considered:

"The use of the phrase 'shall include' in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.

. . .

With regard to the use of the word 'including', we consider that this simply emphasises that there may be other 'relevant factors and indices having a bearing on the state of the industry' among 'all' such factors that must be evaluated. We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the

¹⁸⁴ Panel Report on *EC – Bed Linen*, para. 6.181.

¹⁸⁵ Panel Report on *EC – Bed Linen*, para. 6.182.

¹⁸⁶ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.327.

¹⁸⁷ However, the Appellate Body in *US – Wheat Gluten* had held that all the factors in the list of economic factors to be considered as having a bearing on the state of the domestic industry under Article 4.2(a) of the Safeguards Agreement must be considered:

"The use of the word 'all' in the phrase 'all relevant factors' in Article 4.2(a) indicates that the effects of *any* factor may be relevant to the competent authorities' determination, irrespective of whether the particular factor relates to imports specifically or to the domestic industry more generally. This conclusion is borne out by the list of factors which Article 4.2(a) stipulates are, 'in particular', relevant to the determination. This list includes factors that relate *both* to imports specifically *and* to the overall situation of the domestic industry more generally. The language of the provision does not distinguish between, or attach special importance or preference to, any of the listed factors. In our view, therefore, Article 4.2(a) of the *Agreement on Safeguards* suggests that all these factors are to be *included* in the determination and that the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry. Thus, we consider that Article 4.2(a) does not support the Panel's conclusion that some of the 'relevant factors' – those related exclusively to increased imports – should be counted towards an affirmative determination of serious injury, while others – those not related to increased imports – should be excluded from that determination."

Appellate Body Report on *US – Wheat Gluten*, para. 72. See also Chapter on the *Agreement on Safeguards*, Section V.B.4(a)(ii).

phrase 'such as', which was changed to the word 'including' that now appears in Article 3.4 of the AD Agreement. . . . We thus read the phrase 'shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including . . .' as introducing a mandatory list of relevant factors which must be evaluated in every case. The change in the wording that was introduced in the Uruguay Round in our view supports an interpretation of the current text of Article 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative.

. . . [I]n our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four 'factors'. We further note that the two 'ors' appear within – rather than between – the groups of factors separated by semicolons. Thus, we consider that the use of the term 'or' here does not detract from the mandatory nature of the textual requirement that 'all relevant economic factors' shall be evaluated. With respect to the second 'or,' it appears in the phrase 'ability to raise capital or investments', which clearly indicates that the factor that an investigating authority must examine is the 'ability to raise capital' or the 'ability to raise investments', or both.

. . .

Based on the foregoing, we conclude that *each* of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned."¹⁸⁸

149. The Panel on *Mexico – Corn Syrup* confirmed the mandatory nature of the list of factors in Article 3.4. The Panel indicated that, in its view, the language of Article 3.4 makes it clear that the listed factors in Article 3.4 must be considered in all cases "even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority."¹⁸⁹¹⁹⁰

150. The Panel on *Thailand – H-Beams*, in a finding subsequently explicitly endorsed by the Appellate Body¹⁹¹, also confirmed that Article 3.4 requires the examination of *all* the listed factors:

"We note Thailand's argument that the list of factors in Article 3.4 is illustrative only, and that no change in meaning was intended in the change in drafting from the 'such as' that appeared in the corresponding provision in the Tokyo Round Antidumping Code to the 'including' that now appears in Article 3.4 of the AD

Agreement.¹⁹² The term 'such as' is defined as '[o]f the kind, degree, category being or about to be specified' . . . 'for example'. By contrast, the verb 'include' is defined to mean 'enclose'; 'contain as part of a whole or as a subordinate element; contain by implication, involve'; or 'place in a class or category; treat or regard as part of a whole'. We thus read the Article 3.4 phrase 'shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including . . .' as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from 'such as' to 'including') was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory."¹⁹³¹⁹⁴

151. Also, in support of its proposition referenced in paragraph 150 above, in *Thailand – H-Beams*, the Panel examined the presence of the word "or" in Article 3.4, but concluded that the use of this word did not serve to detract from the mandatory nature of the list of factors under this provision:

¹⁸⁸ Panel Report on *EC – Bed Linen*, paras. 6.154–6.159. See also Panel Report on *Mexico – Corn Syrup*, para. 7.128; Panel Report on *Egypt – Steel Rebar*, para. 7.36. With respect to a very similar issue concerning the term "all relevant factors" under Article 4.2(a) of the Safeguards Agreement, see the Chapter on the *Agreement on Safeguards*, Section IV.B.4(a).

¹⁸⁹ (footnote original) In this regard, we note the text of Article 12.2.2, which provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .".

¹⁹⁰ Panel Report on *Mexico – Corn Syrup*, para. 7.128.

¹⁹¹ Appellate Body Report on *Thailand – H-Beams*, paras. 121–128.

¹⁹² (footnote original) As a third party, the European Communities was also of the view that the list in Article 3.4 was illustrative despite the change in language from "such as" in the relevant Tokyo Round Code provision to "including" in current Article 3.4. See EC third party submission, Annex 3–1, para. 41 and EC Response to Panel Question 13, Annex 3–7. Japan submitted that the change in terminology indicated that each factor listed in Article 3.4 must be evaluated. See Response of Japan to Panel Question 13, Annex 3–8. The United States was of the view that the change in terminology "clarified the need for the authority to evaluate each and every listed factor that is relevant to the state of the industry". See US Response to Panel Question 13, Annex 3–9.

¹⁹³ (footnote original) Article 3.2 DSU directs panels to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law", which are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See e.g. Appellate Body Report on *Japan – Alcoholic Beverages II*, pp.10–12. Here, we look to negotiating history pursuant to Article 32 of the *Vienna Convention* in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31 of the *Vienna Convention*.

¹⁹⁴ Panel Report on *Thailand – H-Beams*, para. 7.225. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.314.

"We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. We do not consider that the presence of semi-colons separating certain groups of factors in the text of Article 3.4, nor the presence of the word 'or' within the first and fourth of these groups serve to render the mandatory list in Article 3.4 a list of only four 'factors'. We note that the two 'ors' appear within – rather than between – the groups of factors separated by semi-colons. The first 'or' in Article 3.4 appears at the end of a group of factors that may indicate declines in the domestic industry (i.e. 'actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity' (emphasis added)). In our view, the use of the word 'or' here is textually linked to the phrase 'actual and potential decline', and may indicate that such 'declines' need not occur in respect of each and every one of the factors listed in this group in order to support a finding of injury. Thus, we do not consider that the use of the term 'or' here detracts from the textual requirement that 'all relevant economic factors' be evaluated. Moreover, we note that this first group of factors in Article 3.4 contains factors that all relate to, and are indicative of, the state of the industry.¹⁹⁵

With respect to the second 'or,' we note that it appears in the phrase 'ability to raise capital or investments'. In our view, this 'or' indicates that the factor that an investigating authority must examine is 'ability to raise capital' or 'ability to raise investments', or both."¹⁹⁶

152. In *Guatemala – Cement II*, the Panel found that in violation of Article 3.4, Guatemala's authority had not considered certain factors among those enumerated in that Article. In doing so, the Panel agreed with the finding of the Panel on *Mexico – Corn Syrup* referenced in paragraph 149 above. In further support of its finding, the Panel also noted a finding of the Panel on *Korea – Dairy* with respect to Article 4.2 of the Agreement on Safeguards, "which is very similar to Article 3.4 of the AD Agreement."¹⁹⁷

153. The Panel on *EC – Bed Linen (Article 21.5 – India)* underlined that "there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury."¹⁹⁸ The Panel concluded that:

"[. . .] an analysis of injury does not rest on the evaluation of the Article 3.4 factors individually, or in isolation. Nor is it necessary that all factors show negative trends or declines. Rather, the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry."¹⁹⁹

(ii) *Other factors not listed in Article 3.4*

154. The Panel on *Mexico – Corn Syrup* indicated that, in a particular case, the examination of relevant economic factors other than those listed in Article 3.4 could be required:

"In our view, this language [of Article 3.4] makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required . . ."²⁰⁰

155. In *US – Hot-Rolled Steel*, the Appellate Body ruled that the obligation of evaluation that Article 3.4 imposes on investigating authorities is not confined to the listed factors, but extends to "all relevant economic factors":

"Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities.²⁰¹ However, the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to "all relevant economic factors". We see nothing in the *Anti-Dumping Agreement* which prevents a Member from requiring that its investigating authorities examine, in every investigation, the potential relevance of a particular "other factor", not listed in Article 3.4, as part of its overall "examination" of the state of the domestic industry."²⁰²

¹⁹⁵ (*footnote original*) We note that Article 4.2(a) of the Agreement on Safeguards, which contains a requirement that the investigating authorities "shall evaluate all relevant factors . . . having a bearing on the situation of that industry, in particular, . . . changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" has been interpreted to require an evaluation of each of these listed factors having a bearing on the state of the industry. See Appellate Body Report on *Argentina – Footwear (EC)*, para. 136 and Panel Report on *Argentina – Footwear (EC)*, para. 8.123.

While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, i.e. evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

¹⁹⁶ Panel Report on *Thailand – H-Beams*, paras. 7.229–7.230.

¹⁹⁷ Panel Report on *Guatemala – Cement II*, fn. 884, where the Panel refers to Panel Report on *Korea – Dairy*, para. 7.55. With respect to the term "all relevant factors" under Article 4.2(a) of the *Safeguards Agreement*, see Chapter on the *Agreement on Safeguards*, Section V.B.4(a).

¹⁹⁸ Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.163.

¹⁹⁹ Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.213.

²⁰⁰ Panel Report on *Mexico – Corn Syrup*, para. 7.128. See also Panel Report on *Thailand – H-Beams*, para. 7.225.

²⁰¹ (*footnote original*) Appellate Body Report, *Thailand – Steel*, *supra*, footnote 36, para. 128.

²⁰² (*footnote original*) Appellate Body Report on *US – Hot-Rolled Steel*, para. 195.

(iii) “having a bearing on”

156. In *Egypt – Steel Rebar*, the Panel rejected Turkey’s argument that Article 3.4 required a full causation analysis, including a non-attribution analysis, which, according to the Panel, stemmed from Turkey’s reading of the words “having a bearing on” as having to do exclusively with causation:

“Turkey’s argument that Article 3.4 requires a full “non-attribution” analysis appears to stem from its reading of the term “having a bearing on” as having to do exclusively with causation, (i.e., as meaning factors *having an effect on* the state of the industry). There is another meaning of this term which we find more pertinent in the overall context of Article 3.4, however. In particular, the term “having a bearing on” can mean *relevant to or having to do with* the state of the industry²⁰³, and this meaning is consistent with the fact that many of the factors listed in Article 3.4 are descriptors or indicators of the state of the industry, rather than being factors *having an effect* thereon. For example, sales levels, profits, output, etc. are not in themselves *causes* of an industry’s condition. They are, rather, among the factual indicators by which that condition can be judged and assessed as injured or not. Put another way, taken as a whole, these factors are more in the nature of *effects* than *causes*.

This reading of “having a bearing on” finds contextual support in the wording of the last group of factors in Article 3.4, namely “actual and potential negative *effects on* cash flow, inventories, . . .” (emphasis added). Further contextual support is found in the cross-reference to Article 3.4 contained in the first sentence of Article 3.5: “. . . the *effects* of dumping as set forth in paragraph [] 4 [of Article 3]” (emphasis added)

We note in addition that if Turkey were correct that the full causation analysis, including non-attribution, were required by Article 3.4, this would effectively render redundant Article 3.5, which explicitly addresses causation, including non-attribution. Such an outcome would not be in keeping with the relevant principles of international treaty law interpretation, or with consistent practice in WTO dispute settlement.²⁰⁴²⁰⁵

(d) Evaluation of relevant factors

(i) Concept of evaluation

157. In *Thailand – H-Beams*, the Panel opined that each of the factors listed in Article 3.4 must be evaluated, not merely as to whether it is “relevant” or “irrelevant”, but on the basis of a “thorough evaluation” of the state of the industry at issue. While the Appellate Body in *Thailand – H-Beams* explicitly endorsed the Panel’s finding that consideration of all factors listed under Article 3.4 is mandatory, it did not address this particular finding:

“. . . Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-

reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of ‘relevance or irrelevance’ of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4²⁰⁶, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.”²⁰⁷

158. In *Egypt – Steel Rebar*, the Panel faced the question of whether the mere presentation of tables of data, without more, constitutes an “evaluation” in the sense of Article 3.4. Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities’ evaluation of all those factors. The Panel considered that “the “evaluation” to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor”. Since, in spite of having gathered data on all of the factors listed in Article 3.4, the Egyptian investigating authority failed to evaluate a number of listed factors, the Panel found that Egypt acted inconsistently with Article 3.4.²⁰⁸

“We first consider the ordinary meaning of the word ‘evaluation’. The Oxford English Dictionary defines ‘evaluation’ as follows:

‘(1) The action of appraising or valuing (goods, etc.); a calculation or statement of value. (2) The action of evaluating or determining the value of (a mathematical expression, a physical quantity, etc.), or of estimating the force of (probabilities, *evidence*).’²⁰⁹(emphasis added)

The Merriam-Webster’s Collegiate Dictionary defines ‘evaluation’ as follows:

‘(1) To determine or fix the value of. (2) To determine the significance, worth, or condition of *usually by careful appraisal or study*.’²¹⁰ (emphasis added)

²⁰³ For example, *Webster’s New World Dictionary*, 2nd College Edition, 1986, at p.123, includes as a definition of “bearing”: “relevant meaning, appreciation, relation [the evidence had no bearing on the case]”.

²⁰⁴ (footnote original) Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“US – Gasoline”), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I,3. On page 23 of the Appellate Body Report it is stated: “. . . One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”

²⁰⁵ Panel Report on *Egypt – Steel Rebar*, paras. 7.62–7.64.

²⁰⁶ (footnote original) This sentence reads: “This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

²⁰⁷ Panel Report on *Thailand – H-Beams*, para. 7.236.

²⁰⁸ Panel Report on *Egypt – Steel Rebar*, para. 7.51.

²⁰⁹ (footnote original) Oxford English Dictionary Online: <http://dictionary.oed.com>.

²¹⁰ (footnote original) Merriam-Webster’s Collegiate Dictionary online: <http://www.m-w.com>.

The Merriam-Webster's Thesaurus lists as synonyms for "evaluation" the following:

'(1) appraisal, appraisement, assessment, estimation, valuation (with related words: interpreting; judging, rating); (2) appraisal, appraisement, assessment, estimate, judgement, stock (with related words: appreciation; interpretation; decision).'²¹¹

We find significant that all of these definitions and synonyms connote, particularly in the context of 'evaluation' of evidence, the act of analysis, judgement, or assessment. That is, the first definition recited above refers to 'estimating the force of' evidence, evoking a process of weighing evidence and reaching conclusions thereon. The second definition recited above – to determine the significance, worth, or condition of, usually by careful appraisal or study – confirms this meaning. Thus, for an investigating authority to 'evaluate evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data.

We nevertheless do recognize that, in addition to the dictionary meanings of 'evaluation' that we have cited, the definitions set forth above also refer to a purely quantitative process (i.e., calculating, stating, determining or fixing the value of something). If this were the definition applicable to the word 'evaluation' as used in Article 3.4, arguably mere compilation of data on the listed factors, without any narrative explanation or analysis, might suffice to satisfy the requirements of Article 3.4. We find, however, contextual support in Article 17.6(i) of the AD Agreement for our reading that 'evaluation' is something different from, and more than, simple compilation of tables of data. We recognize that Article 17.6(i) does not apply directly to investigating authorities, and that instead, it is part of the standard of review to be applied by panels in reviewing determinations of investigating authorities. However, Article 17.6(i) identifies as the object of a panel's review two basic components of a determination: first, the investigating authority's 'establishment of the facts', and second, the investigating authority's 'evaluation of those facts'. Thus, Article 17.6(i)'s characterization of the essential components of a determination juxtaposes 'establishment of the facts' with the 'evaluation of those facts'. That panels are instructed to determine whether an investigating authority's 'establishment of the facts' was proper connotes an assessment by the panel of the means by which the data before the investigating authority were gathered and compiled. By contrast, the fact that panels are instructed to determine whether an investigating authority's 'evaluation of those facts' was objective and unbiased, provides further support for our view that the 'evaluation' to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor."²¹²

159. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings*. The Panel considered that "an

evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance. Rather, we believe that an 'evaluation' also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined."²¹³ According to the Panel, "a meaningful investigation must also take into account the actual intervening trends in each of the injury factors and indices – rather than just a comparison of 'end-points'. There must a streamlined, genuine and undistorted picture drawn from the facts before the investigating authority. Only on the basis of such a thorough and dynamic evaluation of data capturing the current state of the industry in the determination would a reviewing panel be able to assess whether the conclusions drawn from the examination are those of an unbiased and objective authority."²¹⁴

(ii) *Evaluation of all listed factors*

Evaluation of all listed factors must be apparent in the authorities' conclusions

160. The Panel on *EC – Bed Linen*, in a finding not specifically addressed by the Appellate Body, stated that the evaluation of all the factors by the investigating authorities must be apparent in the final determination:

"[W]hile the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. . . . [W]e are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination."²¹⁵

161. Similarly, the Panel on *Guatemala – Cement II* stated that "the consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation."²¹⁶

162. On the other hand, in its Report on *EC – Tube or Pipe Fittings*, the Appellate Body stated that Article 3.4

²¹¹ (*footnote original*) Merriam-Webster's Thesaurus online: <http://www.m-w.com>.

²¹² Panel Report on *Egypt – Steel Rebar*, paras. 7.42–7.45. For a similar view see Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; Panel Report on *EC – Tube or Pipe Fittings*, para. 7.314.

²¹³ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.314.

²¹⁴ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.316.

²¹⁵ Panel Report on *EC – Bed Linen*, para. 6.162.

²¹⁶ Panel Report on *Guatemala – Cement II*, para. 8.283.

“requires an investigating authority to evaluate all relevant economic factors in its examination of the impact of the dumped imports. By its terms, it does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted”²¹⁷. In other words, the Appellate Body considered that the text of Article 3.4 “does not address the *manner* in which the results of the investigating authority’s analysis of each injury factor are to be set out in the published documents”²¹⁸. This led the Appellate Body to reject Brazil’s claims that the absence of an explicit evaluation in the published record of the investigation of one of the factors of Article 3.4 – i.e. the factor “growth” – was inconsistent with Article 3.4:

“Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel’s conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor ‘growth’.

Having regard to the nature of the factor ‘growth’, we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor ‘growth’.”²¹⁹.

163. The Panel on *EC – Bed Linen (Article 21.5 – India)* addressed the question of the adequacy of the evaluation in the case of a redetermination by the investigating authority in order to implement a recommendation by the DSB to bring the measure into conformity. In doing so, the Panel made the following finding:

“With respect to the adequacy of the evaluation of the elements as an overall matter, we look to the explanation of the EC regarding its conclusions, based on the combination of elements discussed in the original determination and redetermination. While this is perhaps less straightforward than we might wish, it is clear to us that merely because the redetermination confirms or adopts certain findings made in the original determination does not **demonstrate** a failure to carry out an overall evalu-

ation of the information in making the injury redetermination.”²²⁰

Checklist approach

164. In *EC – Bed Linen*, the European Community objected to what it termed the “checklist” approach to the list of factors under Article 3.4 and argued that the relevance of some factors may be apparent early in the investigation. The Panel, in a finding not reviewed by the Appellate Body, concluded that “as long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement’s requirements are satisfied. While a checklist would perhaps increase an authority’s and a panel’s confidence that all factors were considered, we believe that it is not a required approach to decision-making under Article 3.4.”²²¹

165. In *US – Hot-Rolled Steel*, the issue was whether the US investigating authority had violated Article 3.4 by failing to explicitly discuss, in its determination, certain factors for each year of the period of investigation. In that case, according to the Panel, the authority had discussed each of the factors for the final two years of the three-year period of investigation, and only some of them for the first year of that period. The Panel found that the determination explained the particular relevance of the second and third years of the period, and that the authority’s failure to explicitly address each factor in its discussion of the first year of the period did not constitute a violation of Article 3.4.²²² The Panel thus found that each of the listed Article 3.4 factors was explicitly discussed in the authority’s determination, and given the explanations provided in that determination for the particular emphasis on a part of the period of investigation, the evaluation of the facts was deemed adequate by the panel.²²³

²¹⁷ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 131.

²¹⁸ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 157.

²¹⁹ Appellate Body Report on *EC – Tube or Pipe Fittings*, paras. 161–162.

²²⁰ Panel Report on *EC – Bed Linen (Article 21.5 – India)*, para. 6.173.

²²¹ Panel Report on *EC – Bed Linen*, para. 6.163. See also Panel Report on *Thailand – H-Beams*, para. 7.236 where the Panel concluded: “We are of the view that the ‘evaluation of all relevant factors’ required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of ‘positive evidence’ and ‘objective examination’ in determining the existence of injury. Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere ‘checklist approach’ that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. It may well be in the circumstances of a particular case that certain factors enumerated in Article 3.4 are not relevant, that their relative importance or weight can vary significantly from case to case, or that some other non-listed factors could be deemed relevant . . .”

²²² Panel Report on *US – Hot-Rolled Steel*, paras. 7.235–7.236.

²²³ See also Panel Report on *Egypt – Steel Rebar*, para. 7.47.

Relevance of written record of authorities' evaluation

166. In *Egypt – Steel Rebar*, Egypt had gathered data on all of the listed factors but could not adduce sufficient evidence of its authorities' evaluation of all those factors on its written analysis. See paragraph 158 above. The Panel stressed the importance of the written record in the context of an anti-dumping investigation for burden of proof purposes.

"Here we must emphasize that in the context of an anti-dumping investigation, which is by definition subject to multilateral rules and multilateral review, a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process. If there is no such written record – whether in the disclosure documents, in the published determination, or in other internal documents – of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent. Thus, while Egypt attempts to derive support from the panel report in the *US – Hot-Rolled Steel* dispute for its position that Article 3.4 does not require an explicit written analysis of all of the factors listed therein²²⁴, to us, the findings in that dispute confirms our interpretation, in that what was at issue, was the substantive adequacy

of the authority's written analysis of *each* of those factors."²²⁵

167. In *Egypt – Steel Rebar*, the Panel rejected the argument of one of the parties whereby the requirement of a written analysis of the Article 3.4 factors would be exclusively governed by Article 12 of the *Anti-Dumping Agreement*:

"Nor do we consider, as suggested by Egypt [footnote omitted], that the requirement of a written analysis of the Article 3.4 factors is exclusively governed by Article 12 of the AD Agreement (public notice and explanation of determinations). While Article 12 contains a requirement to *publish*, and to make available to the interested parties in the investigation, some form of a report on the investigating authority's determination, this is, as the Appellate Body has noted, a procedural requirement having to do with due process²²⁶, rather than with the relevant substantive analytical requirements (which in the context of this claim are found in Article 3.4)."²²⁷

Evaluation of specific listed factors

"profits"

168. In *Egypt – Steel Rebar*, Turkey claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting profits. The Panel disagreed:

"We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine *all factors affecting profits*, and did not examine *all factors affecting domestic prices*. The above text indicates to us, however, a different requirement on an investigating authority. In particular, the text is straightforward in that the requirement is to examine all relevant factors and indices *having a bearing on the state of the industry*. The text then lists a variety of such factors and indices that are presumptively relevant to the investigation and must be examined, one of which is

²²⁴ (footnote original) Written Response, dated 13 March 2002, of Egypt to Question 9 to Egypt and Question 3 to Both Parties of the *Written Questions of the Panel*, of 27 February 2002 – Annex 8–2. Egypt contends in its response that "[t]he *Confidential Injury Analysis* therefore constitutes an evaluation of the factors that it covers in the sense of Article 3.4" and that this approach is consistent with the findings of the panel in *US – Hot-Rolled Steel*. However, the facts in the *US – Hot-Rolled Steel* dispute differ significantly from those in this dispute. In this dispute the allegation is that the IA did not properly evaluate all of the factors listed in Article 3.4 of the AD Agreement, whereas in the *US – Hot-Rolled Steel* case, all Article 3.4 factors were evaluated, but Japan claimed that the discussion did not sufficiently evaluate certain factors by failing to discuss data for all three years which comprised the period of investigation for the determination of injury – paras. 7.231–7.236 of the Panel Report, *ibid*.

²²⁵ Panel Report on *Egypt – Steel Rebar*, para. 7.49.

²²⁶ (footnote original) In the Appellate Body Report in *Thailand – H-Beams*, para.110, the Appellate Body stated that "... Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a *final determination*". We note that what is at issue before us is not the adequacy of the *final determination* or any other published

document, as such, but rather, the adequacy of the *substance* of the analysis performed by the Egyptian investigating authority, in whatever document such analysis might be found. Moreover, the basic issue before the Appellate Body in *Thailand – H-Beams* was very different from that before us. In that appeal, the issue raised was whether the panel was limited by the language of Articles 3.1 and 17.6 to reviewing the Thai investigating authority's injury determination exclusively on the basis of facts and analysis discernible in documents that had been published or otherwise made available to the respondents in the investigation or their counsel, or whether in addition, the panel could and should take into account internal analysis memoranda and similar documents prepared by and for the exclusive use of the authority during the investigation, the contents of which were not discernible in any documents available to the respondents. Thus, the issue there was essentially about how a panel should address confidential information, an issue not before us in this dispute. Thus, while Egypt cites *Thailand – H-Beams* as support for its position in the present dispute, in our view that dispute pertains to a different issue entirely. To the extent that it may touch upon issues before us, it does not detract in any way from our interpretation of the substantive requirements of Article 3.4 – paras.98 *et al* of the Appellate Body Report.

²²⁷ Panel Report on *Egypt – Steel Rebar*, para. 7.50.

'profits'. The text does not say, as argued by Turkey, 'all factors affecting profits'. To us, this text means that in its evaluation of the state of the industry, an investigating authority must include an analysis of the domestic industry's profits. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation."²²⁸

"factors affecting domestic prices"

169. In *Egypt – Steel Rebar*, Turkey claimed that Egypt had violated Article 3.4 because its investigating authorities had not examined all factors affecting prices. The Panel disagreed:

"We recall that Turkey's claim is that Egypt violated Article 3.4 because the IA did not examine . . . *all factors affecting domestic prices*."

. . . Here again, we note that contrary to Turkey's argument, the text does not read "all factors affecting domestic prices". Rather, what is required is that there be *an* evaluation of factors affecting domestic prices. This requirement is clearly linked to the requirements of Articles 3.1 and 3.2 for an "objective examination" of "the effect of dumped imports on prices in the domestic market for like products" . . .

In our view, this means that in its evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2. Turkey has raised no claim that the IA failed to conduct such an analysis in the rebar investigation. In addition, in our view, an investigating authority must consider generally the question of "factors affecting domestic prices" . . ."²²⁹

170. The Panel on *EC – Tube or Pipe Fittings* stated that it saw "no basis in the text of the Agreement for Brazil's argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may be more in the way of causal factors to be analysed under Article 3.5, rather than under 3.4."²³⁰

"growth"

171. In *Egypt – Steel Rebar*, the Panel considered that Article 3.4 threshold as regards addressing the factor "growth" had been satisfied by Egypt since its authorities had addressed sales volume and market share in their final determinations.²³¹

(e) Relationship with other paragraphs of Article 3

172. With respect to the relationship of paragraph 4 with paragraphs 1, 2, 3 and 5 of Article 3, see paragraphs 100–101 above.

173. With respect to the relationship between Article 3.4 and Article 3.7, see paragraphs 195–196 below.

7. Article 3.5

(a) Article 3.5 requirements for investigating authorities

174. In *US – Hot-Rolled Steel*, the Appellate Body laid down the requirements that Article 3.5 imposes on the investigating authorities when performing a causation analysis as follows:

"This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* 'known factors', 'other than dumped imports', which are causing injury to the domestic industry 'at the same time' as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not '*attributed* to the dumped imports.' (emphasis added)"²³²

(b) Scope of the non-attribution language in Article 3.5

175. The Appellate Body in *US – Hot-Rolled Steel* delimited the situations where the non-attribution language of Article 3.5 plays a role. In this regard, the Appellate Body specified that this language applies "solely [to] situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*".²³³

(c) "dumped imports"

176. In *EC – Bed Linen*, the Panel rejected the argument that "dumped imports" must be understood to refer only to imports which are the subject of transactions in which the export price was below normal value. See paragraph 119 above.

(d) "any known factors other than dumped imports"

(i) Concept of known factors

177. On the issue of what are "known factors" other than the dumped imports, the Panel on *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, found that other "known factors" would include factors "clearly raised before the investigating authorities by interested parties in the course of an AD investigation" and that investigating authorities are not required to seek out such factors on their own initiative:

"We consider that other 'known' factors would include those causal factors that are clearly raised before the

²²⁸ Panel Report on *Egypt – Steel Rebar*, para. 7.60.

²²⁹ Panel Report on *Egypt – Steel Rebar*, paras. 7.60–7.61.

²³⁰ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.335.

²³¹ Panel Report on *Egypt – Steel Rebar*, para. 7.37.

²³² Appellate Body Report on *US – Hot-Rolled Steel*, para. 222.

²³³ Appellate Body Report on *US – Hot-Rolled Steel*, para. 223.

investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation.²³⁴ . . . We note that there may be cases where, at the time of the investigation, a certain factor may be ‘known’ to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case.”²³⁵

178. The Appellate Body on *EC – Tube or Pipe Fittings* disagreed with the Panel’s understanding of the term “known” in Article 3.5. The Panel had considered that the alleged causal factor *was* “known” to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless not “known” in the context of its causality analysis.²³⁶ The Appellate Body disagreed with this approach and considered that “a factor is either “known” to the investigating authority, or it is not “known”; it cannot be “known” in one stage of the investigation and unknown in a subsequent stage.”²³⁷

179. In *Guatemala – Cement II*, the Panel agreed with Mexico’s claim that Guatemala’s authority failed to take into account certain undumped imports, and accordingly, failed to assess other factors which were injuring the domestic industry at the same time, in violation of Article 3.5.²³⁸

(ii) Illustrative list of known factors

180. In *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, the Panel further stated that “[t]he text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative.”²³⁹

(e) Non-attribution methodology

181. In *US – Hot-Rolled Steel*, the Appellate Body considered that the Panel had erred in its interpretation of the non-attribution language by finding that this language does not require the investigating authorities to separate and distinguish the injurious effects of the other known causal factors from the injurious effects of the dumped imports. The Panel had followed the interpretive approach set forth by the GATT Panel in *US – Norwegian Salmon AD* which the Appellate Body thus also presumably considered erroneous. The Appellate Body ruled that “in order to comply with the non-attribution language in that provision, investigating

authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports”:²⁴⁰

“The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not “attributed” to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.

We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injuri-

²³⁴ (*footnote original*) The panel in *US – Norwegian Salmon AD*, para. 550 stated: “there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation.” That panel was examining Article 3.4 of the Tokyo Round Anti-Dumping Code, which contained different language than Article 3.5 of the WTO AD Agreement.

²³⁵ Panel Report on *Thailand – H-Beams*, para. 7.273. The “clearly raised” standard in the context of national investigations has been rejected by the Appellate Body under the *Safeguards Agreement* which contains different language. See Chapter on the *Agreement on Safeguards*, Section IV.B.2(a).

²³⁶ The Panel on *EC – Tube or Pipe Fittings* found:

In light of these findings, these factors, although “known” to them in the context of the dumping and injury analysis, would not be a “known” causal factor, that is, a factor that the European Communities was aware would possibly be causing injury to the domestic industry.

Panel Report on *EC – Tube or Pipe Fittings*, para. 7.362.

²³⁷ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 178

²³⁸ Panel Report on *Guatemala – Cement II*, paras. 8.268–8.272. The Panel also found a violation of Articles 3.1 and 3.2 with respect to the failure by Guatemala’s authority to take into account certain undumped imports. See paras. 124 and 131 of this Chapter.

²³⁹ Panel Report on *Thailand – H-Beams*, para. 7.274. See also Panel Report on *Egypt – Steel Rebar*, para. 7.115.

²⁴⁰ Appellate Body Report on *US – Hot-Rolled Steel*, para. 226.

ous effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.”²⁴¹

182. The Appellate Body in *US – Hot-Rolled Steel* acknowledged the practical difficulty of separating and distinguishing the injurious effects of different causal factors but indicated that “although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.”²⁴²

183. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner.²⁴³

184. The Appellate Body on *EC – Tube or Pipe Fittings* addressed the question whether the non-attribution language of Article 3.5 requires an investigating authority, in conducting its causality analysis, to examine the effects of the other causal factors collectively after having examined them individually. The Appellate Body first reiterated its basic view that non-attribution requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not “lumped together” and made “indistinguishable”. It further stated that “provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the “causal relationship” between dumped imports and injury.”²⁴⁴ On this basis, the Appellate Body did not find that “an examination of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.”²⁴⁵ At the same time, the Appellate Body recog-

nized that “there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports.”²⁴⁶

(f) Relationship with other paragraphs of Article 3

185. With respect to the relationship of paragraph 5 with paragraphs 1, 2, 3 and 4 of Article 3, see paragraphs 100–101 above.

8. Article 3.6

(a) Domestic industry production

186. The Panel on *Mexico – Corn Syrup* addressed the issue of allowing the determination of injury on the basis of the portion of the domestic industry’s production sold in one sector of the domestic market, as follows:

“Article 3.6 does not, on its face, allow the determination of injury or threat of injury on the basis of the portion of the domestic industry’s production sold in one sector of the domestic market, rather than on the basis of the industry as a whole. Indeed, Article 3.6 relates to a situation different from that at issue here. Article 3.6 provides for the situation where information concerning the production of the like product, such as producers’ profits and sales, cannot be separately identified. In such cases, Article 3.6 allows the authority to consider information concerning production of a *broader* product group than the like product produced by the domestic industry, which includes the like product, in evaluating the effect of imports. Nothing in Article 3.6 allows the investigating authority to consider information concerning production of a product sub-group that is *narrower* than the like product produced by the domestic

²⁴¹ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 223–224.

²⁴² Appellate Body Report on *US – Hot-Rolled Steel*, para. 228.

²⁴³ According to the Appellate Body, “[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language. Under both Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards*, any injury caused to the domestic industry, at the same time, by factors other than imports, must not be attributed to imports. Moreover, under both Agreements, the domestic authorities seek to ensure that a determination made concerning the injurious effects of imports relates, in fact, to those imports and not to other factors. In these circumstances, we agree with the Panel that adopted panel and Appellate Body Reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.” Appellate Body Report on *US – Hot-Rolled Steel*, para. 230.

²⁴⁴ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 189.

²⁴⁵ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 191.

²⁴⁶ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 192.

industry. In particular, nothing in Article 3.6 allows the investigating authority to limit its examination of injury to an analysis of the portion of domestic production of the like product sold in the particular market sector where competition with the dumped imports is most direct."²⁴⁷

187. In *US – Hot-Rolled Steel*, the Appellate Body examined whether the investigating authorities could make a sectoral examination of the domestic industry. See paragraphs 116 and 144 above.

9. Article 3.7: threat of material injury

(a) “change in circumstances”

188. In *Egypt – Steel Rebar*, the Panel considered that the text of Article 3.7 makes explicit that the central question in a threat of injury investigation is whether there will be a “change in circumstances” that would cause the dumping to begin to injure the domestic industry:

“[T]he text of this provision makes explicit that in a threat of injury investigation, the central question is whether there will be a ‘change in circumstances’ that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.”²⁴⁸

189. The Panel on *US – Softwood Lumber VI* after first noting that the text of Article 3.7 concerning “change of circumstances” is “not a model of clarity”²⁴⁹, went on to find that Articles 3.7 and 15.7 required that some change in circumstances must be both foreseen and imminent and that this change of circumstances would lead to a situation in which injury would occur:

“[T]he relevant ‘change in circumstances’ referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which

has not yet occurred can be predicted to occur imminently.”²⁵⁰

(b) Requirement to “consider” factors of Article 3.7

190. The Panel on *US – Softwood Lumber VI* was of the view that while investigating authorities are not required to make an explicit determination with respect to factors considered under Articles 3.7 and 15.7, they must however do more than simply recite the facts in the abstract:

“[I]n order to conclude that the investigating authorities have ‘considered’ the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors. That consideration must go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit ‘finding’ or ‘determination’ with respect to the factors considered.”²⁵¹

191. Moreover, according to the Panel on *US – Softwood Lumber VI*, due to the use of the word “should” in Article 3.7, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory:

“Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. In this case, it is clear from the face of the determination that the USITC in fact addressed the facts concerning each of the factors set out in Articles 3.7 and 15.7 of the Agreements. Indeed, Canada does not argue that any relevant factor was ignored by the USITC, or not addressed in the determination. Thus, we cannot conclude that the USITC failed to consider the factors set forth in Articles 3.7 and 15.7, in the sense of not taking them into account at all.”²⁵²

192. The Panel on *US – Softwood Lumber VI* hastened to add that the fact that the Article 3.7 factors were “considered” does not answer the question “whether the USITC’s overall determination of a threat of material injury is consistent with the requirement of Articles 3.7 that the totality of the factors considered lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur”.²⁵³

²⁴⁷ Panel Report on *Mexico – Corn Syrup*, para. 7.157. With respect to the issue of a market segment analysis under the *Safeguards Agreement*, see Chapter on the *Agreement on Safeguards*, Section V.B.4(a)(ix).

²⁴⁸ Panel Report on *Egypt – Steel Rebar*, para. 7.91.

²⁴⁹ Panel Report on *United States – Softwood Lumber VI*, para. 7.53

²⁵⁰ Panel Report on *US – Softwood Lumber VI*, para. 7.57.

²⁵¹ Panel Report on *US – Softwood Lumber VI*, para. 7.67.

²⁵² Panel Report on *US – Softwood Lumber VI*, para. 7.68

²⁵³ Panel Report on *US – Softwood Lumber VI*, para. 7.69.

(c) Article 3.7(i): “likelihood of substantially increased importation”

193. The Panel on *Mexico – Corn Syrup* found that the investigating authority had failed to adequately address the likelihood of substantially increased imports by failing to properly evaluate the facts concerning, and to provide a reasoned explanation of its conclusions regarding the potential effects of the alleged restraint agreement. The Panel considered as follows:²⁵⁴

“In our view, the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement²⁵⁵, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, in our view, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists.”²⁵⁶

(d) Analysis of the “consequent impact” of dumped imports on the domestic industry

194. The Panel on *Mexico – Corn Syrup* considered the requirements imposed upon investigating authorities in a determination of a “threat of injury” under Article 3.7. One of the issues which arose in this context was whether a specific analysis of the consequent impact of the dumped imports on the domestic industry is required in a threat of injury determination. Referring to Article 3.7, the Panel stated that “[t]his language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.”²⁵⁷ The Panel concluded that “an analysis of the consequent impact of imports is required in a threat of material injury determination”:

“[I]t is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that ‘*material injury would occur*’ (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.

While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the

capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the ‘consequent impact’ of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the ‘consequent impact’ of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.”²⁵⁸

195. Having established that an analysis of the impact of imports on the domestic industry is required also in the context of the determination of a “threat of injury”, the Panel on *Mexico – Corn Syrup* held that this analysis is to be performed pursuant to Article 3.4, since “[n]othing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury”:

“Turning to the question of the nature of the analysis required, we note that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of “injury”, which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth

²⁵⁴ Panel Report on *Mexico – Corn Syrup*, paras. 7.173–7.178. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Panel considered the factual determination of likelihood of substantially increased imports made by the Mexican investigating authority in their redetermination. The Panel indicated that “in assessing the redetermination, we must judge whether, in light of the explanations given in the redetermination, an unbiased and objective investigating authority could reach the conclusions reached by [the investigating authority] on the evidence before it. As stated by the Panel on the original dispute, the relevant question is ‘whether [the investigating authority]’s analysis provides a reasoned explanation for its conclusion that, assuming [a restraint] agreement existed, there was nonetheless a likelihood of substantially increased importation.’” The Panel further indicated that “the reasoned explanation required to satisfy us under the standard of review must respect [the] elements of Article 3.7 as well”. The Panel, in a finding upheld by the Appellate Body (Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 135.(b)), determined that the investigating authority’s conclusion that there was a significant likelihood of increased importation in the redetermination was not consistent with Article 3.7(i) of the *Anti-Dumping Agreement*. Paras. 6.14–6.23.

²⁵⁵ (*footnote original*) We note in this regard that Article 12.2.2 of the AD Agreement requires that the notice of final determination contain “the reasons for the acceptance of relevant arguments or claims made by the exporters and importers.” It is clear that the arguments concerning the alleged restraint agreement were relevant.

²⁵⁶ Panel Report on *Mexico – Corn Syrup*, para. 7.174.

²⁵⁷ Panel Report on *Mexico – Corn Syrup*, para. 7.124.

²⁵⁸ Panel Report on *Mexico – Corn Syrup*, paras. 7.125–7.126.

factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.”²⁵⁹

196. The Panel on *Mexico – Corn Syrup* concluded that consideration of the factors in Article 3.4 “is necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry’s condition in such a manner that material injury would occur in the absence of protective actions, as required by Article 3.7.”²⁶⁰ It further indicated that “[t]he text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.”²⁶¹

197. The Panel on *US – Softwood Lumber VI* agreed with the views expressed by the Panel on *Mexico – Corn Syrup* (see paragraph 196 above), while emphasizing at the same time that there is no requirement under Article 3.7 to conduct a second Article 3.4 analysis:

“It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, or Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision-making process, which is not consistent with the requirements of the Agreements.”²⁶²

198. The Panel on *US – Softwood Lumber VI* came to a similar conclusion with respect to the absence of a requirement for a second Article 3.2 analysis:

“With respect to the factors set out in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, we see even less basis for concluding that they must be directly considered in a ‘predictive’ context in making a threat of material injury determination. These provisions require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury. Thus, the text directs the investigating authorities to consider whether there ‘has been’ a significant increase in imports, whether there ‘has been’ significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases which otherwise ‘would have’ occurred. As with the consideration of the Article 3.4/15.4 factors, the consideration of the Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports.”²⁶³²⁶⁴

(e) Distinction between the roles of the investigating authorities and the Panel

199. In *Mexico – Corn Syrup (Article 21.5 – US)*, Mexico had requested the Appellate Body to reverse the finding of the Panel regarding the likelihood of increased imports on the grounds that the Panel had wrongly interpreted Article 3.7 of the *Anti-Dumping Agreement* and incorrectly applied the standard of review prescribed by Articles 17.5 and 17.6 of that Agreement. The Appellate Body drew the line between the roles of the investigating authorities and the panel in respect to Article 3.7 of the *Anti-Dumping Agreement* as follows:

“In previous anti-dumping cases, we have emphasized the importance of distinguishing between the different roles of panels and investigating authorities.”²⁶⁵ We note, in this regard, that Article 3.7 of the *Anti-Dumping Agreement* sets forth a number of requirements that

²⁵⁹ Panel Report on *Mexico – Corn Syrup*, para. 7.127. In this regard, see also paras. 149 and 154 of this Chapter. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.93–7.94.

²⁶⁰ Panel Report on *Mexico – Corn Syrup*, para. 7.132.

²⁶¹ Panel Report on *Mexico – Corn Syrup*, para. 7.137.

²⁶² Panel Report on *US – Softwood Lumber VI*, para. 7.105.

²⁶³ (*footnote original*) Of course, the proper establishment of a background under Articles 3.2 and 3.4 and 15.2 and 15.4 of the AD and SCM Agreements does not determine whether the evaluation of the effects of future imports is consistent with the requirements governing determinations of threat of material injury set out in Articles 3.7 and 15.7 of the AD and SCM Agreements.

²⁶⁴ Panel Report on *US – Softwood Lumber VI*, para. 7.111.

²⁶⁵ (*footnote original*) Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (“*United States – Hot-Rolled Steel*”), WT/DS184/AB/R, adopted 23 August 2001, para. 55.

must be respected in order to reach a valid determination of a threat of material injury. The third sentence of Article 3.7 explicitly recognizes that it is the *investigating authorities* who make a determination of threat of material injury, and that such determination – by the investigating authorities – ‘must be based on facts and not merely on allegation, conjecture or remote possibility’. Consequently, Article 3.7 is not addressed to panels, but to the national investigating authorities which determine the existence of a threat of material injury.

The *Anti-Dumping Agreement* imposes a specific standard of review on *panels*. With respect to facts, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement*, together with Article 11 of the DSU²⁶⁶, set out the standard to be applied by panels when assessing whether a Member’s investigating authorities have ‘established’ and ‘evaluated’ the facts consistently with that Member’s obligations under the covered agreements.²⁶⁷ These provisions do not authorize panels to engage in a new and independent fact-finding exercise. Rather, in assessing the measure, panels must consider, in the light of the claims and arguments of the parties, whether, *inter alia*, the ‘establishment’ of the facts by the investigating authorities was ‘proper’, in accordance with the obligations imposed on such investigating authorities under the *Anti-Dumping Agreement*.²⁶⁸

In our view, the ‘establishment’ of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to ‘the ‘occurrence of future events’ since such *future* events ‘can never be definitively proven by facts’.²⁶⁹ Notwithstanding this intrinsic uncertainty, a ‘proper establishment’ of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be ‘clearly foreseen and imminent’, in accordance with Article 3.7 of the *Anti-Dumping Agreement*.^{270–271}

(f) Relationship with other paragraphs of Article 3

200. In *Thailand – H-Beams*, the Appellate Body referred to Article 3.7 in interpreting Article 3.1. See paragraph 112 above.

201. With respect to the relationship between paragraphs 4 and 7 of Article 3, see paragraphs 195–196 above.

10. Article 3.8

202. The Panel on *US – Softwood Lumber VI* examined the meaning of the requirement under Article 3.8 to consider and decide the application of anti-dumping measures in a threat of injury case with “special care”:

“The adjective ‘special’ is defined as, *inter alia*, ‘Exceptional in quality or degree; unusual; out of the ordinary’.²⁷² The noun ‘care’ is defined, *inter alia*, as ‘Serious attention, heed; caution, pains, regard’.²⁷³ Thus, it seems clear to us that a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury.”²⁷⁴

203. The Panel on *US – Softwood Lumber VI*, further considered that, in spite of the fact that Article 3.8 provides that the application of a measure has to be considered with special care, the “special care” obligation of Article 3.8 applies “during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken”.²⁷⁵ Faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the “special care” obligation, the Panel made the following finding:

“The Agreements require, as noted above, an objective evaluation based on positive evidence in making any injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such “special care” in the context of an objective evaluation based on positive evidence would be. In these

²⁶⁶ (footnote original) Article 11 of the DSU provides in relevant part that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”.

²⁶⁷ (footnote original) Appellate Body Report, *United States – Hot-Rolled Steel*, *supra*, footnote 59, paras. 50–62.

²⁶⁸ (footnote original) *Ibid.*, para. 56.

²⁶⁹ (footnote original) Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

²⁷⁰ (footnote original) As we noted in *United States – Hot-Rolled Steel*:

Article 17.6(i) . . . defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their “establishment” and “evaluation” of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities’* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. (original emphasis)

Appellate Body Report, *supra*, footnote 265, para. 56.

²⁷¹ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 83–85.

²⁷² The New Shorter Oxford English Dictionary (Clarendon Press 1993)

²⁷³ *Ibid.*

²⁷⁴ Panel Report on *US – Softwood Lumber VI*, para. 7.33.

²⁷⁵ Panel Report on *US – Softwood Lumber VI*, para. 7.33

circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation could not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations.”²⁷⁶

11. Relationship with other Articles

(a) Article 1

204. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, among them Article 1, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”²⁷⁷ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Article 4

205. In *Mexico – Corn Syrup*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 4.1. See paragraph 106 above.

(c) Article 5

206. In *Thailand – H-Beams*, the Appellate Body referred to Articles 5.2 and 5.3, as well as to Articles 3.7, 6 and 12 in interpreting Article 3.1. See paragraph 112 above.

207. The Panel on *Mexico – Corn Syrup* touched on the relationship between Articles 3.2 and 5.2. See paragraph 238 below.

208. The Panel on *Mexico – Corn Syrup* also discussed the relationship between Articles 3.4 and 5.2. See paragraph 238 below.

209. In *Guatemala – Cement II*, the relationship between Article 3.7 and Articles 5.2 and 5.3 was discussed. See paragraphs 253–255 below.

(d) Article 6

210. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 as well as Articles 3.7, 5.2, 5.3 and 12 in interpreting Article 3.1. See paragraph 112 above.

(e) Article 9

211. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then asserted that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”²⁷⁸ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(f) Article 11

212. The Panel on *US – DRAMS* discussed the relationship between Articles 3.5 and 11.2. See paragraph 506 below.

213. Further in *US – DRAMS*, the Panel discussed the relationship between footnote 9 to Article 3 and Article 11.2. See paragraph 506 below.

(g) Article 12

214. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 as well as Articles 3.7, 5.2, 5.3 and 6 in interpreting Article 3.1. See paragraph 112 above.

215. The Panels on *EC – Bed Linen* and *Egypt – Steel Rebar* touched on the relationship between Articles 3.4 and 12.2. See paragraphs 566 below and 167 above respectively.

(h) Article 17

216. The Appellate Body in *Thailand – H-Beams* compared the obligation set forth in Article 3.1 with those in Articles 17.5 and 17.6. See paragraph 113 above.

217. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body drew a line between the roles of investigating authorities and the panels as regards Article 3.7 threat of injury analysis. In doing so, the Appellate Body referred to Articles 17.5 and 17.6(i). See paragraph 199 above.

(i) Article 18

218. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were

²⁷⁶ Panel Report on *US – Softwood Lumber VI*, para. 7.34.

²⁷⁷ Panel Report on *Guatemala – Cement II*, para. 8.296.

²⁷⁸ Panel Report on *Guatemala – Cement II*, para. 8.296.

“dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”²⁷⁹ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

12. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

219. The Panel on *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

“Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of ‘material injury’ contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice.”²⁸⁰

220. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 3. The Panel then determined that Mexico’s claims under other articles of the *Anti-Dumping Agreement* and under Article VI of the *GATT 1994* were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”²⁸¹ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Agreement on Safeguards

221. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner. See also the Panel Report in *Guatemala – Cement II*, paragraph 152 above.

IV. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products

or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

- (i) when producers are related¹¹ to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers;

(*footnote original*)¹¹ For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

- (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied¹² only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

²⁷⁹ Panel Report on *Guatemala – Cement II*, para. 8.296.

²⁸⁰ Panel Report on *US – 1916 Act (EC)* para. 6.211; Panel Report on *US – 1916 Act (Japan)*, para. 6.254.

²⁸¹ Panel Report on *Guatemala – Cement II*, para. 8.296.

(*footnote original*)¹² As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Article 4.1

(a) “domestic industry”

222. Referring to Article 4.1 and footnote 9 to Article 3, the Panel on *Mexico – Corn Syrup* stated: “These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1.”²⁸²

223. As regards domestic industry production, see paragraphs 186–187 above

(b) “domestic producers”

224. Referring to provisions which use the plural form, but are applicable in the singular case, the Panel on *EC – Bed Linen*, in a finding not reviewed by the Appellate Body, stated that “Article 4.1 of the AD Agreement defines the domestic industry in terms of ‘domestic producers’ in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the AD Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation.”²⁸³

225. The Panel on *EC – Bed Linen* examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry. See paragraphs 145–147 above.

(c) “a major proportion of the total domestic production”

226. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered whether or not the phrase “a major proportion” implies that the “domestic industry” refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The Panel considered differ-

ent dictionary definitions and noted that the the word “major” is also defined as “important, serious, or significant”.²⁸⁴ The Panel therefore found that “an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible.”²⁸⁵²⁸⁶

2. Relationship with other Articles

227. In *Mexico – Corn Syrup*, the Panel referred to footnote 9 to Article 3 in interpreting Article 4.1. See paragraph 222 above.

228. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that Article 4.1 does not contain an obligation, but is merely a definition which, as such, cannot be violated. The Panel considered that:

“Article 4.1 provides that the term ‘domestic industry’ ‘shall’ be interpreted in a specific manner. In our view, this imposes an express obligation on Members to interpret the term ‘domestic industry’ in that specified manner. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1.”²⁸⁷

V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The applica-

²⁸² Panel Report on *Mexico – Corn Syrup*, para. 7.147. The Panel on *EC – Bed Linen* indicated that “[they] express no opinion as to the correctness *vel non* of the European Communities’ interpretation of Article 4 of the AD Agreement or its application in this case”. Panel Report on *EC – Bed Linen*, para. 6.175.

²⁸³ Panel Report on *EC – Bed Linen*, para. 6.72.

²⁸⁴ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

²⁸⁵ (*footnote original*) We recall that, in accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is “permissible”, then we are compelled to accept it.

²⁸⁶ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

²⁸⁷ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

tion shall contain such information as is reasonably available to the applicant on the following:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;
- (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed¹³ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁴ The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output consti-

tutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

(*footnote original*)¹³ In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

(*footnote original*)¹⁴ Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

(a) The Doha mandate

229. Paragraph 7.1 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns provides that the Ministerial Conference “agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.”²⁸⁸

2. Article 5.2

(a) General

230. In *Guatemala – Cement II*, in examining Mexico’s claim that Guatemala’s authority, in violation of Article 5.2, had initiated the anti-dumping investigation without sufficient evidence of dumping having been included in the application, the Panel interpreted Article 5.2 with reference to Article 2, which outlines the elements that describe the existence of dumping. The Panel stated that “evidence on the . . . elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2.”²⁸⁹ See paragraph 248 below.

231. On the issue of what evidence was necessary to justify the initiation of an investigation under Article 5, the Panel on *Guatemala – Cement I* had reached the same conclusion as the Panel on *Guatemala – Cement II*.²⁹⁰ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel’s discussion of Article 5.²⁹¹ The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.²⁹²

232. In *Guatemala – Cement II*, the Panel further agreed that “statements of conclusion unsubstantiated by facts do not constitute evidence of the type required by Article 5.2.”²⁹³

233. The Panel on *US – Lumber V* considered that an application need only include such reasonably available information on the relevant matters as the applicant

deems necessary to substantiate its allegations of dumping, injury and causality, and not *all* information available to the applicant:

“We note that the words ‘such information as is reasonably available to the applicant’, indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the ‘reasonably available’ language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations.²⁹⁴ This is particularly true where such information might be redundant or less reliable than, information contained in the application.”²⁹⁵

(b) “evidence of . . . dumping”

234. In *Guatemala – Cement II*, the Panel addressed the issue of whether the elements of “dumping” require sufficient evidence under Article 5.3, and based its analysis upon its reading of the term “dumping”, under Article 5.2, as a reference to dumping as within the meaning of Article 2. See paragraphs 248–249 below.

235. On this issue, the Panel on *Guatemala – Cement I* also reached the same conclusion²⁹⁶, but the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel’s discussion of Article 2.4.²⁹⁷ The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.²⁹⁸

²⁸⁸ WT/MIN(01)/17.

²⁸⁹ Panel Report on *Guatemala – Cement II*, para. 8.35.

²⁹⁰ Panel Report on *Guatemala – Cement I*, paras. 7.49–7.53.

²⁹¹ Appellate Body Report on *Guatemala – Cement I*, para. 89.

²⁹² WT/DSB/M/51, section 9(a).

²⁹³ Panel Report on *Guatemala – Cement II*, para. 8.53.

²⁹⁴ (*footnote original*) If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.

²⁹⁵ Panel Report on *US – Lumber V*, para. 7.54.

²⁹⁶ See para. 249 of this Chapter.

²⁹⁷ Appellate Body Report on *Guatemala – Cement I*, para. 89.

²⁹⁸ WT/DSB/M/51, section 9(a).

(c) “evidence of . . . injury”

236. The Panel on *Guatemala – Cement I*, in response to Mexico’s claim of violation of Articles 5.2 and 5.3, addressed the issue of the evidence of injury in an application necessary under Article 5.2.²⁹⁹ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel’s discussion of Article 5.³⁰⁰ The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³⁰¹

237. The Panel on *Guatemala – Cement II* also addressed the issue of the evidence of threat of injury necessary in an application under Article 5.2, and the closely related issue of the amount of evidence necessary under Article 5.3 to justify the initiation of an investigation. See paragraphs 253–254 below.

(d) “evidence of . . . causal link” – subparagraph (iv)

238. In considering what information regarding the existence of a causal link must be provided in an application pursuant to Article 5.2, the Panel on *Mexico – Corn Syrup* found that “the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury”:

“[T]he inclusion in Article 5.2(iv) of the word ‘relevant’ and the phrase ‘such as’ in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is *not* required to contain information on *all* the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant. Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, ‘shows evidence of’, the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.

Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is ‘reasonably available’ to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its oper-

ations, such information would generally be available to applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3.”³⁰²

239. In *Mexico – Corn Syrup*, the Panel distinguished, for the purposes of Article 5.2, between information and analysis:

“Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.”³⁰³“³⁰⁴

240. In *Thailand – H-Beams*, the Panel agreed with the view of the Panel on *Mexico – Corn Syrup* referenced in paragraph 239 above.³⁰⁵ Further, the Panel rejected Poland’s argument that paragraph (iv) of Article 5.2 implies that some sort of analysis of data is required in the application, and stated that “we do not read this provision as imposing any additional *requirement* that the application contain analysis of the data submitted in support of the application.”³⁰⁶ The Appellate Body did not review these findings of the Panel.

(e) “simple assertion, unsubstantiated by relevant evidence”

241. In *Thailand – H-Beams*, the Panel stated that “raw numerical data would constitute ‘relevant evidence’ rather than merely a ‘simple assertion’ within the meaning of this provision.”³⁰⁷

(f) Relationship with other paragraphs of Article 5

242. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 5.2 and 5.3 in order to clarify the requirements under both Articles 5.2 and 5.3. See paragraph 248 below.

243. Also, in *Guatemala – Cement II*, the Panel stated that “[i]n light of our finding that the Ministry’s

²⁹⁹ Panel Report on *Guatemala – Cement I*, paras. 7.75–7.77.

³⁰⁰ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³⁰¹ WT/DSB/M/51, section 9(a).

³⁰² Panel Report on *Mexico – Corn Syrup*, paras. 7.73–7.74.

³⁰³ (*footnote original*) Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.

³⁰⁴ Panel Report on *Mexico – Corn Syrup*, para. 7.76.

³⁰⁵ Panel Report on *Thailand – H-Beams*, paras. 7.75–7.76.

³⁰⁶ Panel Report on *Thailand – H-Beams*, para. 7.77.

³⁰⁷ Panel Report on *Thailand – H-Beams*, para. 7.77.

determination that it had sufficient evidence to justify the initiation of an investigation was inconsistent with Article 5.3, we do not consider it necessary to rule on Mexico's Article 5.2 claims regarding the sufficiency of Cementos Progreso's application."³⁰⁸

3. Article 5.3

- (a) "sufficient evidence to justify the initiation of an investigation"
- (i) *Distinction from the requirements under Article 5.2*

244. In *Guatemala – Cement II*, in examining the claim that Guatemala's investigating authority based its initiation decision on insufficient evidence in violation of Article 5.3, the Panel stated:

"Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation."³⁰⁹

245. On the relationship between Articles 5.2 and 5.3, the Panel on *Guatemala – Cement I* commented to the same effect that the fact that an application satisfied the requirements of Article 5.2 did not demonstrate that there was "sufficient evidence" to justify initiation under Article 5.3.³¹⁰ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 5.³¹¹ The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³¹²

246. The Panel on *Guatemala – Cement II* held that the appropriate legal standard under Article 5.3 was not the adequacy and accuracy *per se* of the evidence in the application, but the sufficiency of the evidence:

"[I]n accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation. Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and not its adequacy and accuracy *per se*, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation."³¹³

247. In *Guatemala – Cement II*, on the basis of the distinction between Articles 5.2 and 5.3 described in the

excerpt in paragraph 248 below, the Panel stated that "[o]ne of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3."³¹⁴ In support of this proposition, the Panel cited the panel's finding on *Guatemala – Cement I*.³¹⁵

- (ii) *Sufficient evidence for "dumping"*

248. In *Guatemala – Cement II*, in examining the issue of whether Articles 2.1 and 2.4 are applicable to the decision to initiate an investigation, i.e. which specific elements of dumping need to be supported by sufficient evidence under Article 5.3, the Panel first held that what constitutes necessary evidence for the purposes of Article 5.3 can be inferred from Article 5.2. The Panel then found that "in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2":

"[W]e first observe that, although there is no express reference to evidence of dumping in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term 'dumping' in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an

³⁰⁸ Panel Report on *Guatemala – Cement II*, para. 8.59.

³⁰⁹ Panel Report on *Guatemala – Cement II*, para. 8.35. Also see Panel Report on *US – Lumber V*, paras. 7.83–7.84.

³¹⁰ Panel Report on *Guatemala – Cement I*, paras. 7.49–7.53.

³¹¹ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³¹² WT/DSB/M/51, section 9(a).

³¹³ Panel Report on *Guatemala – Cement II*, para. 8.31. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.60.

³¹⁴ Panel Report on *Guatemala – Cement II*, para. 8.62.

³¹⁵ Panel Report on *Guatemala – Cement I*, para. 7.53.

investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.

We note that Article 2.1 states that a product is to be considered as dumped 'if the export price . . . is less than the *comparable* price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.' (emphasis added). Other provisions of Article 2 that further elaborate on this basic definition include Article 2.4, which sets forth certain principles regarding the comparability of export prices and normal value. In particular, Article 2.4 specifies that comparisons between the export price and the normal value shall be made at the same level of trade, and that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in level of trade and quantity. Consistent with our discussion above, we consider that, although these provisions of Article 2 do not 'apply' as such to initiation determinations, they are certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation.³¹⁶³¹⁷

249. The Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II* on the issue of which specific elements of dumping need to be supported by sufficient evidence under Article 5.3 (see paragraph 248 above)³¹⁸, but the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel's discussion of Article 2.4.³¹⁹ The Panel Report on *Guatemala – Cement I* was accordingly adopted as reversed by the Appellate Body.³²⁰

250. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected Brazil's claim that an investigation cannot be initiated based on an application including only normal value data related to sales in one city and expressed the view that "it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country"³²¹

251. The Panel on *Argentina – Poultry Anti-Dumping Duties* also examined the compatibility with Article 5.3,

read in light of Article 2.4.2, of an initiation based on a weighted average export price that was calculated using only those transactions with a price lower than the normal value. As the weighted average export price was therefore not based on the totality of comparable export transactions, the Panel considered that "the use of such a practice would not allow an objective and impartial investigating authority to properly conclude that there was sufficient evidence of dumping to justify the initiation of an investigation."³²² The Panel thus also rejected the argument that, in order to initiate, an investigating authority need only satisfy itself that there has been some dumping, in the sense that certain transactions were dumped:

"We recall that, 'in order to determine whether or not there is sufficient evidence of dumping for the purpose of initiation, an investigating authority cannot entirely disregard the elements that configure the existence of [dumping] outlined in Article 2'.³²³ A determination of dumping should be made in respect of the product as a whole, for a given period, and not for individual transactions concerning that product. An investigating authority therefore cannot disregard export transactions at the time of initiation simply because they are equal to or greater than normal value. Disregarding such transactions does not provide a proper basis for determining whether or not there is sufficient evidence of dumping to justify initiation."³²⁴

³¹⁶ (*footnote original*) We understand Guatemala to agree to our approach concerning the relationship between Article 2 and Article 5.3. At para. 136 of its first written submission, Guatemala asserted that it is "not suggesting that Articles 2 and 3 are totally irrelevant during the initiation phase. Articles 2 and 3 contain definitions which give meaning to the expressions 'dumping', 'injury' and 'causal link' used in Article 5.2. When the authorities examine the accuracy and adequacy of the evidence submitted in the application, those definitions help to establish whether there is 'sufficient evidence' in the meaning of Article 5.3 to justify the initiation of the investigation."

³¹⁷ Panel Report on *Guatemala – Cement II*, paras. 8.35–8.36. The Panel on *Argentina – Poultry Anti-Dumping Duties* fully agreed with this view expressed by the Panel on *Guatemala – Cement II* while adding that it did not mean to suggest that "an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the *quantity* and *quality* that would be necessary to support a preliminary or final determination. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation." Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.

³¹⁸ Panel Report on *Guatemala – Cement I*, paras. 7.64–7.66.

³¹⁹ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³²⁰ WT/DSB/M/51, section 9(a).

³²¹ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.67.

³²² Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.78.

³²³ (*footnote original*) Panel Report, *Guatemala – Cement II*, para. 8.35.

³²⁴ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.80.

252. On the question of whether a comparison between normal value for one day and export price for a period of several months constitutes a proper basis for determining whether there is sufficient evidence of dumping to justify the initiation of the investigation, the Panel on *Argentina – Poultry Anti-Dumping Duties* recalled that Article 2.4 requires that a fair comparison be made between the export price and the normal value in respect of sales “made at as nearly as possible the same time”. It concluded that “there should be a substantial degree of overlap in the periods considered in order for the comparison of normal value and export price to be fair within the meaning of Article 2.4”.³²⁵ For a product in respect of which there are many transactions taking place on a daily basis, it was “not persuaded that domestic sales data for one day provides sufficient overlap with export price data for several months for the purpose of Article 5.3.”³²⁶

(iii) *Sufficient evidence for “injury”*

253. In *Guatemala – Cement II*, the Panel examined Mexico’s argument that the Guatemalan authority did not have sufficient evidence of threat of material injury to justify the initiation of an investigation. In rebuttal, Guatemala argued that Article 3.7 does not apply to the determination of the investigating authorities on this issue, because Article 5.2(iv), which requires that an application contain certain information, does not refer to Article 3.7, but only to Articles 3.2 and 3.4. The Panel responded:

“[W]hen considering whether there is sufficient evidence of threat of injury to justify the initiation of an investigation, an investigating authority cannot totally disregard the elements that configure the existence of threat of injury outlined in Article 3. We do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of threat of material injury within the meaning of Article 3 of the quantity and quality that would be necessary to support a preliminary or final determination of threat of injury. However, the investigating authority must have before it evidence of threat of material injury, as defined in Article 3, sufficient to justify the initiation of an investigation.”³²⁷

254. However, with respect to Article 3.7, the Panel added a caveat to its finding quoted under paragraph 253 above, in stating that the investigating authority need not have before it information on all Article 3.7 factors where there is an allegation of threat of injury:

“Article 3.7 provides specific guidance on the factors to be considered by an investigating authority when making a determination of threat of injury. Although we do not necessarily believe that an investigating authority

must have before it information on all Article 3.7 factors in a case where initiation of an investigation is requested on the basis of an alleged threat of injury, a consideration of those factors is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of material injury to justify the initiation of an investigation.”³²⁸

255. On the issue of which specific elements of dumping need to be supported by sufficient evidence under Article 5.3, the Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II* (see paragraphs 253–254 above).³²⁹ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach any conclusion on the Panel’s discussion of Article 5³³⁰, and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³³¹

(iv) *Standard of review – relationship with Article 17.6*

256. In determining what constitutes “sufficient evidence to justify the initiation of an investigation” under Article 5.3, the Panel on *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i)³³², referring, in so doing, to the GATT Panel Report on *US – Softwood Lumber II*.³³³ The Panel also agreed with the view expressed by the Panel on *US – Softwood Lumber II* that “the quantum and quality of the evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after the investigation”.³³⁴ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17.6 by the Panel³³⁵, and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³³⁶

³²⁵ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.84. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 5.3, read in light of Article 2.4, cannot be interpreted to require that data on normal value and export price cover identical periods of time. Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.84.

³²⁶ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.85.

³²⁷ Panel Report on *Guatemala – Cement II*, para. 8.45.

³²⁸ Panel Report on *Guatemala – Cement II*, para. 8.52.

³²⁹ Panel Report on *Guatemala – Cement I*, paras. 7.75–7.77.

³³⁰ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³³¹ WT/DSB/M/51, section 9(a).

³³² Panel Report on *Guatemala – Cement I*, para. 7.57. See paras. 629–641 of this Chapter.

³³³ (footnote original) Panel Report on *US – Softwood Lumber II*, para. 331.

³³⁴ Panel Report on *Guatemala – Cement I*, para. 7.57.

³³⁵ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³³⁶ WT/DSB/M/51, section 9(a).

257. Referring to the approach of the Panel on *Guatemala – Cement I*³³⁷, which took into account the reasoning of the GATT Panel on *US – Softwood Lumber II*, the Panel on *Mexico – Corn Syrup* stated that “[o]ur approach in this dispute will similarly be to examine whether the evidence before [the investigating authority] at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation.”³³⁸

258. In *Guatemala – Cement II*, the Panel found that “[i]t is clear on the face of these documents that the invoices reflecting prices in Mexico are for sales occurring at the very end of the commercialisation chain and the import certificates reflect prices at the point of importation which is the beginning of the commercialisation chain for Mexican cement in Guatemala.”³³⁹ The Panel subsequently found, applying the standard of review set forth in Article 17.6(i):

“[T]he fact that the sales in the Mexican and Guatemalan markets were at different levels of trade was apparent from the application itself, and an unbiased and objective investigating authority should have recognized this fact without the need for it to be pointed out. Nor do we consider that an investigating authority can completely ignore obvious differences that could affect the comparability of the prices cited in an application on the ground that the foreign exporter has not demonstrated that they have affected price comparability. Moreover, at the point where the investigating authority is considering whether there is sufficient evidence to initiate an investigation, potentially affected exporters have not even been notified of the existence of an application, much less been provided a copy thereof. Thus, the logical implication of Guatemala’s argument is that an investigating authority need never take into account issues of price comparability when considering whether there is sufficient evidence of dumping to initiate an investigation. We cannot agree with such an interpretation of the AD Agreement, particularly in light of the criteria set out in para. 8.36 above.

After a thorough review of all the actions by the Ministry leading up to the initiation of the investigation, we find that no attempt was made to take into account glaring differences in the levels of trade and sales quantities and their possible effects on price comparability. Under these circumstances, an unbiased and objective investigating authority could not in our view have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation.”³⁴⁰

259. Having found that the Guatemalan investigating authority should have considered the issue of price comparability when considering whether there was

sufficient evidence of dumping to initiate an investigation, the Panel emphasized that it did not expect:

“[I]nvestigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so.”³⁴¹

(b) “shall examine the accuracy and adequacy of the evidence provided in the application”

260. The Panel on *Guatemala – Cement I* considered whether there had been sufficient evidence to justify an anti-dumping investigation under Article 5.3.³⁴² However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.3 by the Panel³⁴³, and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³⁴⁴

261. In determining what the parameters are of the requirement to “examine” the accuracy and adequacy of the evidence, and on what basis an assessment can be made regarding whether the necessary examination was carried out, the Panel on *EC – Bed Linen*, in a finding subsequently not reviewed by the Appellate Body, stated:

“The only basis, in our view, on which a panel can determine whether a Member’s investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of – the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that

³³⁷ The Panel on *Mexico – Corn Syrup* cited Panel Report on *Guatemala – Cement I*, paras. 7.54–7.55. The Panel stated:

“We recognize that, because the Appellate Body reversed the *Guatemala-Cement* Panel’s conclusion on the issue of whether the dispute was properly before it, that Panel’s conclusions in this regard have no legal status. However, the Panel’s report sets out a standard that we consider instructive in this case.”

Panel Report on *Mexico – Corn Syrup*, para. 7.94.

³³⁸ Panel Report on *Mexico – Corn Syrup*, para. 7.95.

³³⁹ Panel Report on *Guatemala – Cement II*, para. 8.37.

³⁴⁰ Panel Report on *Guatemala – Cement II*, paras. 8.38–8.39.

³⁴¹ Panel Report on *Guatemala – Cement II*, para. 8.40.

³⁴² Panel Report on *Guatemala – Cement I*, para. 7.71.

³⁴³ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³⁴⁴ WT/DSB/M/51, section 9(a).

there was sufficient evidence to justify initiation, that determination can only have been made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it.”³⁴⁵

262. Regarding a determination under Article 5.3, the Panel on *Mexico – Corn Syrup* stated that “Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of *all* underlying issues considered”.³⁴⁶ Applied to the facts of the dispute, the Panel concluded that “Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation.”³⁴⁷

263. In *Guatemala – Cement II*, the Panel agreed that “statements of conclusion unsubstantiated by facts do not constitute evidence of the type . . . which allows an objective examination of its adequacy and accuracy by an investigating authority as provided in Article 5.3.”³⁴⁸

(c) Relationship with other paragraphs of Article 5

264. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 5.2 and 5.3. See paragraphs 248–249 above.

265. The Panel on *Guatemala – Cement II* rejected Mexico’s argument that a violation of Article 5.3 due to the initiation of an investigation in the absence of sufficient evidence necessarily constitutes a violation of Article 5.7. See paragraph 281 below.

266. The Panel on *Mexico – Corn Syrup* touched on the relationship between Articles 5.3 and 5.8. See paragraph 283 below.

4. Article 5.4

(a) General

267. The Appellate Body on *US – Offset Act (Byrd Amendment)* considered that Article 5.4 requires “no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application.”³⁴⁹ The Appellate Body went on to note that Article 5.4 contains no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application.³⁵⁰ The Appellate Body recalled that “there may be a number of reasons why a domestic producer could choose to support an investigation.”³⁵¹ The Appellate Body strongly disagreed with the approach taken by the

Panel in relation to the concept of support³⁵² and reached the following conclusion:

“A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms “expressing support” and “expressly supporting” clarify that Articles 5.4 and 11.4 require only that authorities “determine” that support has been “expressed” by a sufficient number of domestic producers. Thus, in our view, an “examination” of the “degree” of support, and not the “nature” of support is required. In other words, it is the “quantity”, rather than the “quality”, of support that is the issue.”³⁵³

(b) Relationship with Article 11.4 of the SCM Agreement

268. In *US – Offset Act (Byrd Amendment)*, the Appellate Body further to noting that both Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* are “identical” provisions, analysed them jointly. See paragraph 267 above.

5. Article 5.5

(a) “before proceeding to initiate”

269. In *Guatemala – Cement II*, Mexico claimed that in violation of Article 5.5, Guatemala did not notify the Government of Mexico before proceeding to initiate the investigation. Guatemala argued that that the effective date of initiation of the investigation was not 11 January 1996, the date alleged by Mexico, and maintained that according to its own Constitution and legislation, the investigating authority could not have initiated the investigation until the Government of Mexico had been officially notified. Referring to footnote 1 of the *Anti-Dumping Agreement*, the Panel first determined at what

³⁴⁵ Panel Report on *EC – Bed Linen*, para. 6.199.

³⁴⁶ Panel Report on *Mexico – Corn Syrup*, para. 7.102.

³⁴⁷ Panel Report on *Mexico – Corn Syrup*, para. 7.105.

³⁴⁸ Panel Report on *Guatemala – Cement II*, para. 8.53.

³⁴⁹ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 286.

³⁵⁰ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 291.

³⁵¹ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 290.

³⁵² The Panel on *US – Offset Act (Byrd Amendment)* was of the view that the Offset Act defeated the object and purpose of Article 5.4 as it considered that Article 5.4 was “introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports.” Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.65.

³⁵³ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 283.

specific point in time the Guatemalan investigation had been initiated within the meaning of the *Anti-Dumping Agreement*:

“[T]he date of initiation is the date of the procedural action by which Guatemala formally commenced the investigation. We are of the view that in the case before us the action by which the investigation was formally commenced is the date of publication of the notice of initiation which occurred on 11 January 1996.”³⁵⁴

270. The Panel on *Guatemala – Cement I*, like the Panel on *Guatemala – Cement II*, also reached the conclusion that the date of initiation for purposes of Article 5.5 is the date of action by which the Guatemalan authorities formally commenced the investigation.³⁵⁵ The Appellate Body, however, found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.5 by the Panel,³⁵⁶ and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³⁵⁷

271. The Panel on *Guatemala – Cement II* further rejected Guatemala’s argument that “[it] could not have initiated the investigation until after it had notified Mexico”³⁵⁸, because its own Constitution and laws mandated it to do so:

“In acceding to the WTO, Guatemala undertook to be bound by the rules contained in the AD Agreement, and our mandate is to review Guatemala’s compliance with those rules. The fact that the Constitution of Guatemala mandates that the investigating authorities proceed in a way which is consistent with its international obligations, does not validate the actions actually carried out by those authorities if those actions violate Guatemala’s commitments under the WTO. Whether Mexico chose not to pursue its rights under Guatemalan law is of no concern to us, as this would not affect its rights under the WTO Agreements. . . .”³⁵⁹

272. In *Guatemala – Cement II*, the Panel also stated, with respect to Guatemala’s assertion that “in some cases Mexico has failed to notify the government of the investigated exporters in a timely fashion under Article 5.5”³⁶⁰, that “[w]e are of the view that Mexico’s actions regarding notifications is of no relevance to issues before us in this case, which requires us to review the actions of the Guatemalan authorities.”³⁶¹³⁶²

(b) “notify the government”

(i) *General*

273. At its meeting of 29 October 1998, the Committee on Anti-Dumping Practices adopted a recommendation on the timing of notifications required under Article 5.5.³⁶³

(ii) “Oral” notification

274. In *Thailand – H-Beams*, the Panel, in a finding not reviewed by the Appellate Body, considered that a notification required under Article 5.5 can be made orally. The Panel stated:

“Article 5.5 AD does not specify the form that the notification must take. The *Concise Oxford Dictionary* defines the term ‘notify’ as: ‘inform or give notice to (a person)’; ‘make known, announce or report (a thing)’. We consider that the form of the notification under Article 5.5 must be sufficient for the importing Member to ‘inform’ or ‘make known’ to the exporting Member certain facts. While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the AD Agreement, the text of Article 5.5 does not expressly require that the notification be in writing.”³⁶⁴³⁶⁵

(iii) *Content of notification*

275. In *Thailand – H-Beams*, the Panel examined what must be notified under Article 5.5, as follows:

“The text of Article 5.5 does not specify the contents of the notification. It provides: ‘after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned’.³⁶⁶ Because the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, we consider that the fact of the receipt of a properly documented application would be

³⁵⁴ Panel Report on *Guatemala – Cement II*, para. 8.82.

³⁵⁵ Panel Report on *Guatemala – Cement I*, para. 7.34.

³⁵⁶ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³⁵⁷ WT/DSB/M/51, section 9(a).

³⁵⁸ Panel Report on *Guatemala – Cement II*, para. 8.83.

³⁵⁹ Panel Report on *Guatemala – Cement II*, para. 8.83.

³⁶⁰ Panel Report on *Guatemala – Cement II*, para. 8.83.

³⁶¹ (*footnote original*) As for Guatemala’s defences claiming acquiescence and estoppel, harmless error or lack of nullification or impairment of a benefit, these issues are addressed in sections VIII.B.5 and VIII.C.7.

³⁶² Panel Report on *Guatemala – Cement II*, para. 8.83.

³⁶³ G/ADP/M/13, Section E, in particular, para. 44. The text of the recommendation can be found in G/ADP/5.

³⁶⁴ (*footnote original*) While there have been discussions in the Ad Hoc Group on the issue of the form of the notification (See G/ADP/AHG/R/4, para. 19 (Exhibit Thailand-61); G/ADP/AHG/R/5, paras. 18–19 (Exhibit Thailand-59); G/ADP/AHG/R/2, para. 5 (Exhibit Thailand-60)), there has been no recommendation adopted by the ADP Committee on this issue.

³⁶⁵ Panel Report on *Thailand – H-Beams*, para. 7.89.

³⁶⁶ (*footnote original*) While there have been discussions in the Ad Hoc Group on the elements that certain Members consider relevant in this context (G/ADP/AHG/R/4, para. 18 (Exhibit Thailand-61), G/ADP/AHG/R/5, para. 17 (Exhibit Thailand-59)) there has been no recommendation adopted by the ADP Committee on this issue.

an essential element of the contents of the notification."³⁶⁷

(c) “Harmless error” with respect to Article 5.5 violation/Rebuttal against nullification or impairment presumed from a violation of Article 5.5

276. In *Guatemala – Cement II*, Guatemala argued that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, had not affected the course of the investigation, and thus, (a) the alleged violations were not harmful according to the principle of harmless error, (b) Mexico “convalidated” the alleged violations by not objecting immediately after their occurrence, and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the *Anti-Dumping Agreement*. The Panel first responded to the argument on “harmless error”, concluding that “the concept of ‘harmless error’ as presented by Guatemala” had not “attained the status of a general principle of public international law”:

“In our view, the GATT panel referred to by Guatemala in support of its position merely stated that it did not wish ‘to exclude that the concept of harmless error could be applicable in dispute settlement proceedings under the Agreement.’³⁶⁸ It therefore cannot be concluded that the GATT panel referred to ‘recognized the principle of harmless error ‘as alleged by Guatemala. We do not consider that the concept of ‘harmless error’ as presented by Guatemala has attained the status of a general principle of public international law. In any event, we consider that our first task in this dispute is to determine whether Guatemala has acted consistently with its obligations under the relevant provisions of the AD Agreement. To the extent that Mexico can demonstrate that Guatemala has not respected its obligations under the relevant provisions of that Agreement, we must next consider arguments raised by Guatemala in respect of the nullification or impairment of benefits accruing to Mexico thereunder. Thus, while arguments regarding the existence and extent of the possible harm suffered by Mexico may be relevant to the issue of nullification or impairment,³⁶⁹ we do not consider that an argument of harmless error represents a defence in itself to an alleged infringement of a provision of the WTO Agreement.”³⁷⁰

277. On the second argument put forward by Guatemala in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely the lack of reaction from Mexico, the Panel found that “Mexico was under no obligation to object immediately to the violations it now alleges before the Panel”:

“Guatemala uses both the concepts of ‘acquiescence’ and ‘estoppel’ in support of this argument. We note that ‘acquiescence’ amounts to ‘qualified silence’, whereby silence in the face of events that call for a reaction of

some sort may be interpreted as a presumed consent.³⁷¹ The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is ‘estopped’, that is precluded.³⁷²

Regarding both arguments of acquiescence and estoppel we note that Mexico was under no obligation to object immediately to the violations it now alleges before the Panel.³⁷³ Mexico raised claims concerning Articles 5.5, 12.1.1 and 6.1.3 at an appropriate moment under the dispute settlement procedure envisaged by the AD Agreement and the DSU. Thus, Mexico cannot therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice or to delay in providing the full text of the application, much less to have given ‘assurances’ to Guatemala that it would not later challenge these actions in WTO dispute settlement. Since Mexico raised its claims at an appropriate moment under the WTO dispute settlement procedures, Guatemala could not have reasonably relied upon Mexico’s alleged lack of protest to conclude that Mexico would not bring a WTO complaint. In any event, Guatemala has not satisfied us that, had Mexico complained after the fact, but during the course of the investigation, Guatemala could or would have taken action to remedy the situation. Specifically, with respect to the delay in the Article 5.5 notification, Guatemala asserts that had Mexico objected to the notification delay in a timely manner, the Guatemalan authorities would have reinitiated the investigation after presenting Mexico with the notification under Article 5.5. We are of the view that this argument presented by Guatemala is highly speculative and note that the Panel has been established to rule on the WTO conformity of the actions by Guatemala and not on the WTO conformity of the actions Guatemala alleges it could have taken. In any event, Guatemala states at para. 217 of its first written submission that Mexico first raised the Article 5.5 issue on 6 June 1996, that is at a relatively early stage of the Ministry’s investigation, and precedes the Ministry’s preliminary affirmative determination. Nevertheless, Guatemala failed to take any steps to address the delayed Article 5.5 notification at that time. Based

³⁶⁷ Panel Report on *Thailand – H-Beams*, para. 7.91.

³⁶⁸ (*footnote original*) Panel Report on *Brazil – EEC Milk*, para. 271.

³⁶⁹ (*footnote original*) Or in the event Article 22 is invoked, to the issues of compensation and/or suspension of equivalent concessions.

³⁷⁰ Panel Report on *Guatemala – Cement II*, para. 8.22.

³⁷¹ (*footnote original*) V.D. Degan, *Sources of International Law*, Martinus Nijhoff Publishers, p. 348–349.

³⁷² (*footnote original*) Brownlie, *Principles of International Law*, Clarendon Press, p. 640–642.

³⁷³ (*footnote original*) Regarding acquiescence we note that the precise scope and applicability of this concept is still a matter of debate, and it is clear that not any silence can be considered to constitute consent.

on these considerations the Panel rejects Guatemala's defence that Mexico 'convalidated' the alleged violations of Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement."³⁷⁴

278. The Panel on *Guatemala – Cement II* then considered the third element of Guatemala's argument in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely that no nullification or impairment resulted from the alleged violation of Article 5.5. The Panel found that Guatemala did not rebut the presumption of nullification or impairment under Article 3.8 of the *DSU*, stating:

"There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5."³⁷⁵

279. The Panel also rejected Guatemala's argument "that the Panel should examine Guatemala's acts and decide whether the non-fulfilment of a procedural obligation should be overlooked on the grounds that the omission did not prejudice the rights of Mexico or [the Mexican producer on whose products anti-dumping duties had been imposed]":

"We could find no basis for such a distinction in the *DSU*, as suggested by Guatemala between substantive and 'mere' procedural violations. There is no reason to regard violations of procedural obligations differently than obligation of a substantial nature. Compliance with the complete set of procedural rules relating to anti-dumping investigations, including those concerning notification and enhanced transparency, is required. This obligation to comply with all provisions, both procedural and substantive should not be taken lightly if one is not to devoid of all meaning the AD Agreement itself. As detailed in sections . . . above we have found that Guatemala violated Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement by failing to timely notify Mexico of the decision to initiate an investigation, to timely provide Mexico and Cruz Azul a copy of the application, and to publish an adequate notice of initiation. We consider that a key function of the transparency requirements of the AD Agreement is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, or the application is not provided in time, or the public notice is inadequate the ability of the interested party to take such steps is vitiated. It is not for us to now speculate on what steps Mexico might have taken had it been timely notified or provided with the application, or had the public notice been adequate, and how Guatemala

might have responded to those steps. Thus, while there is a possibility that the investigation would have proceeded in the same manner had Guatemala complied with its transparency obligations, we cannot state with certainty that the course of the investigation would not have been different."³⁷⁶

280. The Panel on *Guatemala – Cement I* also addressed the argument for the concept of "harmless error".³⁷⁷ However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the discussion of Article 5.5 by the Panel.³⁷⁸ The Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³⁷⁹

6. Article 5.7

281. In *Guatemala – Cement II*, with the understanding that Mexico argued that "the initiation of an investigation in the absence of sufficient evidence to justify initiation (contrary to Article 5.3) necessarily constitutes a violation of Article 5.7", the Panel held :

"Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially. We do not consider that the fulfilment of this requirement is conditioned in any way on the substantive nature of that evidence."³⁸⁰

282. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that evidence of dumping and injury must cover simultaneous periods. It was thus of the view that an argument which concerned the substantive nature of the evidence considered by the authorities in the decision whether or not to initiate an investigation, rather than the timing of the consideration itself, was "outside the scope of the obligation contained in Article 5.7".³⁸¹ The Panel considered that:

"Article 5.7 imposes a procedural obligation on the investigating authority to examine the evidence before it of dumping and injury simultaneously, rather than sequentially, *inter alia* in the decision whether or not to initiate an investigation. We are of the view that Article 5.7 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3 of the *AD Agreement*."³⁸²

³⁷⁴ Panel Report on *Guatemala – Cement II*, paras. 8.23–8.24.

³⁷⁵ Panel Report on *Guatemala – Cement II*, para. 8.109.

³⁷⁶ Panel Report on *Guatemala – Cement II*, para. 8.111. In support of this proposition, the Panel cited Panel Report on *Guatemala – Cement I*, para. 7.42.

³⁷⁷ Panel Report on *Guatemala – Cement I*, paras. 7.42–7.43.

³⁷⁸ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³⁷⁹ WT/DSB/M/51, section 9(a).

³⁸⁰ Panel Report on *Guatemala – Cement II*, para. 8.67.

³⁸¹ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.119.

³⁸² Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.118.

7. Article 5.8

(a) Rejection of an application to initiate an investigation

283. The Panel on *Mexico – Corn Syrup* noted that “Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application.”³⁸³

284. In *Guatemala – Cement II*, the Panel addressed the question of applicability of Article 5.8 before the initiation of an investigation, in order to examine Mexico’s claim that Guatemala violated Article 5.8 by not rejecting the application made by a Guatemalan producer and by not refraining from initiating the investigation due to the lack of sufficient evidence of dumping and threat of material injury to justify initiation. Citing the finding of the Panel on *Mexico – Corn Syrup* referenced in paragraph 285 below, Guatemala argued that Article 5.8 applies only after the initiation of an investigation. The Panel rejected this argument, and stated:

“We note that Article 5.8 makes specific reference to the rejection of an application as soon as the authorities conclude that there is not sufficient evidence of dumping or injury to justify proceeding with the case. This language on rejection of an application seems to be in contrast with Guatemala’s argument that Article 5.8 applies only after initiation. We are of the view that, if the drafters intended that Article 5.8 apply only after initiation, the reference to promptly terminating an investigation would have sufficed. By referring to the rejection of an application Article 5.8 addresses the situation where an application has been received but an investigation has not yet been initiated. That the text of Article 5.8 continues after the quoted section to describe situations in which an initiated investigation should be terminated, does not support Guatemala’s argument that the whole of Article 5.8 applies only after the investigation has been initiated. On the contrary, the second sentence of Article 5.8, by specifying that ‘there shall be immediate termination in cases’ confirms that the first sentence of Article 5.8 expressly contemplates its application pre-initiation by including a reference to the rejection of an application. Otherwise, mere reference to the termination of an investigation, as in the second sentence of Article 5.8, would have been all that was needed in the first sentence to make it clear that it applied once an investigation was underway.”³⁸⁴

285. With respect to the finding of the Panel on *Mexico – Corn Syrup* cited by Guatemala, the Panel stated:

“In our view, the findings in *Mexico – HFCS* on this issue do not support the interpretation that Article 5.8 applies only after an investigation has been initiated.

...
The panel in *Mexico – HFCS* determined that there had not been a violation of Article 5.3 as there was sufficient evidence to justify initiation. After having made that determination the *Mexico – HFCS* panel proceeded to find that given that there was sufficient evidence to justify initiation under Article 5.3, there was no possible violation of Article 5.8. This in no way detracts from our position that Article 5.8 applies pre-initiation. The Panel in *Mexico – HFCS* would not have even considered the question of whether rejection of the application was warranted if it had not considered that Article 5.8 applies before initiation.”³⁸⁵

286. On the issue of whether Article 5.8 applied only after the initiation of an investigation, the Panel on *Guatemala – Cement I* reached the same conclusion as the Panel on *Guatemala – Cement II*.³⁸⁶ However, the Appellate Body found that the dispute was not properly before the Panel and did not reach any conclusion on the interpretation of Article 5.8 by the Panel³⁸⁷, and accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.³⁸⁸

287. The Panel on *US – Lumber V* stated that Article 5.8 does not require an investigating authority, after initiation, to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence:

“We can however find no basis to conclude that Article 5.8 imposes upon an investigating authority a continuing obligation after initiation to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence. Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application. We are of the view that it could not have been the intention of the drafters of Article 5.8 that its interpretation could result in that an investigation could have been initiated on the basis of sufficient evidence, but that the very same investigation had to be terminated if additional evidence was made available by the

³⁸³ Panel Report on *Mexico – Corn Syrup*, para. 7.99.

³⁸⁴ Panel Report on *Guatemala – Cement II*, para. 8.72.

³⁸⁵ Panel Report on *Guatemala – Cement II*, paras. 8.73–8.74.

³⁸⁶ Panel Report on *Guatemala – Cement I*, para. 7.59.

³⁸⁷ Appellate Body Report on *Guatemala – Cement I*, para. 89.

³⁸⁸ WT/DSB/M/51, section 9(a).

respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping".³⁸⁹

(b) "cases"

288. The Panel on *US – DRAMS* was called upon to decide whether the scope of Article 5.8, as defined by the word "cases" in the second sentence, includes both anti-dumping investigations and Article 9.3 duty assessment procedures. The Panel held that it did not see "how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation'":

"First, the term 'case' is used in the first sentence of Article 5.8. The first sentence is concerned explicitly and exclusively with the circumstances in which an 'application' ('under [Article 5.] paragraph 1') shall be rejected and an 'investigation' terminated as a result of insufficient evidence to justify proceeding with the 'case'. As the treatment of the 'application' and conduct of the 'investigation' is dependent on the sufficiency of evidence concerning the 'case', we consider that the term 'case' in the first sentence must at least encompass the notions of 'application' and 'investigation'. In our view, it would [be] meaningless for the term 'case' in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure, since we fail to see how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation', both of which precede the Article 9.3 duty assessment procedure. As we consider that the term 'case' in the first sentence of Article 5.8 does not include the concept of 'duty assessment', we see no reason to adopt a different approach to the term 'cases' in the second sentence of that provision."³⁹⁰

(c) "*de minimis*" test

289. Having determined that that term "cases" in Article 5.8 does not encompass the concept of an Article 9.3 duty assessment procedure³⁹¹, as referenced in paragraph 288 above, the Panel on *US – DRAMS* then concluded that "Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures".³⁹² The Panel described the function of the Article 5.8 *de minimis* test as "to determine whether or not an exporter is subject to an anti-dumping order" and clearly distinguished this from any *de minimis* test applied under Article 9.3 duty assessment procedures.³⁹³

290. For further discussion of this issue by the Panel on *US – DRAMS*, see also paragraphs 461–462 below.

(d) Negligible import volumes

291. On 27 November 2002, the Committee on Anti-Dumping Practices adopted the "Recommendation concerning the time-period to be considered in making a determination of negligible import volumes for purposes of Article 5.8 of the Agreement".³⁹⁴ In this Recommendation, the Committee on Anti-Dumping Practices notes that Article 5.8 of the *Anti-Dumping Agreement*, which provides that there shall be immediate termination in cases where the authorities determine that the volume of dumped imports, actual or potential, is negligible, does define the volume of dumped imports from a particular country that shall normally be regarded as negligible but does not however establish a period of time over which imports are to be counted in determining whether the volume of imports is negligible. The Committee therefore considered that guidance regarding an appropriate time-period for that determination would be useful. Accordingly, the Committee on Anti-Dumping Practices recommends:

"... with respect to original investigations to determine the existence of dumping and consequent injury, whether the volume of dumped imports, actual or potential, from a particular country is regarded as negligible shall be determined with reference to the volume of dumped imports from that country during:

- (a) the period of data collection for the dumping investigation; or
- (b) the most recent 12 consecutive months prior to initiation for which data are available; or
- (c) the most recent 12 consecutive months prior to the date on which the application was filed, for which data are available, provided that the lapse of time between the filing of the application and the initiation of the investigation is no longer than 90 days.

Not later than 60 days after the approval of this recommendation Members shall notify to the Committee on Anti-Dumping Practices which of the time-periods set out above, they will use in all investigations thereafter. If in any investigation the chosen methodology is not utilized, one of the two other methodologies shall be adopted, and an explanation shall be made in the public notice or separate public report of that investigation. Members which adopt the time-period mentioned in item (c) above shall also notify which of the other two time-periods they shall use in any case in which the lapse

³⁸⁹ Panel Report on *US – Softwood Lumber V*, para. 7.137.

³⁹⁰ Panel Report on *US – DRAMS*, para. 6.87.

³⁹¹ Panel Report on *US – DRAMS*, para. 6.87.

³⁹² Panel Report on *US – DRAMS*, para. 6.89.

³⁹³ Panel Report on *US – DRAMS*, para. 6.90.

³⁹⁴ G/ADP/10.

of time between the filing of the application and the initiation of the investigation is longer than 90 days, unless a Member's domestic law prohibits such a lapse"³⁹⁵

(e) Relationship with other paragraphs of Article 5

292. With respect to the relationship between Articles 5.3 and 5.8, see paragraph 283 above.

8. Relationship with other Articles

(a) Article 1

293. The *Guatemala – Cement II* Panel referred to footnote 1 to Article 1 in interpreting Article 5.5. See paragraph 269 above.

294. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."³⁹⁶ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(b) Article 2

295. The Panel on *Guatemala – Cement II* discussed the relationship between Articles 2, 5.2 and 5.3 in order to clarify the requirements under Article 5.3. See paragraph 248 above.

(c) Article 3

296. The relationship between Article 5.2(iv) and Articles 3.2 and 3.4 was discussed in *Mexico – Corn Syrup*. See paragraph 238 above.

297. In *Thailand – H-Beams*, the Appellate Body referred to Articles 3.7, 5.2 and 5.3 in interpreting Article 3.1. See paragraph 112 above.

298. Article 3 was discussed in interpreting which elements of "injury" have to be supported by sufficient evidence under Article 5.3 in *Guatemala – Cement II*. See paragraphs 253–254 above.

(d) Article 6

299. In *Guatemala – Cement II*, the Panel referred to Article 5.10 in examining Mexico's claim under Article 6.1.3. See paragraph 325 below.

(e) Article 9

300. Also, in *US – DRAMS*, the Panel discussed the relationship between Articles 5.8 and 9.3. See paragraphs 288–289 above, and 461–462 below.

301. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then determined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."³⁹⁷ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

(f) Article 10

302. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7 by reference to Article 5.3. See paragraph 483 below.

(g) Article 12

303. The Panel on *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1 in addressing a claim under Article 12.1. See paragraph 548 below.

304. In *Thailand – H-Beams*, the Panel examined Poland's argument that Article 12 of the *Anti-Dumping Agreement* is "useful context" in connection with its Article 5.5 claim. The Panel responded as follows:

"We note that both Articles 5.5 and 12.1 contain a requirement to notify the government of the exporting Member concerned of certain events connected with the initiation of an investigation at a certain point in time. However, it is clear that the requirements as to the timing, form and content of these notifications is different. Article 5.5 makes it clear that the notification referred to in that provision must take place 'after receipt of a properly documented application and before proceeding to initiate an investigation'. By contrast, Article 12.1 of the AD Agreement concerns notification of initiation, as it requires notification to 'the Member or Members the products of which are subject to such investigation . . .', '[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 . . .' and requires 'public notice' of initiation. As Article 12.1 provides that such 'public notice' must 'contain, or otherwise make available through a separate report, adequate information. . .',

³⁹⁵ G/ADP/10.

³⁹⁶ Panel Report on *Guatemala – Cement II*, para. 8.296.

³⁹⁷ Panel Report on *Guatemala – Cement II*, para. 8.296.

the notice must presumably be in writing. Furthermore, Article 12 involves the notification of a decision to initiate, which a Member may not yet have taken at the time of an Article 5.5 notification. That Article 12 specifically enumerates certain requirements with respect to the contents and form of the notice it requires, and Article 5.5 does not, strongly suggests to us that the requirements of Article 12 do not apply to notification under Article 5.5, and in no way changes our interpretation of the requirements concerning the timing, form and content of the notification to be given under Article 5.5.”³⁹⁸

(h) Article 17

305. With respect to the application of Article 17 in the examination required under Article 5.3, see paragraphs 256–259 above.

(i) Article 18

306. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then found that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”³⁹⁹ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

9. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

307. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, among them Article 5. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement* and under Article VI of *GATT 1994*, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁴⁰⁰ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See also paragraph 5 above.

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6 *Evidence*

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the

authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.¹⁵ Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

(footnote original) ¹⁵ As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters¹⁶ and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

(footnote original) ¹⁶ It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party’s case. Interested parties shall also have the right, on justification, to present other information orally.

³⁹⁸ Panel Report on *Thailand – H-Beams*, para. 7.93.

³⁹⁹ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁴⁰⁰ Panel Report on *Guatemala – Cement II*, para. 8.296.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.¹⁷

(footnote original) ¹⁷ Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.¹⁸

(footnote original) ¹⁸ Members agree that requests for confidentiality should not be arbitrarily rejected.

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I⁴⁰¹ shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II⁴⁰² shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be

⁴⁰¹ See Section XIX.

⁴⁰² See Section XX.

considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
- (ii) the government of the exporting Member; and
- (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.1

(a) General

(i) *Failure to indicate the information required*

308. In *Argentina – Ceramic Tiles*, the Panel, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article

6.8, concluded that an investigating authority could not fault an interested party for not providing information it was not clearly requested to submit:

"Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."⁴⁰³

(ii) *Failure to set time-limits for the presentation of arguments and evidence*

309. In *Guatemala – Cement II*, Mexico argued that Guatemala's investigating authority had violated Article 6.1 by failing to set a time-limit for the presentation of arguments and evidence during the final stage of the investigation while it had fixed a time-limit for the submission of arguments and evidence for the early part of the investigation. The Panel rejected this argument:

"In our view, Article 6.1 of the AD Agreement does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1 is that contained in Article 6.1.1, whereby exporters shall be given at least 30 days for replying to questionnaires. . . .

Article 6.1 requires investigating authorities to provide interested parties 'ample opportunity' to present in writing certain evidence. Article 6.1 does not explicitly require an investigating authority to set time limits for the submission of arguments and evidence during the final stage of an investigation.⁴⁰⁴ Article 6.1 simply requires that interested parties shall have 'ample' opportunity to present evidence and 'full' opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. In other words, these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in subparagraphs 1 through 3 of Article 6.1). What counts is whether, in practice, sufficient opportunity was provided, not whether time limits for the submission of evidence were set. Thus, even if the Ministry had failed to set time-limits for the submission of arguments and evidence during the final stage of the investigation, this would not *ipso facto* constitute a violation of Article 6.1 of the AD Agreement."⁴⁰⁵

⁴⁰³ Panel Report on *Argentina – Ceramic Tiles*, para. 6.54.

⁴⁰⁴ (*footnote original*) This does not, of course, preclude an authority from establishing such limits, so long as the basic requirements (such as "ample opportunity", or 30 days in respect of questionnaire replies) are respected.

⁴⁰⁵ Panel Report on *Guatemala – Cement II*, paras. 8.118–8.119.

310. The Panel further rejected Mexico's argument that "the Ministry's public notice of initiation granted interested parties 30 days in which to defend their interests, whereas no such time-limit was included in the public notice concerning the imposition of a provisional measure".⁴⁰⁶

"We would note that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the 'time-limits allowed to interested parties for making their views known'. No such obligation is included in Article 12.2.1, concerning the contents of public notices on the imposition of provisional measures. We consider that Article 12.2.1 constitutes useful context when examining Mexico's claim under Article 6.1. In particular, the fact that there is no requirement for investigating authorities to include time-limits for the submission of evidence in the public notice of their preliminary determinations confirms the conclusion set forth in the preceding paragraph."⁴⁰⁷

(iii) *Failure to provide information concerning the extension of the period of investigation*

311. In *Guatemala – Cement II*, Mexico argued that because Guatemala's authority extended the period of investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was unable to defend its interests in respect of the extension of the period of investigation contrary to Articles 6.1 and 6.2. The Panel rejected this argument, stating:

"[W]e consider that Mexico's interpretation of that provision is too expansive. The plain language of Article 6.1 merely requires that interested parties be given (1) notice of the information which the authorities require, and (2) ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation. First, we note that Cruz Azul [the Mexican producer] was given two weeks in which to present data concerning the extended POI. Cruz Azul therefore had two weeks' notice of the information required by the Ministry in respect of the extended POI.⁴⁰⁸ Second, Mexico has made no claim to the effect that Cruz Azul was prevented from adducing written 'evidence' concerning the extended POI. Whereas Mexico claims that Cruz Azul was denied any opportunity to comment on the extension of the POI *per se*, Article 6.1 does not explicitly require the provision of opportunities for interested parties to comment on decisions taken by the investigating authority in respect of the information it requires."⁴⁰⁹

(iv) *Failure to allow interested parties access to information*

312. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority acted inconsistently with Articles 6.1, 6.2 and 6.4 by failing to allow a Mexican producer "proper access" to the information submitted by a Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, as referenced in paragraphs 321–322 below, the Panel stated:

"Since we consider [Articles 6.1.2 and 6.4] to be the specific provisions of the AD Agreement governing an interested party's right to information submitted by another interested party, we do not consider it necessary to address Mexico's claims under Articles 6.1 and 6.2. These provisions do not specifically address an interested party's right of access to information submitted by another interested party."⁴¹⁰

313. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority had acted inconsistently with Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing a Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Referring to Article 12.2, the Panel first made the following general observation:

"We do not consider that an investigating authority need inform interested parties in advance when, having issued a preliminary affirmative determination on the basis of threat of material injury, it subsequently makes a final determination of actual material injury. No provision of the AD Agreement requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination. Investigating authorities are instead required to forward to interested parties a public notice, or a separate report, setting forth 'in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities', consistent with Article 12.2 of the AD Agreement. If decisions on issues of law had to be disclosed to interested parties during the course of the

⁴⁰⁶ Panel Report on *Guatemala – Cement II*, para. 8.120.

⁴⁰⁷ Panel Report on *Guatemala – Cement II*, para. 8.120.

⁴⁰⁸ (*footnote original*) We note that Mexico has not alleged that a failure to provide Cruz Azul with at least 30 days to respond to the Ministry's supplementary questionnaire (which required the provision of data for an additional six-month POI) constitutes a violation of Article 6.1.1 of the AD Agreement. That being the case, we shall refrain from making any findings on this matter.

⁴⁰⁹ Panel Report on *Guatemala – Cement II*, para. 8.178.

⁴¹⁰ Panel Report on *Guatemala – Cement II*, para. 8.216.

investigation, there would be little need for interested parties to receive the notice provided for in Article 12.2. Furthermore, to the extent that there is any difference between the preliminary determination of injury and the final determination of injury, that change will be apparent to interested parties comparing the public notice of the investigating authority's preliminary determination with the public notice of its final determination."⁴¹¹

314. The Panel on *Guatemala – Cement II* then went on to draw a distinction, in regard to Article 6.1, between “information”, “evidence” and “essential facts” on the one hand and “legal determinations” on the other:

“We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of ‘information’, ‘evidence’ and ‘essential facts’. However, Mexico’s claim does not concern interested parties’ right to have access to certain factual information during the course of an investigation. Mexico’s claim concerns interested parties’ alleged right to be informed of an investigating authority’s legal determinations during the course of an investigation.”⁴¹²

(b) Article 6.1.1

(i) “questionnaires”

315. In *Egypt – Steel Rebar*, the Panel addressed the question of whether “questionnaires” as referred to in Article 6.1.1 are only the original questionnaires in an investigation, or whether this term would also include all other requests for information, or certain types of requests, including requests in addition and subsequent to original questionnaires.⁴¹³ The Panel, which noted that the term “questionnaire” was not defined anywhere in the *Anti-Dumping Agreement*, considered that the references in Annex I, paragraphs 6 and 7, to this term provide strong contextual support for its interpretation in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation:

“The term ‘questionnaire’ as used in Article 6.1.1 is not defined in the AD Agreement, and in fact, this term only appears in Article 6.1.1, and in paragraphs 6 and 7 of Annex I. In our view, the references in Annex I, paragraphs 6 and 7 provide strong contextual support for interpreting the term ‘questionnaires’ in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation. In particular, both of these provisions refer to ‘the questionnaire’ in the singular, implying that there is only one document that constitutes a ‘questionnaire’ in a dumping investigation, namely the initial questionnaire, at least as far as the foreign companies (producers and exporters) that might be visited are concerned. Paragraph 6 refers to visits by an investigating authority to the territory of an

exporting Member ‘to explain *the questionnaire*’. Paragraph 7 provides that ‘on-the-spot investigation . . . should be carried out after the response to *the questionnaire* has been received . . .’

If any requests for information other than the initial questionnaire were to be considered ‘questionnaires’ in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the AD Agreement. First, there is no basis in the AD Agreement on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute ‘questionnaires’. Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were ‘questionnaires’ in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the AD Agreement in Article 5.10. Moreover, a 30- or 37-day deadline for requests for information made in the context of an on-the-spot verification – i.e., the ‘obtain[ing of] further details’ explicitly referred to in Article 6.7 to as one of the purposes of such verifications – obviously would be completely illogical as well as unworkable. Finally, such an interpretation would render superfluous the requirement in Annex II, paragraph 6 to allow a ‘reasonable period . . .’ for the provision of any explanations concerning identified deficiencies in submitted information.”⁴¹⁴

316. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.1.1 does not, however, address what sort of questionnaires are to be sent to exporters or foreign producers. According to the Panel, the first sentence of Article 6.1.1 means “that if questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply, and, accordingly, “the failure to send a particular questionnaire to exporters or foreign producers does not constitute a violation of Article 6.1.1.”⁴¹⁵

(ii) Deadlines

317. In *US – Hot-Rolled Steel*, the United States authorities had rejected certain information provided by two Japanese exporters which was submitted beyond the

⁴¹¹ Panel Report on *Guatemala – Cement II*, para. 8.237.

⁴¹² Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel’s finding regarding the claims under Articles 6.2 and 6.9, see the excerpts referenced in paras. 314, 336 and 432 of this Chapter.

⁴¹³ Panel Report on *Egypt – Steel Rebar*, para. 7.275.

⁴¹⁴ Panel Report on *Egypt – Steel Rebar*, paras. 7.276–7.277.

⁴¹⁵ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.145.

deadlines for responses to the questionnaires and thus applied “facts available” in the calculation of the dumping margins. The United States interpreted Article 6.8⁴¹⁶ as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data and argued that such an interpretation is supported by Article 6.1.1. The Appellate Body agreed with the Panel that “in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines”.⁴¹⁷ It further considered that those deadlines are “not necessarily absolute and immutable”:

“We observe that Article 6.1.1 does not explicitly use the word ‘deadlines’. However, the *first* sentence of Article 6.1.1 clearly contemplates that investigating authorities may impose appropriate time-limits on interested parties for responses to questionnaires. That first sentence also prescribes an absolute minimum of 30 days for the initial response to a questionnaire. Article 6.1.1, therefore, recognizes that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses. Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*. We note, in that respect, that Article 5.10 of the *Anti-Dumping Agreement* stipulates that anti-dumping investigations shall normally be completed within one year, and in any event in no longer than 18 months, after initiation. Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 ‘are not intended to prevent the authorities of a Member from proceeding *expeditiously*’. (emphasis added) We, therefore, agree with the Panel that ‘in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.’⁴¹⁸

While the United States stresses the significance of the *first* sentence of Article 6.1.1, we believe that importance must also be attached to the *second* sentence of that provision. According to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires ‘upon *cause shown*’, where granting such an extension is ‘*practicable*’. (emphasis added) This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable.”⁴¹⁹

318. The Panel on *US – Corrosion-Resistant Steel Sunset Review* stated that “the right of interested parties to submit information in a sunset review cannot be unlimited. One of the important limitations that can

legitimately be imposed on that right is deadlines for the submission of information”⁴²⁰. The Panel considered that by virtue of the cross-reference in Article 11.4, the requirements of Article 6.1 and 6.2 also applied in the case of sunset reviews.⁴²¹ According to the Panel, in a sunset review as well, “there must be a balance struck between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.”⁴²²

319. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* also considered that Articles 6.1 and 6.2 do not provide for indefinite rights so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose:

“Therefore, the ‘ample’ and ‘full’ opportunities guaranteed by Articles 6.1 and 6.2, respectively, cannot extend indefinitely and must, at some point, legitimately cease to exist. This point must be determined by reference to the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews. Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority’s ability to ‘control the conduct’ of its inquiry and to ‘carry out the multiple steps’ required to reach a timely completion of the sunset review, a respondent will have reached the limit of the ‘ample’ and ‘full’ opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*.”⁴²³

320. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* was of the view that the right to present evidence and request a hearing cannot be said to have been “denied” to a respondent that is given an

⁴¹⁶ See paras. 374–425 of this Chapter.

⁴¹⁷ Panel Report on *US – Hot-Rolled Steel*, para. 7.54. Appellate Body Report, para. 73.

⁴¹⁸ (*footnote original*) Panel Report, para. 7.54.

⁴¹⁹ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 73–74.

⁴²⁰ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258.

⁴²¹ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.254–7.255.

⁴²² Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258. On appeal, the Appellate Body agreed that claims under Article 6 may be made in relation to sunset review determinations on the basis of the cross-reference to Article 6 found in Article 11.4. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 152.

⁴²³ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 237. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* thus considered that disregarding evidence presented by a respondent in a sunset review because it is “incomplete” is incompatible with the respondent’s right under Article 6.1 to present evidence that it considers relevant in respect of the sunset review. As the respondent will also be denied any opportunity to confront parties with adverse interests in a hearing, this respondent is denied its rights, pursuant to Article 6.2, to the “full opportunity for the defence of its interest. See Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 246.

opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable:

“We do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights. Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the ‘ample’ and ‘full’ opportunities available for the defence of its interests, the fault lies with the respondent, and not with the deemed waiver provision.”⁴²⁴

(c) Article 6.1.2

(i) “evidence presented . . . by one party shall be made available promptly to other interested parties”

321. In *Guatemala – Cement II*, Mexico claimed that Guatemala’s authority violated Articles 6.1.2, 6.2 and 6.4 by (a) refusing a Mexican producer access to the file at a certain date during the investigation, and (b) failing to promptly provide the producer with a copy of a submission made by the applicant. In examining this claim, the Panel juxtaposed the notion of “access to the file” on the one hand and, on the other hand, the requirements that evidence presented by one interested party be “made available promptly” and that parties shall have “timely opportunities” to see all relevant information:

“Article 6.1.2 of the AD Agreement provides that evidence presented by one interested party shall be ‘made available promptly’ to other interested parties. Article 6.4 provides that an interested party shall have ‘timely opportunities’ to see all information that is relevant to the presentation of its case. On their face, neither Article 6.1.2 nor Article 6.4 necessarily require access to the file. For example, if an investigating authority required each interested party to serve its submissions on all other interested parties, or if the investigating authority itself undertook to provide copies of each interested party’s submission to other interested parties, there may be no need for interested parties to have access to the file. If, however, there is no service of evidence by interested parties, or no provision of copies by the investigating authority, access to the file may be the only practical means by which evidence presented by one interested party could be ‘made available promptly’ to other interested parties (consistent with Article 6.1.2), or by which interested parties could have ‘timely opportunities’ to see information relevant to the presentation of their cases (consistent with Article 6.4). Assuming access to the file is the only practical means of complying with Articles 6.1.2 and 6.4, access to the file need not necessarily be unlimited. Nor need the file be made available

on demand. Provided access to the file is regular and routine, we consider that the requirements of Articles 6.1.2 and 6.4 would be satisfied.”⁴²⁵

322. The Panel on *Guatemala – Cement II* then stated that “[i]n principle, . . . a 20–day delay is inconsistent with . . . Article 6.1.2 obligation [of Guatemala’s authority] to make [the subject] submission available to [other interested parties] ‘promptly.’”⁴²⁶

(ii) “interested parties participating in the investigation”

323. The Panel on *Argentina – Poultry Anti-Dumping Duties* underlined that Article 6.1.2 does not refer to “interested parties” but to “interested parties participating in the investigation”. It thus considered that had the drafters intended to extend the obligation imposed by Article 6.1.2 to all interested parties as defined in Article 6.11 of the *AD Agreement*, they would not have included the term “participating”. According to the Panel the term “participating” suggests that, a party must undertake some action. In the view of the Panel, “the mere knowledge by an interested party of an ongoing investigation does not make that party an interested party “participating in the investigation” within the meaning of Article 6.1.2 unless it actively takes part in the investigation.”⁴²⁷ According to the Panel, an investigating authority is not required to promptly make evidence presented in writing by other interested parties available to exporters which were not even aware of the investigation such that they could participate in it.⁴²⁸

(iii) “subject to the requirement to protect confidential information”

324. With respect to the claim by Mexico that the failure to make a submission available to a Mexican producer was inconsistent with Article 6.1.2, the Panel on *Guatemala – Cement II* rejected Guatemala’s argument that the failure was justified because the submission contained confidential information:

⁴²⁴ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 252.

⁴²⁵ Panel Report on *Guatemala – Cement II*, para. 8.133.

⁴²⁶ Panel Report on *Guatemala – Cement II*, para. 8.142.

⁴²⁷ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.153

⁴²⁸ In a footnote, the Panel on *Argentina – Poultry Anti-Dumping Duties* expressed the view that “a violation of Article 12.1 does not automatically entail a violation of Article 6.1.2. The fact that interested parties were not participating in the investigation because they were not notified of the initiation of the investigation does not change the fact that the beneficiaries of the obligations in Articles 12.1 and 6.1.2 are different. We consider that the Brazilian exporters were not aware of the investigation because they had not been notified in accordance with Article 12.1 of the *AD Agreement*.” Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.153, fn. 128.

"In this regard, we note that the obligation in Article 6.1.2 is qualified by the words '[s]ubject to the requirement to protect confidential information'. In principle, therefore, evidence presented by one interested party need not be made available 'promptly' to other interested parties if it is 'confidential'. However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. We examine Article 6.5 in detail . . . below. We have noted that Article 6.5 reserves special treatment for 'confidential' information only 'upon good cause shown', and we have determined that the requisite 'good cause' must be shown by the interested party which submitted the information at issue. Guatemala has not demonstrated, or even argued, that Cementos Progreso [the applicant] requested confidential treatment for its . . . submission, or that 'good cause' for confidential treatment was otherwise shown.⁴²⁹ The Article 6.1.2 proviso regarding the 'requirement to protect confidential information', when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated⁴³⁰ by any request for confidential treatment from the party submitting the evidence – that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be 'made available promptly' to interested parties). Accordingly, we find that the Ministry violated Article 6.1.2 of the AD Agreement by failing to make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997."⁴³¹

(d) Article 6.1.3

325. In *Guatemala – Cement II*, the Panel found the communication of Guatemala of the full text of the application at the earliest 18 days after initiation of the investigation to be inconsistent with Article 6.1.3. The Panel based its findings under Article 6.1.3 on the interpretation of the phrase that the text of the application be provided "as soon as an investigation has been initiated":

"We note that Article 6.1.3 does not specify the number of days within which the text of the application shall be provided. What it does specify is that the text of the application be provided 'as soon as' the investigation has been initiated. In this regard, the term 'as soon as' conveys a sense of substantial urgency. In fact, the terms 'immediately' and 'as soon as' are considered to be interchangeable. We do not consider that providing the text of the application 24 or even 18 days after the date of

initiation fulfils the requirement of Article 6.1.3 that the text be provided 'as soon as an investigation has been initiated.'

We further consider that the timeliness of the provision of the text of the application should be evaluated in the context of its purpose and function. Timely access to the application is important for the exporters to enable preparation of the arguments in defence of their interests before the investigating authorities. Moreover, once the investigation has been initiated the timetable of the investigation commences and the timing for many events in the proceeding are counted from initiation including the 12 or 18 months total for completion of the investigation provide for in Article 5.10. Since deadlines in the timetable of the investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application 'as soon as an investigation has been initiated', for the exporter to be able to devise a strategy to defend the allegations it is being confronted with. Also, Article 7.3 of the AD Agreement allows a Member to impose provisional measures as early as sixty days after the date of initiation of an investigation. Access to the text of the application is crucial for the exporter to prepare its defence, and even more so if the authorities are likely to consider applying a provisional measure which may come as early as 60 days after initiation.⁴³² ⁴³³

⁴²⁹ (*footnote original*) Even if Cementos Progreso had requested confidential treatment, the Ministry should (consistent with 6.5.1) have required it to furnish a non-confidential version thereof which could have been made available to Cruz Azul "promptly", or to provide "a statement of the reasons why [non-confidential] summarization is not possible".

⁴³⁰ (*footnote original*) The Cementos Progreso submission at issue was made at a public hearing on 19 December 1996. Guatemala argues that, although the Ministry authorized parties to make submissions in writing, the Ministry had not specified whether such written submissions could contain confidential information or not. According to Guatemala, this justified the Ministry in assuming that the Cementos Progreso submission may contain confidential information. We are not at all convinced by this argument. The instructions issued by the Ministry concerning the public hearing state that "[t]he hearing is being organized for the purpose of receiving the final arguments of the parties, which may submit a *written version thereof*" (emphasis supplied). Thus, any written submission was simply to be a written version of arguments presented orally. Arguments made by a party at a public hearing will presumably not contain confidential information. Similarly, therefore, written versions of arguments presented orally will also not contain information. Thus, to the extent that Cementos Progreso would not have included confidential information in its oral presentation, similarly its written version of that oral presentation also would not have included confidential information. In these circumstances, we fail to see how Cementos Progreso's written submission – which, consistent with the Ministry's instructions, was to be a written version of its oral presentation – could have contained confidential information.

⁴³¹ Panel Report on *Guatemala – Cement II*, para. 8.143.

⁴³² (*footnote original*) On a similar issue the *Korea-Dairy Safeguards* panel found that a 14 day delay on notification to the WTO Safeguards Committee as required by Article 12.1 of the Safeguards Agreement did not satisfy the requirement that the notification be provided "immediately" after initiation. See Panel Report on *Korea – Dairy*, para. 7.134.

⁴³³ Panel Report on *Guatemala – Cement II*, paras. 8.101–8.102.

326. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the meaning of the term “to provide” in the first sentence of Article 6.1.3. The Panel considered that “the term “provide” would require a positive action on the part of the investigating authority akin to that of furnishing or supplying something (i.e., the full text of the application) to someone (i.e., known exporters and authorities of the exporting Member). Therefore, we cannot agree with Argentina that the term “provide” in the English text of the *AD Agreement* or “facilitar” in its Spanish text can be interpreted as meaning “permitting access”. In our view, an investigating authority cannot comply with the obligation to “provide the (...) application (...) to the known exporters and to the authorities of the exporting Member” simply by permitting them access to that application.”⁴³⁴ The Panel distinguished between the obligation to provide the application to the known exporters and to the authorities of the exporting Member, and the obligation to “make available” the application to other interested parties upon request. According to the Panel, “with the use of different verbs in the first sentence of Article 6.1.3, “provide” on the one hand and “make available” on the other, the drafters intended to impose different obligations on investigating authorities depending on the party concerned. The first obligation requires a positive action on the part of the investigating authority, while the second envisages only a passive act.”⁴³⁵

327. In *Guatemala – Cement II*, the Panel rejected Guatemala’s argument that the actions of its investigating authority under Articles 5.5, 12.1.1 and 6.1.3, even if the Panel were to find that they constituted violations of the *Anti-Dumping Agreement*, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of “harmless error”; (b) Mexico “convalidated” the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the *Anti-Dumping Agreement*. See paragraphs 276–279 above.

(e) Relationship with other paragraphs of Article 6

328. The Panel on *Guatemala – Cement II* addressed Mexico’s claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

329. In *Guatemala – Cement II*, Mexico claimed that Guatemala’s investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-Dumping Agreement* by rejecting certain technical accounting evidence submitted by a Mexican interested party one day

before the public hearing held by Guatemala’s authority. The Panel considered it unnecessary to address this claim, on the ground that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had already found the cancellation in violation of Article 6.8.⁴³⁶

330. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 below.

331. The Panel on *Guatemala – Cement II* addressed Mexico’s claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

332. The Panel on *Argentina – Ceramic Tiles*, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information from the party in question. See paragraphs 308 above and 384 below. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 317 above and 397 and 400 below.

333. The Panel on *Guatemala – Cement II* further referred to Article 6.5 in interpreting Article 6.1.2. See paragraph 324 above.

334. In *Guatemala – Cement II*, having found that Guatemala’s failure to disclose the “essential facts” forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 429, 430 and 432 below, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.⁴³⁷

2. Article 6.2

(a) “shall have a full opportunity for the defence of their interests”

(i) *Article 6.2, first sentence as a fundamental due process provision*

335. In *Guatemala – Cement II*, Mexico argued that because Guatemala’s authority extended the period of

⁴³⁴ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.169.

⁴³⁵ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.170.

⁴³⁶ Panel Report on *Guatemala – Cement II*, para. 8.125.

⁴³⁷ Panel Report on *Guatemala – Cement II*, para. 8.232.

investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was not given any opportunity to comment on the applicant's request for extension of the period of investigation contrary to Article 6.2. The Panel, which agreed with this argument, interpreted the first sentence of Article 6.2 "as a fundamental due process provision":

"We interpret the first sentence of Article 6.2 of the AD Agreement as a fundamental due process provision. In our view, when a request for an extension of the POI comes from one interested party, due process requires that the investigating authority seeks the views of other interested parties before acting on that request. Failure to respect the requirements of due process would conflict with the requirement to provide interested parties with 'a full opportunity for the defence of their interests', consistent with Article 6.2.⁴³⁸ Clearly, an interested party is not able to defend its interests if it is prevented from commenting on requests made by other interested parties in pursuit of their interests. In the present case, Cementos Progreso's request for extension of the POI was made on 1 October 1996. The Ministry's decision to extend the POI was made on 4 October 1996, only three days after Cementos Progreso's request. There is no evidence to suggest that the Ministry sought the views of Cruz Azul [the Mexican producer], or other interested parties, before deciding to extend the POI. Accordingly, we find that by extending the POI pursuant to a request from Cementos Progreso without seeking the views of other interested parties in respect of that request, the Ministry failed to provide Cruz Azul with 'a full opportunity for the defence of [its] interests', contrary to Guatemala's obligations under Article 6.2 of the AD Agreement."⁴³⁹

(ii) *General nature and extent of the obligations under Article 6.2*

336. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Following the observation based upon Article 12.2, quoted in paragraph 313 above, the Panel explained that the first sentence of Article 6.2 is very general in nature:

"As for Article 6.2, we note that the first sentence of that provision is very general in nature. We are unable to interpret such a general sentence in a way that would impose a specific obligation on investigating authorities

to inform interested parties of the legal basis for its final determination on injury during the course of an investigation, when the express wording of Article 12.2 only imposes such a specific obligation on investigating authorities at the end of the investigation."⁴⁴⁰

337. In *Egypt – Steel Rebar*, the Panel emphasized that "the language of the provision at issue creates an obligation on the [investigating authorities] to *provide opportunities* for interested parties to defend their interests." The Panel further considered that the "[f]ailure by respondents to take the initiative to defend their own interests in an investigation cannot be equated, through WTO dispute settlement, with failure by an investigating authority to provide opportunities for interested parties to defend their interests."⁴⁴¹

(b) *Relationship with other paragraphs of Article 6*

338. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.4 by failing to allow the Mexican producer "proper access" to the information submitted by the Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, the Panel considered it unnecessary to examine the claim of a violation of Articles 6.1 and 6.2 because these provisions, in the view of the Panel, did not specifically address the issue. See paragraph 312 above.

339. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

340. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-*

⁴³⁸ (*footnote original*) We do not consider that the obligation in the first sentence of Article 6.2 is qualified by the second sentence of that provision. Thus, we do not consider that the obligation in the first sentence of Article 6.2 is concerned exclusively with "providing opportunities for all interested parties to meet those parties with adverse interests. . .". Although the words "[t]o this end" at the beginning of the second sentence suggest that such meetings are one way in which the obligation of the first sentence can be fulfilled, it does not follow that such meetings provide the only means by which the obligation of the first sentence may be fulfilled. If that were the case, there would be no need for the first sentence of Article 6.2.

⁴³⁹ Panel Report on *Guatemala – Cement II*, para. 8.179. See also para. 311 of this Chapter with respect to the same issue in the context of Article 6.1.

⁴⁴⁰ Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.9, see the excerpts referenced in paras. 314 and 432 of this Chapter. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.77–7.96.

⁴⁴¹ Panel Report on *Egypt – Steel Rebar*, para. 7.88.

Dumping Agreement by rejecting certain technical accounting evidence submitted by a Mexican producer one day before the public hearing held by Guatemala's authority. The Panel considered it unnecessary to address this claim, on the grounds that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had found the cancellation in violation of Article 6.8.⁴⁴²

341. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Article 6.2 and other provisions. See paragraph 343 below. The Panel went on to find it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same set of facts.⁴⁴³

342. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 429, 430 and 432 below, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.⁴⁴⁴

(c) Relationship with other provisions of the Anti-Dumping Agreement

343. Addressing Mexico's claim that Guatemala's authority had violated Article 6.2, the Panel on *Guatemala – Cement II* decided to exercise judicial economy because it had already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the *Anti-Dumping Agreement*:

"Whereas this provision clearly imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it provides no specific guidance as to what steps investigating authorities must take in practice. By contrast, other more specific provisions apply to the facts at hand, in respect of which Mexico has also made claims. Although there may be cases in which a panel will nevertheless need to address claims under Article 6.2, we do not consider it necessary for us to do when we have already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the AD Agreement."⁴⁴⁵⁴⁴⁶

3. Article 6.4

(a) "shall . . . provide timely opportunities for all interested parties to see all information"

344. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority violated Articles 6.1.2, 6.2 and

6.4 by: (a) refusing the Mexican producer access to the file on a certain date during the investigation; and (b) failing to promptly provide the producer with a copy of a submission made by the applicant for the investigation. Mexico also claimed that Guatemala's investigating authority violated Article 6.4 by: (a) failing to provide the Mexican producer with copies of the file; and (b) failing to provide the producer with a full record of a public hearing held by the authority. In examining these claims, the Panel explained the scope and precise meaning of the relevant provisions. See paragraph 321 above.

345. In *Guatemala – Cement II*, in response to Mexico's claim that in violation of Article 6.4, Guatemala's authority did not provide copies of the file to the Mexican producer, Guatemala argued that it was justified in doing so because the producer had not paid the required fee. The Panel found a violation of Article 6.4 because the Mexican producer had offered to pay for the copies it requested. In so doing, the Panel noted that "[t]here are various ways in which an investigating authority could satisfy the Article 6.4 obligation to provide 'whenever practicable . . . timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases . . .'"⁴⁴⁷

346. In *Guatemala – Cement II*, Mexico's argued that Guatemala's authority had acted inconsistently with Article 6.4 by not providing the Mexican producer with a complete copy of the record of its public hearing. The copy of the record of the public hearing which had been transmitted to Mexico was missing two identified individual pages, such that the words at the beginning of one page did not follow on from the phrase at the end of the immediately preceding page. Guatemala argued that even if the copy was incomplete, the Mexican producer could have requested a complete copy as soon as it realized that an omission had occurred. The Panel did not find a violation of Article 6.4:

⁴⁴² Panel Report on *Guatemala – Cement II*, para. 8.125.

⁴⁴³ Panel Report on *Guatemala – Cement II*, para. 8.164.

⁴⁴⁴ Panel Report on *Guatemala – Cement II*, para. 8.232.

⁴⁴⁵ (*footnote original*) In this regard, we recall that the Appellate Body stated in *EC – Bananas III* that "[a]lthough Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures" (Appellate Body Report on *EC – Bananas III*, para. 204). Furthermore, the panel in *US – 1916 Act (EC)* stated that "[i]t is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it" (Panel Report on *US – 1916 Act (EC)*) (footnote deleted).

⁴⁴⁶ Panel Report on *Guatemala – Cement II*, para. 8.162.

⁴⁴⁷ Panel Report on *Guatemala – Cement II*, para. 8.151.

"Despite the factual accuracy of Mexico's argument, we do not consider that [the Ministry's action] amounts to a violation of Article 6.4 of the AD Agreement, as Mexico has failed to adduce any evidence that the Ministry's failure to provide a full copy of its record of the public hearing was anything other than inadvertent. Although we consider that an interested party is entitled to see a full version of the investigating authority's record of any public hearing, it is not inconceivable that an investigating authority which chooses to provide interested parties with a copy of the record could inadvertently fail to provide a complete copy. In our view, such an inadvertent omission on the part of an investigating authority does not constitute a violation of Article 6.4. Although a violation could arise if an investigating authority failed to correct its omission after having been informed of that omission by an interested party, there is no evidence that Cruz Azul informed the Ministry of its omission in the present case."

347. Referring to its finding quoted in paragraph 276 above, the Panel emphasized that it was not finding a "harmless error", an argument put forward previously by Guatemala in a different context:

"In order to avoid any uncertainty, we wish to emphasize that we do not consider that the inadvertent nature of the Ministry's omission renders that omission 'harmless', in the sense of being a defence to a violation of Article 6.4 of the AD Agreement Our position is not that there was a violation of Article 6.4, but that such violation should be disregarded because it was 'harmless'. Rather, our position is that the factual circumstances before us do not amount to a violation. The question of whether or not any violation is 'harmless' therefore does not arise."⁴⁴⁸

(b) "to see all information that is relevant to the presentation of their cases"

348. The Appellate Body on *EC – Tube or Pipe Fittings* stated that the issue of what information is relevant such that it has to be disclosed must be examined from the perspective of *the interested parties*. It thus reversed the Panel's finding in this case that the investigating authority was not obliged to disclose certain information that *the investigating authority* considered not relevant to its conclusions:

"Article 6.4 refers to 'provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their cases*'. (emphasis added) The possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'. The investigating authorities are not mentioned in Article 6.4 until later in the sentence, when the provision refers to the additional requirement that the information be 'used by the authorities'. Thus, whether or not the investigating authorities regarded the information in Exhibit EC-12 to

be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."⁴⁴⁹

349. In addition, the Appellate Body on *EC – Tube or Pipe Fittings* was of the view that information relating to the Article 3.4 injury factors was necessarily "relevant" information which is to be disclosed under Article 6.4:

"This conclusion is supported by our reasoning in *US – Hot Rolled Steel*, where we explained that 'Article 3.4 lists certain factors *which are deemed to be relevant in every investigation* and which must always be evaluated by the investigating authorities.'⁴⁵⁰ Thus, because Exhibit EC-12 contains information on some of the injury factors listed in Article 3.4, and the injury factors listed in that provision 'are deemed to be relevant in every investigation', Exhibit EC-12 must be considered to contain information that is relevant to the investigation carried out by the European Commission. As such, the information in Exhibit EC-12 was necessarily relevant to the presentation of the interested parties' cases and is, therefore, 'relevant' for purposes of Article 6.4."⁴⁵¹

350. The Panel on *EC – Tube or Pipe Fittings* distinguished between information already in the possession of an interested party and information that must be available to interested parties within the meaning of Article 6.4:

"We do not view information that is already in the possession of an interested party and that has been submitted by an interested party to an investigating authority in the course of an anti-dumping proceeding as information that an investigating authority must provide opportunities for that same interested parties to see within the meaning of Article 6.4. This provision relates to information that would not initially be in the possession of an interested party and would therefore be unknown or unfamiliar to an interested party if it were not disclosed to that party in the course of an investigation."⁴⁵²

(c) Relationship with other paragraphs of Article 6

351. The Panel on *Guatemala – Cement II* addressed Mexico's claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 below.

352. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.4 by failing to allow

⁴⁴⁸ Panel Report on *Guatemala – Cement II*, para. 8.158.

⁴⁴⁹ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 145.

⁴⁵⁰ (footnote original) Appellate Body Report, *US – Hot-Rolled Steel*, para. 194. (emphasis added)

⁴⁵¹ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 146.

⁴⁵² Panel Report on *EC – Tube or Pipe Fittings*, para. 7.208.

the Mexican producer “proper access” to the information submitted by the Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, the Panel considered it unnecessary to examine the claim of a violation of Articles 6.1 and 6.2 because these provisions do not specifically address the issue. See paragraph 312 above.

353. In *Guatemala – Cement II*, the Panel addressed Mexico’s claim that Guatemala’s delay in making a submission of the applicant available to the Mexican producer was inconsistent with Articles 6.1.2 and 6.4. After having found a violation of Article 6.1.2, the Panel considered it unnecessary to examine whether the subject facts also constituted a violation of Article 6.4.⁴⁵³

354. In *Guatemala – Cement II*, the Panel also considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 above.

355. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 430 below.

356. The Appellate Body on *EC – Tube or Pipe Fittings* expressed the view that a finding of violation in that case under Article 6.4 would necessarily entail a violation of Article 6.2.⁴⁵⁴

4. Article 6.5

(a) Showing of “good cause” for confidential treatment

357. In *Guatemala – Cement II*, the Panel examined the claim that Guatemala’s authority violated Articles 6.5, 6.5.1 and 6.5.2 by granting a submission from the domestic producer confidential treatment on its own initiative, i.e. without “good cause” having been shown by the producer. The Panel upheld this claim, stating:

“The text of Article 6.5 distinguishes between two types of confidential information: (1) ‘information which is by nature confidential’, and (2) information ‘which is provided on a confidential basis’. Article 6.5 then provides that the provision of confidential treatment is conditional on ‘good cause’ being shown. Logically, one might expect that ‘good cause’ for confidential treatment of information which is ‘by nature confidential’ could be presumed, and that ‘good cause’ need only be shown for information which is not ‘by nature confidential’ (but for which confidential treatment is nonetheless sought). It is presumably for this reason that, in rejecting Mexico’s claim, Guatemala argues that the relevant information was ‘clearly of a confidential nature’. While we have some sympathy for Guatemala’s

argument, given the logical appeal of such an interpretation of Article 6.5, we note that Article 6.5 is not drafted in a way which suggests this approach. Instead, the requirement to show ‘good cause’ appears to apply for both types of confidential information, such that even information ‘which is by nature confidential’ cannot be afforded confidential treatment unless ‘good cause’ has been shown.⁴⁵⁵

In our view, the requisite ‘good cause’ must be shown by the interested party submitting the confidential information at issue. We do not consider that Article 6.5 envisages ‘good cause’ being shown by the investigating authority itself, since – with respect to information that is not ‘by nature confidential’ in particular – the investigating authority may not even know whether or why there is cause to provide confidential treatment.”⁴⁵⁶

(b) Article 6.5.1

(i) Purpose of non-confidential summaries

358. In *Argentina – Ceramic Tiles*, the Panel, while examining whether the authorities were allowed to base themselves on confidential information in their determination (see paragraph 416 below), considered that the purpose of the non-confidential summaries is to inform the interested parties so as to enable them to defend their interests:

“Consistent with our view that authorities may rely on confidential information in making their determination, the purpose of the non-confidential summaries provided for in Article 6.5.1 is to inform the interested parties so as to enable them to defend their interests. We do not consider that the purpose of the non-confidential summaries is to enable the authorities to arrive at public conclusions, as Argentina contends. [footnote omitted] Thus, an authority would not in our view be justified in rejecting the exporters’ responses simply because the information in the non-confidential summaries was not sufficient to allow the calculation of normal value, export price, and the margin of dumping.”⁴⁵⁷

(ii) Requirement to provide reasons for confidentiality

359. In *Guatemala – Cement II*, Mexico argued that Guatemala’s authority violated Article 6.5.2 by failing to require the domestic producer to provide reasons why certain information could not be made public. The Panel agreed with this argument, stating:

⁴⁵³ Panel Report on *Guatemala – Cement II*, para. 8.145.

⁴⁵⁴ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 149.

⁴⁵⁵ (*footnote original*) Although we will now consider who must show “good cause”, we make no findings as to how “good cause” may be shown in respect of information which is “by nature” confidential.

⁴⁵⁶ Panel Report on *Guatemala – Cement II*, paras. 8.219–8.220.

⁴⁵⁷ Panel Report on *Argentina – Ceramic Tiles*, para. 6.39.

“Although Article 6.5.1 does not explicitly provide that ‘the authorities shall require’ interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the AD Agreement is not addressed at interested parties. The AD Agreement imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible. . . . In making this finding, we attach no importance whatsoever to Guatemala’s assertions concerning the alleged treatment of similar information by other WTO Members. Whether or not other WTO Members act in conformity with Article 6.5.1 is of no relevance to the present dispute, which concerns the issue of whether or not the Ministry acted in conformity with that provision.”⁴⁵⁸

360. The Panel then considered it unnecessary to address Mexico’s claim under Articles 6.1, 6.2, 6.4, 6.5 and 6.5.2 on the same factual ground, because “the need for a statement of the reasons why the information is not susceptible of summary is specifically addressed by Article 6.5.1.”⁴⁵⁹

(c) Article 6.5.2

361. In *Guatemala – Cement II*, the Panel rejected Mexico’s claim that Guatemala’s authority had violated Article 6.5.2 by agreeing to provide confidential treatment for certain information submitted during the verification visit at the domestic producer’s premises. Mexico’s claim of violation was based on the domestic producer’s alleged failure to justify its request for confidential treatment. The Panel held:

“Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. If any such obligation exists, it derives from Article 6.5, not 6.5.2. Mexico has not based this claim on Article 6.5. Article 6.5.2 speaks only to events when ‘the authorities find that a request for confidentiality is not warranted’.”⁴⁶⁰

(d) Relationship with other paragraphs of Article 6

362. The Panel on *Guatemala – Cement II* addressed Mexico’s claims of violations of Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2, all of which were based on the same factual foundation. See paragraph 360 above.

363. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Article 6.2 claims because it had already found violations of Article 6.1.2, 6.1.3, 6.4 and 6.5.1 on the same sets of facts. See paragraph 341 above.

364. The Panel, in *Argentina – Ceramic Tiles*, referred to Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* as support of its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 below.

5. Article 6.6

(a) “satisfy themselves as to the accuracy of the information”

365. In support of its opinion that the text of Article 6.6 does not explicitly require verification of all information relied upon, the Panel on *US – DRAMS* stated:

“Article 6.6 simply requires Members to ‘satisfy themselves as to the accuracy of the information’. In our view, Members could ‘satisfy themselves as to the accuracy of the information’ in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.”⁴⁶¹ ⁴⁶²

366. In *Guatemala – Cement II*, addressing Mexico’s claim under Article 6.6, the Panel explained the nature of the obligation under this Article:

“In our view, it is important to distinguish between the accuracy of information, and the substantive relevance of such information. Once an investigating authority has determined what information is of substantive relevance to its investigation, Article 6.6 requires the investigating authority to satisfy itself (except when ‘best information available’ is used) that the substantively relevant information is accurate. Thus, Article 6.6 applies once an initial determination has been made that the information is of substantive relevance to the investigation. Article 6.6 provides no guidance in respect of the initial determination of whether information is, or is not, of substantive relevance to the investigation.”⁴⁶³

⁴⁵⁸ Panel Report on *Guatemala – Cement II*, para. 8.213.

⁴⁵⁹ Panel Report on *Guatemala – Cement II*, para. 6.215.

⁴⁶⁰ Panel Report on *Guatemala – Cement II*, para. 8.209.

⁴⁶¹ (*footnote original*) For example, we query whether investigating authorities should be required to verify import statistics from a different government office. We also query whether investigating authorities should be required to verify “official” exchange rates obtained from a central bank.

⁴⁶² Panel Report on *US – DRAMS*, para. 6.78.

⁴⁶³ Panel Report on *Guatemala – Cement II*, para. 8.172.

(b) Burden on the investigating authorities

367. In *Argentina – Ceramic Tiles*, the Panel confirmed that “the burden of satisfying oneself of the accuracy of the information” is “on the investigating authority”:

“Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying. . . .⁴⁶⁴ We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require.”⁴⁶⁵

6. Article 6.7 and Annex I

(a) Relationship between Article 6.7 and Annex I

368. As regards the relationship between Article 6.7 and Annex I, in *Egypt – Steel Rebar*, the Panel came to the same conclusion as with the relationship between Article 6.8 and Annex II (see paragraph 379 below), i.e. that Annex I is incorporated by reference into Article 6.7:

“Concerning the relationship of Annex I to Article 6.7, we come to the same conclusion as in respect of Annex II and Article 6.8.⁴⁶⁶ In particular, we note Article 6.7’s explicit cross-reference to Annex I: ‘[T]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members’. This language thus establishes that the specific parameters that must be respected in carrying out foreign verifications in compliance with Article 6.7 are found in Annex I.”⁴⁶⁷

(b) On-the-spot verifications as an option

369. The Panel on *Argentina – Ceramic Tiles*, indicated in a footnote that, although common practice, there is no requirement to carry out on-the-spot verifications:

“There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the AD Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfil its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based.”⁴⁶⁸

370. The Panel on *EC – Tube or Pipe Fittings* rejected the argument that Article 2.4 required the investigating

authority to base the adjustment on a visual/physical inspection of the working activities and practices in the packaging area at the company’s premises. The Panel stated that it viewed verification as an essentially “documentary” exercise that may be supplemented by an actual on-site visit, which is not mandated by the Agreement. According to the Panel, “[a]n essentially documentary approach to verification – which focuses upon documented support for claims for adjustment – seems to us to be entirely consistent with the nature of an anti-dumping investigation⁴⁶⁹”⁴⁷⁰

(c) Information verifiable on-the-spot

371. In *Guatemala – Cement II*, Mexico argued Guatemala’s authority had acted inconsistently with Article 6.7 and paragraph 7 of Annex I by seeking to verify certain information that was not submitted by the Mexican producer subject to the investigation because it pertained to a period of investigation newly added during the course of the investigation. The Panel rejected this argument:

“Although Annex I(7) provides that the ‘main purpose’ of the verification visit is to verify information already provided, or to obtain further details in respect of that information, it also provides that an investigating authority may ‘prior to the visit . . . advise the firms concerned . . . of any further information which needs to be provided’. Since there would be little point in advising a firm of ‘further information . . . to be provided’ in advance of the verification visit if the investigating authority were precluded from examining that ‘further information’ during the visit, we consider that the phrase ‘further information . . . to be provided’ refers to information to be provided during the course of the verification. Mexico’s view that an investigating authority may only verify information submitted prior to the verification visit is not consistent with this interpretation of Annex I(7).

⁴⁶⁴ (*footnote original*) There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the AD Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfill its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based.

⁴⁶⁵ Panel Report on *Argentina – Ceramic Tiles*, para. 6.57.

⁴⁶⁶ (*footnote original*) See paras. 7.152–7.154.

⁴⁶⁷ Panel Report on *Egypt – Steel Rebar*, para. 7.325.

⁴⁶⁸ Panel Report on *Argentina – Ceramic Tiles*, footnote 65. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.326–7.327.

⁴⁶⁹ (*footnote original*) Article 6.7 of the *Anti-dumping Agreement*, which deals with verification visits, states that “authorities shall make the results of any such investigations available, or shall provide disclosure thereof . . . to the firms to which they pertain and may make such results available to the applicants.” This supports our view that the nature of verification exercise is primarily documentary.

⁴⁷⁰ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.192

In response to a question from the Panel, Mexico argues that the phrase ‘any further information . . . to be provided’ refers to accounting information to be provided by the verified company during verification in order to substantiate the information previously supplied to the investigating authority. We note, however, that the phrase does not read ‘any further accounting information . . . to be provided’. The term ‘information’ is not qualified in any way by the express wording of Annex I(7), and there are no elements in the context which plead for such qualification.

Furthermore, we note that the last phrase of Annex I(7) refers to on-the-spot requests for further details to be provided in light of ‘information obtained’. Thus, although it should be ‘standard practice’ to advise firms of additional information to be provided in advance of the verification visit, this does not preclude an investigating authority from requesting ‘further details’ during the course of the investigation, ‘in light of the information obtained’. In our view, the reference to ‘information obtained’ cannot mean the information obtained from the exporter in advance of the verification visit, since (consistent with ‘standard practice’) requests regarding that information should be made prior to the visit, and not during the course of the investigation. Accordingly, the ‘information obtained’ must refer to information obtained during the course of the verification visit, since it is only information obtained during the course of a verification visit which may prompt a request for further details during the course of the verification visit. The last phrase of Annex I(7) therefore confirms our understanding that an investigating authority may seek new information during the course of the verification visit.”⁴⁷¹

(d) Participation of non-governmental experts in the on-the-spot verification

372. In *Guatemala – Cement II*, Mexico claimed that a verification visit by Guatemala’s authority to the Mexican producer’s site was inconsistent with Article 6.7 and Annex I(2), (3), (7) and (8) because the authority included non-governmental experts with an alleged conflict of interest in its verification team. The Panel rejected this claim because none of the cited provisions explicitly prohibits such conduct.⁴⁷² However, the Panel found that given the participation of non-governmental experts with an alleged conflict of interest in Guatemala’s verification team, the investigating authority could not argue that the Mexican producer’s refusal to allow the verification meant that the producer was “significantly impeding” the investigation within the meaning of Article 6.8. See also paragraph 410 below.

373. In *Guatemala – Cement II*, the Panel considered that under paragraph 2 of Annex I, a national authority is required to inform the government of exporting Members of its intention to include non-governmental

experts in the verification team for visit to foreign producers/exporters.⁴⁷³ With respect to the burden of proof on this point, referring to a finding of the Panel on *US – Section 301 Trade Act*⁴⁷⁴, the Panel stated:

“In principle, Mexico bears the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry’s verification team. As a practical matter, this burden is impossible for Mexico to meet: one simply cannot prove that one was not informed of something. Although Mexico cannot establish definitively that it was not informed by the Ministry of the Ministry’s intention to include non-governmental experts in its verification team, there is sufficient evidence before us to suggest strongly that it was not so informed. Although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala has failed to rebut the strong suggestion that it failed to do so. In fact, Guatemala has simply referred to the very letter which suggests strongly that Mexico was *not* notified by Guatemala.⁴⁷⁵ In these circumstances, we do not consider that the evidence and arguments of the parties ‘remain in equipoise’. Accordingly, we find that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry’s verification team.”⁴⁷⁶⁴⁷⁷

374. In *Guatemala – Cement II*, the Panel disagreed with Mexico’s argument that under paragraph 2 of Annex I, Guatemala’s authority should have informed the Government of Mexico not only of the Guatemalan

⁴⁷¹ Panel Report on *Guatemala – Cement II*, paras. 8.203–8.205.

⁴⁷² Panel Report on *Guatemala – Cement II*, para. 8.189.

⁴⁷³ Panel Report on *Guatemala – Cement II*, para. 8.193.

⁴⁷⁴ Panel Report on *US – Section 301*, para. 7.14.

⁴⁷⁵ (*footnote original*) The fact that the Mexican authorities knew of the inclusion of non-governmental experts in the Ministry’s verification team (by virtue of Cruz Azul sending SECOFI a copy of the 26 November 1996 letter Cruz Azul had received from the Ministry) is not relevant to Mexico’s claim. This is because Annex I(2) requires that the authorities of the exporting Member be “informed” of the inclusion of non-governmental experts. In our view, the obligation to “inform” is clearly on the authorities of the investigating Member. Those authorities cannot rely on exporters informing their own authorities of the inclusion of non-governmental experts in order to establish compliance with Annex I(2).

⁴⁷⁶ (*footnote original*) Paragraph 2 of Annex I provides that exporting Members “should” be informed of the inclusion of non-governmental experts in a verification team. It does not provide that exporting Members “shall” be so informed. Although the word “should” is often used colloquially to imply an exhortation, it can also be used “to express a duty [or] obligation” (See *The Concise Oxford English Dictionary*, Clarendon Press, 1995, page 1283). Since Article 6.7 provides in relevant part that the provisions of Annex I “shall” apply, we see no reason why Annex I (2) should not be interpreted in the mandatory sense. In our view, a hortatory interpretation of the provisions of Annex I would be inconsistent with Article 6.7. Furthermore, Guatemala has not argued that paragraph 2 of Annex I is merely hortatory. Accordingly, we proceed on the basis that paragraph 2 of Annex I should be interpreted in a mandatory sense.

⁴⁷⁷ Panel Report on *Guatemala – Cement II*, para. 8.196.

authority's intention to include non-governmental experts in its verification team, but also of the exceptional circumstances justifying the participation of these experts in the investigating team:

"Whereas paragraph 2 of Annex I requires the exporting Member to be 'so informed', the logical conclusion from the structure of that provision is that the exporting Member need only be informed of the intention to include non-governmental experts in the investigating team. If the intention of the drafters had been to impose an obligation on authorities to inform exporting Members of the 'exceptional circumstances' at issue, presumably the first sentence of Annex I(2) would have been drafted in a manner that clearly provided for that obligation."⁴⁷⁸

7. Article 6.8 and Annex II: "facts available"

(a) General

(i) Function of Article 6.8 and Annex II

375. In *US – Hot-Rolled Steel*, the Panel indicated that "[o]ne of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts."⁴⁷⁹

376. In *Egypt – Steel Rebar*, the Panel stated that Article 6.8 "addresses the dilemma in which investigating authorities might find themselves – they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted". The Panel indicated that "Article 6.8 identifies the circumstances in which an [investigating authority] may overcome this lack of necessary information by relying on facts which are otherwise available to the investigating authority."⁴⁸⁰ The Panel also concluded that it is clear that the provisions of Annex II that address what information can be used as facts available "have to do with ensuring the reliability of the information used by the investigating authority" and referred to the negotiating history of Annex II as confirmation of its conclusions:

"It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, 'shall be observed') have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties⁴⁸¹, by the negotiating history of Annex II. In particular, this

Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a 'Recommendation Concerning Best Information Available in Terms of Article 6:8'.⁴⁸² During the Uruguay Round negotiations, the substantive provisions of the original recommendation were incorporated with almost no changes as Annex II to the AD Agreement. A preambular paragraph to the original recommendation, which was not retained when Annex II was created, in our view, provides some insight into the intentions of the drafters concerning its application. This paragraph reads as follows:

'The authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources.'

To us, this preambular language conveys that the *full* package of provisions in the recommendation, applicable in implementing Article 6:8 of the Tokyo Round Anti-Dumping Code, was intended, *inter alia*, to ensure that in using facts available (i.e., in applying Article 6:8), information from unreliable sources would be avoided."⁴⁸³

(ii) Relationship between Article 6.8 and Annex II

377. In *US – Hot-Rolled Steel*, the Appellate Body ruled that Annex II "is incorporated by reference into Article 6.8".⁴⁸⁴

⁴⁷⁸ Panel Report on *Guatemala – Cement II*, para. 8.198.

⁴⁷⁹ Panel Report on *US – Hot-Rolled Steel*, para. 7.72 and 7.55.

⁴⁸⁰ Panel Report on *Egypt – Steel Rebar*, para. 7.146.

⁴⁸¹ (*footnote original*) Art. 32 of the Vienna Convention of the Law of Treaties provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable".

⁴⁸² (*footnote original*) ADP/21.

⁴⁸³ Panel Report on *Egypt – Steel Rebar*, para. 7.154.

⁴⁸⁴ Appellate Body Report on *US – Hot-Rolled Steel*, para. 75. The Panel on *Egypt – Steel Rebar* indicated that its "view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is "incorporated by reference" into Article 6.8, i.e., that it forms part of Article 6.8." Panel Report on *Egypt – Steel Rebar*, para. 7.153.

378. In *US – Steel Plate*, the Panel explained the relationship between Article 6.8 and Annex II of the *Anti-Dumping Agreement* and concluded that the provisions of Annex II inform the investigating authority’s evaluation whether necessary information has been provided and whether resort to facts available with respect to that element of information is justified:

“In our view, the failure to provide necessary information, that is information which is requested by the investigating authority and which is relevant to the determination to be made,⁴⁸⁵ triggers the authority granted by Article 6.8 to make determinations on the basis of facts available. The provisions of Annex II, which set out conditions on the use of facts available, inform the question of whether necessary information has not been provided, by establishing considerations for when information submitted must be used by the investigating authority. Thus, the provisions of Annex II inform an investigating authority’s evaluation whether necessary information, in the sense of Article 6.8, has been provided, and whether resort to facts available with respect to that element of information is justified. If, after considering the provisions of Annex II, and in particular the criteria of paragraph 3, the conclusion is that information provided satisfies the conditions therein, the investigating authority must use that information in its determinations, and may not resort to facts available with respect to that element of information. That is, the investigating authority may not conclude, with respect to that information, that “necessary information” has not been provided.”⁴⁸⁶

379. In *Egypt – Steel Rebar*, the Panel considered that the cross-reference in Article 6.8 to Annex II, “[t]he provisions of Annex II shall be observed in the application of this paragraph” indicates that Annex II applies to Article 6.8 in its entirety:

“[W]e find significant the specific wording of that cross-reference: ‘[t]he provisions of Annex II shall be observed in the application of *this paragraph*’ (emphasis added). In other words, the reference to ‘this paragraph’ indicates that Annex II applies to Article 6.8 in its entirety, and thus contains certain substantive parameters for the application of the individual elements of that article. The phrase ‘shall be observed’ indicates that these parameters, which address both when facts available can be used, and what information can be used as facts available, must be followed.

Our view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is ‘incorporated by reference’ into Article 6.8,⁴⁸⁷ i.e., that it forms part of Article 6.8.”⁴⁸⁸

(iii) *Mandatory nature of Annex II provisions*

380. In *US – Steel Plate*, the Panel considered that the wording of Article 6.8 reference to Annex II provisions establishes that the provisions of Annex II are mandatory:

“We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense (‘should’) are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8. explicitly provides that ‘The provisions of Annex II shall be observed in the application of this paragraph’ (emphasis added). In our view, the use of the word ‘shall’ in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required (‘shall’) to apply provisions which are not themselves required, an interpretation that makes no sense.⁴⁸⁹ Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8.”⁴⁹⁰⁴⁹¹

(b) Authorities’ duty to “specify in detail the information required from an interested party”

(i) “as soon as possible”

381. In *Guatemala – Cement II*, Mexico pointed out that paragraph 1 of Annex II requires “[a]s soon as possible after the initiation of the investigation” that the investigating authorities specify in detail the information

⁴⁸⁵ (*footnote original*) We are not dealing here with the possibility that the investigating authority might request irrelevant information. Obviously, such information would not be “necessary” in the sense of Article 6.8. However, there is no suggestion in this case that the investigating authority requested information beyond that which was necessary to the determinations it had to make.

⁴⁸⁶ Panel Report on *US – Steel Plate*, para. 7.55.

⁴⁸⁷ (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para.75.

⁴⁸⁸ Panel Report on *Egypt – Steel Rebar*, paras. 7.152–7.153.

⁴⁸⁹ (*footnote original*) We note that the Panel on, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* (“*Argentina – Ceramic Tiles*”), WT/DS189/R, adopted 5 November 2001, treated the provisions of Annex II as obligations in its analysis and findings.

⁴⁹⁰ (*footnote original*) We note in this regard the Appellate Body’s statement that “Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available.” Appellate Body Report, *US – Hot-Rolled Steel*, at para 78. The Appellate Body appears to have treated the provisions of Annex II which are phrased in the conditional as mandatory, but did not specifically address the question, which was not raised before it, or indeed before the *Hot-Rolled Steel* Panel.

⁴⁹¹ Panel Report on *US – Steel Plate*, para. 7.56.

required from interested parties. Mexico argued that, in the light of this requirement, investigating authorities are effectively precluded from extending the period of investigation during the course of the investigation. The Panel disagreed with Mexico's argument, agreeing with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation:

"We are not persuaded that paragraph 1 of Annex II, or any other provision of the AD Agreement, prevents an investigating authority from extending the POI during the course of an investigation. We agree with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation. In this regard, we would also note that the extension of a POI may in certain cases lead to negative findings of dumping and/or injury, to the benefit of exporters. The fact that the POI may be extended after the imposition of provisional measures is not necessarily problematic, since even without any extension of the POI there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry. Indeed, in such cases differences in the factual bases of the preliminary and final determinations would normally be necessary in order to preserve the integrity of the investigation. Although Annex II(1) provides that interested parties should be informed of the information required by the investigating authority 'as soon as possible after the initiation of the investigation', this does not mean that information concerning a particular period of time may only be required if the request for that information is made immediately after initiation. We interpret the first sentence of paragraph 1 of Annex II to mean that any request for specific information should be communicated to interested parties 'as soon as possible'. Since Mexico has not advanced any argument that it was possible for the Ministry to have requested information concerning the extended POI before it actually did so, we reject Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under paragraph 1 of Annex II of the AD Agreement."⁴⁹²

382. In *Egypt – Steel Rebar*, the Panel indicated that paragraph 1 of Annex II sets forth rules to be followed by the authority, in particular that it must specify the required information "in detail", "as soon as possible after the initiation of the investigation", and that it also must specify "the manner in which that information should be structured by the interested party in its response". Thus, in the Panel's view, "there is a clear burden on the authority to be both prompt and precise

in identifying the information that it needs from a given interested party".⁴⁹³

383. In *Egypt – Steel Rebar*, the investigating authorities had requested certain supplemental cost information as well as explanations concerning certain of the cost information originally submitted in response to the questionnaires. The Panel found "no basis on which to conclude that an investigating authority is precluded by paragraph 1 of Annex II or by any other provision from seeking additional information during the course of an investigation".⁴⁹⁴

(ii) *Failure to specify in detail the information required*

384. In *Argentina – Ceramic Tiles*, the Panel, when analysing whether the investigating authorities were entitled to resort to facts available because the alleged failure on a party to provide sufficient supporting documentation, considered that "a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination", as set forth in Article 6.1. The Panel concluded that, "independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."⁴⁹⁵ The Panel further stated that:

"In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.

...

... we conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation."⁴⁹⁶

(c) *When to resort to facts available*

385. In *Argentina – Ceramic Tiles*, the Panel enunciated the conditions under which the investigating authorities may resort to facts available:

⁴⁹² Panel Report on *Guatemala – Cement II*, para. 8.177.

⁴⁹³ Panel Report on *Egypt – Steel Rebar*, para. 7.155.

⁴⁹⁴ Panel Report on *Egypt – Steel Rebar*, para. 7.320.

⁴⁹⁵ Panel Report on *Argentina – Ceramic Tiles*, paras. 6.53–6.54.

⁴⁹⁶ Panel Report on *Argentina – Ceramic Tiles*, paras. 6.55 and 6.58.

"It is clear to us, and both parties agree, that an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the AD Agreement. Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation."⁴⁹⁷

386. In *Egypt – Steel Rebar*, the Panel explained that paragraphs 3 and 5 of Annex II "together . . . provide key elements of the substantive basis" for the investigating authority to determine whether it can resort to facts available.

"These two paragraphs together thus provide key elements of the substantive basis for an IA to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead, it must rely on the information submitted by respondents "when determinations are made". Some of the elements referred to in these paragraphs have to do with the inherent quality of the information itself, and some have to do with the nature and quality of the interested party's participation in the IA's information-gathering process. Where all of the mentioned elements are satisfied, resort to facts available is not justified under Article 6.8."⁴⁹⁸

387. In *Egypt – Steel Rebar*, the Panel reiterated that paragraph 3 of Annex II applies to an investigating authority's decision to use "facts available" in respect of certain elements of information and stressed that "it does not have to do with determining which particular facts available will be used for those elements of information once that decision has been made."⁴⁹⁹

(d) When not to resort to facts available

388. In *US – Hot-Rolled Steel*, the Appellate Body concluded that, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. These conditions are that the information is (i) verifiable, (ii) appropriately submitted so that it can be used in the investigation without undue difficulties, (iii) supplied in a timely fashion, and, where applicable, (iv) supplied in a medium or computer language requested by the authorities. The Appellate Body concluded that, in its view, "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."⁵⁰⁰

389. In *US – Steel Plate*, the Panel analysed the extent of the limitation that paragraph 3 of Annex II puts on investigating authorities to reject information submitted and instead resort to facts available. The Panel con-

cluded that the "Members [do not] have an unlimited right to reject all information submitted in a case where some necessary information is not provided":

"Paragraph 3 states that all information provided that satisfies the criteria set out in that paragraph is to be taken into account when determinations are made. We consider in this regard that the use of the final connector 'and' in the list of criteria makes it clear to us that an investigating authority, when making determinations, is only **required** to take into account information which satisfies all of the applicable criteria of paragraph 3.⁵⁰¹ In order to assess the limitations this provision puts on the right of an investigating authority to reject information submitted and instead resort to facts available,⁵⁰² we look to the ordinary meaning of the text, in its context and in light of its object and purpose. Paragraph 3 starts with the phrase 'all information'. 'All' means 'the whole amount, quantity, extent or compass of' and 'the entire number of, the individual constituents of, without exception . . . every'.⁵⁰³ To 'take into account' is defined as 'take into consideration, notice'.⁵⁰⁴ Thus, a straightforward reading of paragraph 3 leads to the understanding that it requires that every element of information submitted which satisfies the criteria set out therein must be considered by the investigating authority when making its determinations. If information must be considered under paragraph 3, an investigating authority may not conclude, with respect to that information, that necessary information has not been provided, in the sense of Article 6.8. Consequently, we do not accept the United States' position that 'information' in Article 6.8 means all information, such that Members have an unlimited right to reject all information submitted in a case where some necessary information is not provided.

Of course, we do not mean to suggest that the investigating authority must, in every case, scrutinize each item

⁴⁹⁷ Panel Report on *Argentina – Ceramic Tiles*, para. 6.20. See also Panel Report on *US – Steel Plate*, para. 7.55, in para. 378 of this Chapter; Panel Report on *Egypt – Steel Rebar*, para. 7.147.

⁴⁹⁸ Panel Report on *Egypt – Steel Rebar*, para. 7.159.

⁴⁹⁹ Panel Report on *Egypt – Steel Rebar*, para. 7.309.

⁵⁰⁰ Appellate Body Report on *US – Hot-Rolled Steel*, para. 81. See also Panel Report on *US – Steel Plate*, para. 7.55, in para. 378 of this Chapter.

⁵⁰¹ (*footnote original*) The Appellate Body has stated explicitly that:

"according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."

Appellate Body Report, *US – Hot-Rolled Steel*, at para 81.

⁵⁰² (*footnote original*) We note in this context the statement of the Appellate Body that paragraph 3 of Annex II bears on the issue of "when the investigating authorities are entitled to *reject* information submitted by interested parties." Appellate Body Report, *US – Hot-Rolled Steel*, at para 80.

⁵⁰³ (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

⁵⁰⁴ (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

of information submitted in order explicitly to determine whether it satisfies the criteria of paragraph 3 of Annex II before it uses it in its determination. Clearly, if the authority is satisfied with the information submitted, and concludes that an interested party has fully complied with the requests for information, there is no need to undertake any separate analysis under paragraph 3 of Annex II. However, to the extent the authority is not satisfied with the information submitted, it must examine those elements of information with which it is not satisfied, in light of the criteria of paragraph 3."⁵⁰⁵

390. In *US – Steel Plate*, the Panel further qualified its conclusions by stating that the investigating authorities were not obliged to judge each category of information separately. The Panel however indicated that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls:

‘... we also do not accept India’s view that each category of information submitted must be judged separately. India recognizes that there may be cases where a piece of information submitted which otherwise satisfies paragraph 3 is so minor an element of the information necessary to make determinations that it cannot be used in the investigation without undue difficulties, and that it is possible that so much of the information submitted in a particular ‘category’ fails to satisfy the criteria of paragraph 3, for instance, cannot be verified, that the entire category of information cannot be used without undue difficulty.[footnote omitted]

We consider in addition that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular ‘categories’ of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II. However, to accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any ‘essential’ element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available.

To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.⁵⁰⁶

... In a case in which some information is rejected and facts available used instead, the ... question may arise whether the fact that some information submitted was rejected has consequences for the remainder of the information submitted. In particular, the investigating authority may need to consider whether the fact that some information is rejected results in other information failing to satisfy the criteria of paragraph 3. In this context, we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information.⁵⁰⁷⁵⁰⁸

391. In *US – Steel Plate*, the Panel faced the question of whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3 of Annex II, and thus may be rejected, can in any case justify a decision to reject other information submitted which, in isolation, satisfies that criteria:

‘... The more difficult question, presented in this dispute, is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand.’⁵⁰⁹

(e) Information which is “verifiable”

(i) *General*

392. In *Guatemala – Cement II*, the Panel indicated that recourse to “best information available” should not be had when information is “verifiable”, and when “it can be used in the investigation without undue difficulties”:

“Furthermore, Annex II(3) provides that all information which is ‘verifiable’, and ‘appropriately submitted so that it can be used in the investigation without undue difficulties’, should be taken into account by the investigating authority when determinations are made. In other words, ‘best information available’ should not be used when information is ‘verifiable’, and when ‘it can be used in the investigation without undue difficulties’. In

⁵⁰⁵ Panel Report on *US – Steel Plate*, paras. 7.57–7.58.

⁵⁰⁶ The Panel refers to the Panel Report on *US – Hot-Rolled Steel*, para. 7.55, see para. 375 of this Chapter.

⁵⁰⁷ (footnote original) In addition, as discussed below, the explanation of such findings is vital.

⁵⁰⁸ Panel Report on *US – Steel Plate*, paras. 7.59–7.61.

⁵⁰⁹ Panel Report on *US – Steel Plate*, para. 7.62.

our view, the information submitted by Cruz Azul was 'verifiable'. The fact that it was not actually verified as a result of the Ministry's response to reasonable concerns raised by Cruz Azul does not change this. In addition, there is nothing in the Ministry's final determination to suggest that the information submitted by Cruz Azul could not be used in the investigation 'without undue difficulties'. Since the information was 'verifiable', and since the Ministry did not demonstrate that it could not be used 'without undue difficulties', Annex II(3) provides strong contextual support for the above conclusion that the Ministry violated Article 6.8 in using the 'best information available' as a result of the cancelled verification visit."

(ii) *When is information verifiable?*

393. In *US – Steel Plate*, the Panel considered that the information is "verifiable" when "the accuracy and reliability of the information can be assessed by an objective process of examination" and that this process does not require an on-the-spot verification. In a footnote to its report, the Panel stated:

"While the parties have addressed this concept in terms of the 'on the spot' verification process provided for in Article 6.7 and Annex I of the Agreement, we note that such verification is not in fact required by the AD Agreement. Thus, the use of the term in paragraph 3 of Annex II is somewhat unclear. However, Article 6.6 establishes a general requirement that, unless they are proceeding under Article 6.8 by relying on facts available, the authorities shall 'satisfy themselves as to the accuracy supplied by interested parties upon which their findings are based'. 'Verify' is defined as 'ascertain or test the accuracy or correctness of, esp. by examination of by comparison of data etc; check or establish by investigation'. New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification, the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is 'verified'."⁵¹⁰

(iii) *Relevance of good faith cooperation*

394. In *Egypt – Steel Rebar*, the Panel considered that, pursuant to paragraphs 3 and 5 of Annex II, if read together⁵¹¹, "information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable."⁵¹²

(f) Information "appropriately submitted so that it can be used in the investigation without undue difficulties"

395. In *US – Steel Plate*, the Panel considered that the question of whether information submitted can be used in the investigation "without undue difficulties" is a highly fact-specific issue. It thus concluded that the investigating authority must explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties:

"The second criterion of paragraph 3 requires that the information be 'appropriately submitted so that it can be used in the investigation without undue difficulties.' In our view, 'appropriately' in this context has the sense of 'suitable for, proper, fitting'.⁵¹³ That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be 'used without undue difficulties'. 'Undue' is defined as 'going beyond what is warranted or natural, excessive, disproportionate'.⁵¹⁴ Thus, 'undue difficulties' are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US – Hot-Rolled Steel* case.⁵¹⁵

...

⁵¹⁰ Panel Report on *US – Steel Plate*, footnote 67. See also paras. 369–374 of this Chapter about on-the-spot verifications.

⁵¹¹ See para. 386 of this Chapter.

⁵¹² (*footnote original*) We note that there is an interplay between the concepts of acting to the best of one's ability in Annex II, paragraph 5, and "refusing access to" necessary information or "significantly impeding" an investigation in Article 6.8. That is, the behaviour of the interested party is relevant to the right to use facts available in a given situation.

⁵¹³ (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

⁵¹⁴ (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

⁵¹⁵ See para. 411 of this Chapter.

In our view, it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted. We consider the question of whether information submitted can be used in the investigation 'without undue difficulties' is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."⁵¹⁶

396. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that "the reference to the terms "appropriately submitted" is designed to cover *inter alia* information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws"⁵¹⁷:

"In our view, paragraph 3 of Annex II to the *AD Agreement* can be interpreted to mean that information not "appropriately submitted" in accordance with relevant procedural provisions of WTO Members' domestic laws may be disregarded. In the circumstances of this case, we consider that information submitted by Catarinense was not "appropriately submitted" within the meaning of paragraph 3 of Annex II to the *AD Agreement* because Catarinense had not complied with Argentina's accreditation requirements. Accordingly, the DCD was entitled to reject that information."⁵¹⁸

(g) Necessary information submitted in a timely fashion

(i) Timeliness

397. The Appellate Body in *US – Hot-Rolled Steel* concluded that paragraph 3 of Annex II directs investigating authorities not to resort to reject information submitted by the parties if this is submitted "in a timely fashion" and interpreted this as a "reference to a "reasonable period" of Article 6.8 or a "reasonable time" of paragraph 1 of Annex II (see paragraphs 401–403 below). The Appellate Body also refers to Article 6.1.1, second sentence which requires investigating authorities to extend deadlines "upon cause shown", if "practicable":

"... according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted 'in a *timely* fashion'.

The text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of 'timeliness' under that provision. In our view, 'timeliness' under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8,

and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, 'upon cause shown', and if 'practicable', these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.

That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, 'in a timely fashion', in paragraph 3 of Annex II as a reference to a 'reasonable period' or a 'reasonable time'. This reading of 'timely' contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines 'upon cause shown', if 'practicable'. In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information."⁵¹⁹

(ii) "necessary information"

398. In *Egypt – Steel Rebar*, the Panel examined the concept of "necessary information" in the sense of Article 6.8 and stressed that "Article 6.8 refers to "necessary" information, and not to "required" or "requested" information". Since Article 6.8 itself does not define the concept of "necessary" information, the Panel considered whether there is guidance on this point anywhere else in the *Anti-Dumping Agreement*, in particular in Annex II, given Article 6.8's explicit cross-reference to it.⁵²⁰ The Panel concluded that, subject to the requirements of Annex II, paragraph 1, it is left to the discretion of the

⁵¹⁶ Panel Report on *US – Steel Plate*, paras. 7.72 and 7.74.

⁵¹⁷ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.191.

⁵¹⁸ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.191.

⁵¹⁹ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 81–83. See also Panel Report on *US – Steel Plate*, para. 7.76; Panel Report on *Egypt – Steel Rebar*, para. 7.153.

⁵²⁰ Panel Report on *Egypt – Steel Rebar*, paras. 7.150–7.151.

investigating authority to specify what information is “necessary” in the sense of Article 6.8:

“On the question of the ‘necessary’ information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to ‘specify . . . the information required from any interested party’. This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information ‘in detail’, ‘as soon as possible after the initiation of the investigation’, and that it also must specify ‘the manner in which that information should be structured by the interested party in its response’. Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party . . .”⁵²¹

399. In *Egypt – Steel Rebar*, Turkey had claimed that because the basis for initially questioning and then rejecting Turkish respondents’ costs was unfounded, resort to facts available by the investigating authorities was unjustified under Article 6.8 of the Agreement. Egypt argued that its investigating authority was not in a position to make this determination because the required information to enable it to make the determination was not submitted by the respondents in their responses to the initial questionnaire. The Panel considered that, “[o]n its face, this justification for seeking the detailed cost information appears plausible to us, given, as noted, that a below-cost test is explicitly provided for in Articles 2.2 and 2.2.1 of the AD Agreement”. The Panel thus concluded that “the requested information would seem[ed] to be “necessary” in the sense of Article 6.8.”⁵²²

(iii) *Information submitted after a deadline*

400. In *US – Hot-Rolled Steel*, the United States authorities had rejected certain information provided by two Japanese companies which was submitted beyond the deadlines for responses to the questionnaires and thus applied “facts available” in the calculation of the dumping margins. The United States interpreted Article 6.8 as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data and that this is supported by Article 6.1.1. The Appellate Body, although it upheld the Panel’s finding that the United States had infringed Article 6.8 by rejecting that information and applying best facts available, did so following a different line of reasoning.⁵²³ As regards the Appellate Body’s interpretation of Article 6.1.1 in this context, see paragraph 317 above. The Appellate Body considered that deadlines are indeed

relevant in determining whether information had been submitted within a reasonable period of time but that a balance needs to be made between the rights of the investigating authorities to control and expedite the investigation and the legitimate interest of the parties to submit information and to have it taken into account:

“In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities.⁵²⁴ Instead, Articles 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.”⁵²⁵

(iv) *“within reasonable period” and “within reasonable time”*

401. In *US – Hot-Rolled Steel*, the Appellate Body looked into the issue of when investigating authorities are entitled to reject information submitted by the parties after a deadline established by the investigating authorities, and instead resort to facts available, as the United States did in this case. The Appellate Body considered that when information is provided “within a reasonable period of time” as mandated by Article 6.8, the investigating authorities cannot resort to best facts available:

⁵²¹ Panel Report on *Egypt – Steel Rebar*, para. 7.155.

⁵²² Panel Report on *Egypt – Steel Rebar*, para. 7.217.

⁵²³ Appellate Body Report on *US – Hot-Rolled Steel*, para. 90. The Appellate Body found that the United States authorities had “acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by [the Japanese exporters] were submitted within a reasonable period of time.” It however pointed out that “[i]n reaching this conclusion, we are *not* finding that [United States authorities] *could not*, consistently with the *Anti-Dumping Agreement*, have rejected the weight conversion factors submitted by [the Japanese exporters]. Rather, we conclude simply that, under Article 6.8, [United States authorities were] not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires.” Para. 89.

⁵²⁴ (*footnote original*) Indeed, as we have already noted, *supra*, para. 73, Article 6.14 of the *Anti-Dumping Agreement* provides that:

The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

⁵²⁵ Appellate Body Report on *US – Hot-Rolled Steel*, para. 86.

"Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authorities. According to Article 6.8, where the interested parties do not 'significantly impede' the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information 'within a reasonable period'. Thus, if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party."⁵²⁶

402. The Appellate Body in *US – Hot-Rolled Steel* also drew from paragraph 1 of Annex II to support its conclusion that investigating authorities may resort to facts available only "if information is not supplied within a reasonable time":

"Although [. . .] paragraph [1 of Annex II] is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only 'if information is not supplied within a reasonable time'. Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a 'reasonable time' but should, instead, be based on the information submitted."⁵²⁷

403. As regards the meaning of "reasonable period" under Article 6.8 and "reasonable time" under paragraph 1 of Annex II, the Appellate Body in *US – Hot-Rolled Steel* considered that both concepts should be approached on a case-by-case basis "in the light of the specific circumstances of each investigation":

". . . The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.

In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the

information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit."⁵²⁸

(h) Information submitted in the medium or computer language requested

404. In *US – Steel Plate*, the Panel refer to this fourth criterion of paragraph 3 of Annex II but it did not consider it further because it seemed to it to be straightforward and it was not in dispute in this case.⁵²⁹

(i) Non-cooperation: "refuse access to "or "otherwise fail to provide"

(i) *Meaning of cooperation*

405. In *US – Hot-Rolled Steel*, the United States authorities had resorted to "adverse"⁵³⁰ facts available to calculate the dumping margins of an exporter as a punishment for not having cooperated by failing to provide certain data as requested. The Appellate Body, which upheld the Panel's finding to the effect that the authorities' conclusion that the exporter failed to "cooperate" in the investigation "did not rest on a permissible interpretation of that word"⁵³¹, looked into the meaning of cooperation under paragraph 7 of Annex II. The Appellate Body considered that cooperation is a process which is "in itself not determinative of the end result of the cooperation":

"Paragraph 7 of Annex II indicates that a lack of 'cooperation' by an interested party may, by virtue of the use made of facts available, lead to a result that is 'less favourable' to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of 'cooperate': to 'work together for the same purpose or in the same task.'⁵³² This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of

⁵²⁶ Appellate Body Report on *US – Hot-Rolled Steel*, para. 77.

⁵²⁷ Appellate Body Report on *US – Hot-Rolled Steel*, para. 79.

⁵²⁸ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 84 – 85.

⁵²⁹ Panel Report on *US – Steel Plate*, para. 7.77.

⁵³⁰ See para. 413 of this Chapter.

⁵³¹ Panel Report on *US – Hot-Rolled Steel*, para. 8.1(b).

⁵³² (footnote original) *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 506; Panel Report, para. 7.73.

the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*.⁵³³

(ii) *Degree of cooperation: "to the best of its ability"*

406. The Appellate Body in *US – Hot-Rolled Steel*, when analysing the concept of cooperation under paragraph 7 of Annex II, noted that this provision does not indicate the degree of cooperation which is expected from interested parties to avoid the possibility of the investigating authorities resorting to "less favourable" result. The Appellate Body considered that, on the basis of the wording of paragraph 5 of Annex II, the degree of cooperation required is to cooperate to the "best of their abilities". The Appellate Body also draws from paragraph 2 of Annex II to maintain that the principle of good faith commands for a balance to be kept by the investigating authorities between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities:

"Paragraph 7 of Annex II does not indicate what *degree* of 'cooperation' investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a 'less favourable' outcome. To resolve this question we scrutinize the context found in Annex II. In this regard, we consider it relevant that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is 'not ideal in all respects' if the interested party that supplied the information has, nevertheless, acted 'to the *best* of its ability'. (emphasis added) This provision suggests to us that the level of cooperation required of interested parties is a high one – interested parties must act to the 'best' of their abilities.

We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be 'maintained' if complying with that request would impose an '*unreasonable extra burden*' on the interested party, that is, would 'entail *unreasonable additional cost and trouble*'. (emphasis added) This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a

principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements.⁵³⁴ This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable."⁵³⁵

407. In *US – Steel Plate*, India had argued that even if information submitted fails to satisfy the criteria of paragraph 3 of Annex II to some degree, if the party submitting that information acted to the best of its ability, the investigating authority is required under paragraph 5 of Annex II to make "more concerted efforts" to use it. The Panel did not agree with India:

"Paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort demanded of interested parties by this provision is significant.⁵³⁶ We are somewhat troubled by the implications of India's view of this provision, which might be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless "not be disregarded" if the party submitting it has acted to the best of its ability. We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction.

However, if we understand paragraph 5 to emphasize the obligation on the investigating authority to cooperate with interested parties, and particularly to actively make efforts to use information submitted if the interested party has acted to the best of its ability, we believe that it does not undo the framework for use of information submitted and resort to facts available set out in the AD Agreement overall. Similarly, paragraph 5 can be understood to highlight that information that satisfies the requirements of paragraph 3, but which is not perfect, must nonetheless not be disregarded."⁵³⁷

⁵³³ Appellate Body Report on *US – Hot-Rolled Steel*, para. 99.

⁵³⁴ (footnote original) Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

⁵³⁵ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 100–101.

⁵³⁶ (footnote original) Appellate Body Report, *US – Hot-Rolled Steel*, at para. 102.

⁵³⁷ Panel Report on *US – Steel Plate*, paras. 7.64–7.65.

408. In *Egypt – Steel Rebar*, the Panel considered that the phrase “acted to the best of its ability” in paragraph 5 of Annex II does not exist in isolation, either from other paragraphs of Annex II or from Article 6.8 itself. The Panel indicated that “this is because an interested party’s level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted”:

“[P]aragraph 5 [of Annex II] does not exist in isolation, either from other paragraphs of Annex II, or from Article 6.8 itself. Nor, *a fortiori*, does the phrase ‘acted to the best of its ability’. In particular, even if, with the best possible intentions, an interested party has acted to the very best of its ability in seeking to comply with an investigating authority’s requests for information, that fact, by itself, would not preclude the investigating authority from resorting to facts available in respect of the requested information. This is because an interested party’s level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof. We recall that the Appellate Body, in *US – Hot-Rolled Steel*, recognized this principle (although in a slightly different context), stating that ‘parties may very well ‘cooperate’ to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of ‘cooperating’ is in itself not determinative of the end result of the cooperation”.^{538 539}

409. In *Egypt – Steel Rebar*, the Panel looked at the dictionary meaning of the phrase to the “best” of an interested party’s ability:

“Considering in more detail the concrete meaning of the phrase to the ‘best’ of an interested party’s ability, we note that the *Concise Oxford Dictionary* defines the expression ‘to the best of one’s ability’ as ‘to the *highest level* of one’s *capacity* to do something’ (emphasis added). In similar vein, the *Shorter Oxford Dictionary* defines this phrase as ‘to the *furthest extent* of one’s *ability*; so far as one can do’. We note that in a legal context, the concept of ‘best endeavours’, is often juxtaposed with the concept of ‘reasonable endeavours’ in defining the degree of effort a party is expected to exert. In that context, ‘best endeavours’ connotes efforts going beyond those that would be considered ‘reasonable’ in the circumstances. We are of the opinion that the phrase the ‘best’ of a party’s ability in paragraph 5 connotes a similarly high level of effort.”⁵⁴⁰

(iii) *Justification for non-cooperation*

410. In *Guatemala – Cement II*, the Panel examined whether Guatemala’s authority had made recourse to the “best information available” in compliance with Article 6.8. In rejecting Guatemala’s argument that the Mexican producer concerned significantly impeded the investigation of the authority by failing to cooperate

with the authority’s verification visit to its premises, the Panel found that the objection of the Mexican producer to the verification visit was reasonable:

“[W]e do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of non-governmental experts with a conflict of interest in its verification team. We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the facts of this case, we find that the Ministry did not act in such a manner.”⁵⁴¹

(iv) *Cooperation as a two-way process*

411. The Appellate Body in *US – Hot-Rolled Steel* also considered that both paragraphs 2 and 5 of Annex II and Article 6.13 of the *Anti-Dumping Agreement* call for a “balance between the interests of investigating authorities and exporters” and therefore see “cooperation” as “a two-way process involving joint effort”:

“We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the ‘best of their abilities’ – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.

...

Article 6.13 thus underscores that ‘cooperation’ is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to ‘take due account’ of genuine ‘difficulties’ experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation.”⁵⁴²

⁵³⁸ (footnote original) Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.

⁵³⁹ Panel Report on *Egypt – Steel Rebar*, para. 7.242. See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 405.

⁵⁴⁰ Panel Report on *Egypt – Steel Rebar*, para. 7.244.

⁵⁴¹ Panel Report on *Guatemala – Cement II*, para. 8.251.

⁵⁴² Appellate Body Report on *US – Hot-Rolled Steel*, paras. 102 and 104.

(j) Information used in case of resorting to facts available

(i) “secondary source . . . with special circumspection”

412. In *Egypt – Steel Rebar*, Egypt has resorted to facts available in the calculation of the cost of production and constructed value of a Turkish company concerned. In particular, Egypt had added a 5 per cent for inflation to that company reported costs when constructing its normal value. Turkey had claimed that the addition of 5 per cent was arbitrary and, as information from a “secondary source”, should have been used with “special circumspection”, and in particular, should have been “check[ed] . . . from other independent sources at [the investigating authority’s] disposal”. The Panel rejected Turkey’s claim and emphasized that “applying ‘special circumspection’ does not mean that only one outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel.”⁵⁴³

(ii) “Adverse” facts available

413. In *US – Hot-Rolled Steel*, the United States authorities had resorted to “adverse” facts available to calculate the dumping margins of an exporter as a punishment for not having cooperated by failing to provide certain data as requested. In this case, Japan had not contested the possibility of resorting to “adverse” facts available in case of non-cooperation by a party. Its claim was that the Japanese exporter concerned had cooperated and thus the United States authorities should have not declared them non-cooperating parties and thus used “adverse” facts available. The Panel focussed its analysis on whether or not the Japanese exporter had cooperated without entering into an analysis of the compatibility of resorting to “adverse” effects with the *Anti-Dumping Agreement*. The Panel held that the authorities’ conclusion that the exporter failed to “cooperate” in the investigation “did not rest on a permissible interpretation of that word”.⁵⁴⁴ The Appellate Body, which upheld the Panel’s finding, indicated in a footnote to its Report, that “the term “adverse” does not appear in the *Anti-Dumping Agreement* in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available”.⁵⁴⁵ It however indicated that it would not consider “whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for

investigating authorities consciously to choose facts available that are *adverse* to the interests of the party concerned”⁵⁴⁶ The Appellate Body stressed that its analysis was circumscribed to using the term “adverse” facts available simply to denote that the authorities had drawn “an inference that was adverse to the interests of the non-cooperating party ‘in selecting among the facts otherwise available’”.⁵⁴⁷ For its analysis of the term non-cooperation, see paragraphs 405–411 above.

(k) Authorities’ duty to inform on reasons for disregarding information

414. In *Argentina – Ceramic Tiles*, the Panel considered that “Article 6.8, read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information”.⁵⁴⁸

415. In *Egypt – Steel Rebar*, the Panel considered that “the fact that an investigating authority may request information in several tranches during an investigation⁵⁴⁹ cannot, however, relieve of it of its Annex II, paragraph 6 obligations in respect of the second and later tranches, as that requirement applies to “information and evidence” without temporal qualification.⁵⁵⁰”⁵⁵¹

⁵⁴³ Panel Report on *Egypt – Steel Rebar*, para. 7.305.

⁵⁴⁴ Panel Report on *US – Hot-Rolled Steel*, para. 8.1(b).

⁵⁴⁵ Appellate Body Report on *US – Hot-Rolled Steel*, footnote 45. This footnote further indicates that “[p]ursuant to 19 U.S.C. § 1677e(b), if the investigating authorities find that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information”, then they may, in reaching their determination, “use an inference that is *adverse* to the interests of that party in selecting from among the facts otherwise available”. (emphasis added) The United States explained to us at the oral hearing that, in practice, an “adverse inference” is used because it is assumed that the information that a non-cooperative party did not provide would have been adverse to its interests . . .”

⁵⁴⁶ Appellate Body Report on *US – Hot-Rolled Steel*, footnote 45.

⁵⁴⁷ Appellate Body Report on *US – Hot-Rolled Steel*, footnote 60.

⁵⁴⁸ Panel Report on *Argentina – Ceramic Tiles*, para. 6.21.

⁵⁴⁹ See paras. 699–700 of this Chapter concerning paragraph 6 of Annex II.

⁵⁵⁰ (*footnote original*) We do not mean to imply here that an interested party can impose on an investigating authority an Annex II, paragraph 6 requirement simply by submitting new information *sua sponte* during an investigation. Rather, the role of paragraph 6 of Annex II, namely that it forms part of the basis for an eventual decision pursuant to Article 6.8 whether or not to use facts available, makes it clear that its requirements to inform interested parties that information is being rejected and to give them an opportunity to provide explanations, pertain to “necessary” information in the sense of Article 6.8. As discussed above, “necessary” information is left to the discretion of the investigating authority to specify, subject to certain requirements, notably those in Annex II, paragraph 1.

⁵⁵¹ Panel Report on *Egypt – Steel Rebar*, para. 7.262.

(1) Confidential *versus* non-confidential information

416. In *Argentina – Ceramic Tiles*, Argentina had argued that the failure to provide a non-confidential summary which is sufficiently detailed to permit the calculation of normal value, export price and the margin of dumping amounts to a refusal to provide access to information that is necessary for the authority in the determination of a dumping margin determination. The Panel disagreed with Argentina and supported its position by reference to Article 6.5 of the *Anti-Dumping Agreement* which requires an investigating authority to treat information which is by nature confidential or which is provided on a confidential basis as confidential information and prescribes that such information shall not be disclosed without specific permission of the party submitting it. The Panel considered that it would be contradictory to suggest that the *Anti-Dumping Agreement* creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. It further concluded that nothing in this Article authorises a Member to disregard confidential information solely on the basis that the non-confidential summary does not permit dumping calculations:

“In our view, the presence in [Article 6.5] the AD Agreement of a requirement to protect confidential information indicates that investigating authorities might need to rely on such information in making the determinations required under the AD Agreement. The AD Agreement therefore contains a mechanism that allows parties to provide investigating authorities with such information for the purposes of making their determinations, while ensuring that the information is not used for other purposes. In accordance with the accepted principles of treaty interpretation, we are to give meaning to all the terms of the Agreement.⁵⁵² It would be contradictory to suggest that the AD Agreement creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. If that were the case, then there would be no reason for the investigating authority to seek such information in the first place.

...

We are aware that, for the purpose of transparency, Article 6.5.1 obliges an authority to require the parties providing confidential information to furnish non-confidential summaries which shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. We consider that this is an important element of the AD Agreement which reflects the balance struck by the Agreement between the need to protect the confidentiality of cer-

tain information, on the one hand, and the need to ensure that all parties have a full opportunity to defend their interests, on the other. However, we see nothing in Article 6.5.1, nor elsewhere in Article 6.5, that authorizes a Member to disregard confidential information solely on the basis that the non-confidential summary of that information contains insufficient detail to permit authorities to calculate normal value, export price and the margin of dumping.^{553 554}

417. The Panel, in *Argentina – Ceramic Tiles*, further referred to Article 12 of the *Anti-Dumping Agreement*, which sets forth requirements regarding the contents of public notices in confirmation of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information:

“Thus, the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the AD Agreement. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice. In sum, Article 12 implies, to our mind, that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information.”⁵⁵⁵

418. The Panel, in *Argentina – Ceramic Tiles*, also found support for its view on the Appellate Body decision in *Thailand – H-Beams*, which addressed the question of the use of confidential information by the investigating authorities as a basis for its final determinations under Article 3 of the *Anti-Dumping Agreement*.

⁵⁵² (footnote original) As the Appellate Body noted in the case of *United States – Standards for reformulated and Conventional Gasoline*, “one of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 21.

⁵⁵³ (original footnote) We note that Article 6.5.2 of the AD Agreement specifically provides for a situation in which the authorities may disregard confidentially submitted information: in case the authorities consider that a request for confidentiality is not warranted and the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form. We note, however, that the DCD considered the request for confidential treatment was warranted and treated the information as such. Argentina has not invoked Article 6.5.2 as a justification for the DCD’s rejection of the exporters’ information either.

⁵⁵⁴ Panel Report on *Argentina – Ceramic Tiles*, paras. 6.34 and 6.38.

⁵⁵⁵ Panel Report on *Argentina – Ceramic Tiles*, para. 6.36.

- (m) Scope of Panel's review: national authorities' justification at the time of its determination

419. With respect to the use of "best information available", the Panel on *Guatemala – Cement II* restricted the scope of its examination to the reasoning provided by Guatemala's authority in its determination, citing the finding of the Panel on *Korea – Dairy*.⁵⁵⁶ The Panel stated that "[e]ven if the additional factors identified by Guatemala before the Panel could justify the use of 'best information available', such *ex post* justification by Guatemala should not form part of our assessment of the conduct of the Ministry leading up to the imposition of the January 1997 definitive anti-dumping measure."⁵⁵⁷ Subject to this limitation, however, the Panel stated that "[a]n impartial and objective investigating authority could not properly rely on 'best information available' sales data for the original [period of investigation], simply on the basis of [the] failure [of the subject Mexican producer] to provide sales data for the extended [period of investigation]."⁵⁵⁸

- (n) Consistency of domestic legislation with Article 6.8 and Annex II

420. In *US – Steel Plate*, the Panel was asked to consider the consistency of United States law with Article 6.8 and Annex II of the *Anti-Dumping Agreement*. In reference to the existing jurisprudence on mandatory *versus* discretionary legislation⁵⁵⁹, the Panel considered that the question before it was whether the US statutory provision at issue *required* the US authorities to resort to facts available in circumstances other than the circumstances in which Article 6.8 and paragraph 3 of Annex II permit resort to facts available⁵⁶⁰. The Panel found that the "practice" of the US authorities concerning the application of "total facts available" was not a measure which can give rise to an independent claim of violation of the *Anti-Dumping Agreement*.⁵⁶¹

- (o) Relationship with other paragraphs of Article 6

421. In *Guatemala – Cement II*, the Panel addressed Mexico's claim that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the *Anti-Dumping Agreement* by rejecting certain technical accounting evidence submitted by the Mexican producer one day before the public hearing held by Guatemala's authority. See paragraph 328 above.

422. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as

regards cooperation in anti-dumping investigations. See paragraph 409 above.

423. The Panel on *Argentina – Ceramic Tiles*, the Panel, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information to the party in question. See paragraphs 308 above and 384 above. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 314, 397 and 400 above.

424. The Panel, in *Argentina – Ceramic Tiles*, referred to Article 6.5 of the *Anti-Dumping Agreement* as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 above.

425. In *Egypt – Steel Rebar*, the Panel addressed the relationship of Article 6.2 with Annex II and Article 6.8. See paragraph 704 below.

8. Article 6.9

- (a) "shall, before a final determination is made, inform all interested parties of the essential facts under consideration"
- (i) *Means to inform all interested parties of the essential facts*

426. In *Argentina – Ceramic Tiles*, the Panel, further to noting that Article 6.9 does not prescribe the manner in which the investigating authority is to comply with the disclosure obligation, provided some examples of how investigating authorities may comply with this requirement:

"We agree with Argentina that the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways. Article 6.9 of the AD Agreement does not pre-

⁵⁵⁶ Panel Report on *Korea – Dairy*, para. 7.67.

⁵⁵⁷ Panel Report on *Guatemala – Cement II*, para. 8.245.

⁵⁵⁸ Panel Report on *Guatemala – Cement II*, para. 8.254.

⁵⁵⁹ See Section VI.B.3(c)(ii) of the Chapter on the *DSU*. The Panel also indicated that it kept "in mind that it is a well accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact. Our analysis of the consistency of the US statute with the AD Agreement takes into account, therefore, the principles of statutory interpretation applied by the administering agency and judicial authorities of the United States". Panel Report on *US – Steel Plate*, paras. 7.88–7.90.

⁵⁶⁰ Panel Report on *US – Steel Plate*, para. 7.92.

⁵⁶¹ Panel Report on *US – Steel Plate*, para. 8.3.

scribe the manner in which the authority is to comply with this disclosure obligation. The requirement to disclose the “essential facts under consideration” may well be met, for example, by disclosing a specially prepared document summarizing the essential facts under consideration by the investigating authority or through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures. This view is based on our understanding that Article 6.9 anticipates that a final determination will be made and that the authorities have identified and are considering the essential facts on which that decision is to be made. Under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration.”⁵⁶²

(ii) “the essential facts . . . which form the basis for the decision whether to apply definitive measures”

427. The Panel on *Argentina – Poultry Anti-Dumping Duties* stated that facts which do not form the basis for the decision whether to apply definitive measures cannot be considered to be “essential facts” within the meaning of Article 6.9 of the *AD Agreement*. The Panel was thus of the view that data which “is not going to be relied on in making a final determination is not a fact which forms the basis for the decision whether to apply definitive measures”.⁵⁶³ In other words, while the Panel accepted that normal value and export price data ultimately used in the final determination are essential facts which form the basis for the decision whether to apply definitive measures, “the fact that certain normal value and export price data is not going to be used is not”.⁵⁶⁴

428. The Panel on *Argentina – Poultry Anti-Dumping Duties* further considered that the term “essential facts” refers to “factual information” rather than “reasoning”. In the Panel’s view, the failure to inform an interested party of the reasons why the authority failed to use certain data does not equate to a failure to inform an interested party of an essential fact:

“We do not believe that the ordinary meaning of the word “fact” would support a conclusion that Article 6.9, when using the term “fact”, refers not only to “facts” in the sense of “things which are known to have occurred, to exist or to be true”, but also to “motives, causes or justifications”. ”⁵⁶⁵

(iii) *Relevance of the fact that information is made available in the authorities’ record*

429. In *Guatemala – Cement II*, the Panel considered that, although the information of the essential facts under consideration may be available in the authorities’ file, interested parties with access to that file will not know whether a particular information in that file forms the basis of the authorities’ determination. In the Panel’s view, one purpose of Article 6.9 is to resolve this problem. Accordingly, the Panel rejected Guatemala’s argument that interested parties had been informed that a certain directorate would make a technical study on the basis of the evidence in the file, and that copies of the file had been available. The Panel explained:

“We note that an investigating authority’s file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. For example, the file may contain information submitted by an interested party that was subsequently shown to be inaccurate upon verification. Although that information will remain in the file, it would not form the basis of the investigating authority’s decision whether to apply definitive measures. The difficulty for an interested party with access to the file, however, is that it will not know whether particular information in the file forms the basis of the authority’s final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties. . . . An interested party will not know whether a particular fact is ‘important’ or not unless the investigating authority has explicitly identified it as one of the ‘essential facts’ which form the basis of the authority’s decision whether to impose definitive measures.”⁵⁶⁶

⁵⁶² Panel Report on *Argentina – Ceramic Tiles*, para. 6.125.

⁵⁶³ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.224.

⁵⁶⁴ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.224.

⁵⁶⁵ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.225.

⁵⁶⁶ Panel Report on *Guatemala – Cement II*, para. 8.229. In *Argentina – Ceramic Tiles*, the Argentine authorities had relied primarily upon evidence submitted by petitioners and derived from secondary sources, rather than upon information provided by the exporters, as the factual basis for a determination of the existence of dumping. The Panel found that, in light of the state of the record, “the exporters could not be aware in this case, simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would, despite the responses of the exporters to the DCD’s information requests as summarized above, form the primary basis for the determination of the existence and extent of dumping. . . . Under these circumstances, we find that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the ‘essential facts under consideration which form the basis for the decision whether to apply definitive measures.’” Panel Report on *Argentina – Ceramic Tiles*, para. 6.129.

430. In support of its rejection of Guatemala's argument that it had disclosed the facts forming the basis of its definitive determination by merely allowing access to the file, the Panel referred to Article 6.4 and found that if Guatemala's interpretation were accepted, there would be "little, if any, practical difference between Article 6.9 and Article 6.4":

"Furthermore, if the disclosure of 'essential facts' under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. Guatemala is effectively arguing that it complied with Article 6.9 by complying with Article 6.4, *i.e.*, by providing 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases . . . and that is used by the authorities . . .'. We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases . . . and that is used by the authorities . . .' in order to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures'."⁵⁶⁷

(iv) *Disclosure of information forming the basis of a preliminary ruling*

431. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority acted inconsistently with Article 6.9 by failing to inform the Mexican producer subject to investigation of the "essential facts under consideration". In response, Guatemala first argued that the "essential facts under consideration" had been disclosed to interested parties in a detailed report setting out its authority's preliminary rulings. The Panel rejected Guatemala's justification, pointing out, among other things, that while the preliminary measures had been based on a threat of material injury, the final determination was based on actual material injury:

"Article 6.9 provides explicitly for disclosure of the 'essential facts . . . which form the basis for the decision whether to apply *definitive* measures' (emphasis supplied). Disclosure of the 'essential facts' forming the basis of a preliminary determination is clearly inadequate in circumstances where the factual basis of the provisional measure is significantly different from the factual basis of the definitive measure. In the present case, the preliminary measure was based on a preliminary determination of *threat* of material injury, whereas the final determination was based on *actual* material injury. Furthermore, the Ministry's preliminary determination (16 August 1996) was based on a [period of investigation ('POI')] different from that used for its final determina-

tion, since the POI was extended on 4 October 1996. Indeed, Guatemala has cited the United States' assertion that "[i]n the course of an anti-dumping investigation, the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination'. If the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination, we fail to see how disclosure of the 'essential facts' forming the basis of the preliminary determination could amount to disclosure of the 'essential facts' forming the basis of the final determination, since the 'bulk' of the 'essential facts' underlying the final determination would not yet have been gathered. In these circumstances, we do not consider that the Ministry could satisfy the Article 6.9 obligation to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures' by providing disclosure of the essential facts forming the basis of its preliminary determination."⁵⁶⁸

(v) *Failure to inform the changes in factual foundation from a preliminary determination to final determination*

432. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Following the observation based upon Article 12.2, as referenced in paragraph 313 above, the Panel explained with regard to Article 6.9, as follows:

"We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of 'information', 'evidence' and 'essential facts'. However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation."⁵⁶⁹

(b) *Relationship with other paragraphs of Article 6*

433. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in vio-

⁵⁶⁷ Panel Report on *Guatemala – Cement II*, para. 8.230.

⁵⁶⁸ Panel Report on *Guatemala – Cement II*, para. 8.228.

⁵⁶⁹ Panel Report on *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.2, see the excerpts quoted in paras. 314 and 336 of this Chapter.

lation of Article 6.9, as referenced in paragraphs 429, 430 and 432 above, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.⁵⁷⁰

434. The Panel on *Guatemala – Cement II* touched on the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 430 above.

9. Article 6.10

(a) General

435. In *Argentina – Ceramic Tiles*, the Panel explained the structure of the obligations set forth in Article 6.10 as follows:

“The first sentence of Article 6.10 of the AD Agreement sets forth a general rule that the authorities determine an individual margin of dumping for each known exporter or producer of the product under investigation. The second sentence of Article 6.10 permits an investigating authority to deviate from the general rule by permitting the investigating authorities to “limit their examination either to a reasonable number of interested parties or products by using samples . . . or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated”, in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable . . .”⁵⁷¹

436. The Panel, in *Argentina – Ceramic Tiles*, put the second sentence of Article 6.10 in context by referring to Article 9.4:

“Article 9.4 provides that, where the authorities have limited their examination in accordance with the second sentence of Article 6.10, the anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed an amount calculated on the basis of the margins of dumping for exporters or producers that were included in the examination. Finally, in cases where the authorities have limited their examination under Article 6.10, subparagraph 2 of Article 6.10 provides that the authorities shall nevertheless determine an individual margin of dumping for any exporter not initially selected who submits the necessary information in time for that information to be considered, except where the number of exporters is so large that individual examination would be unduly burdensome to the authorities and prevent timely completion of the investigation.”⁵⁷²

(b) “individual margin of dumping for each known exporter or producer”

437. In *Argentina – Ceramic Tiles*, the Argentine authorities had established a dumping margin for three size categories of ceramic tile irrespective of the exporter. The Panel concluded that “[w]hile the second

sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined”.⁵⁷³

“In our view, the general rule in the first sentence of Article 6.10, that individual margins of dumping be determined for each known exporter or producer of the product under investigation, is fully applicable to exporters who are selected for examination under the second sentence of Article 6.10. While the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that are examined. To the contrary, Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that are examined in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are so entitled as well.”⁵⁷⁴

438. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.10 is purely procedural

⁵⁷⁰ Panel Report on *Guatemala – Cement II*, para. 8.232.

⁵⁷¹ Panel Report on *Argentina – Ceramic Tiles*, para. 6.89. The Panel on *Argentina – Poultry Anti-Dumping Duties* agreed with the view that Article 6.10, first sentence, imposes a general obligation on investigating authorities to calculate individual margins of dumping for each known exporter or producer concerned of the product under investigation. Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.214.

⁵⁷² Panel Report on *Argentina – Ceramic Tiles*, para. 6.90.

⁵⁷³ The Panel acknowledged the “usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4” but indicated that this should not be confused with “the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole.” Panel Report on *Argentina – Ceramic Tiles*, para. 6.99.

⁵⁷⁴ As the Panel on *EC – Bed Linen* stated:

“[T]he fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Article 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation.” (emphasis added).

Panel Report on *EC – Bed Linen*, para. 6.118.

in nature, in the sense that it imposes a procedural obligation on the investigating agency to determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. According to the Panel “Article 6.10 is *not* concerned with substantive issues concerning the determination of individual margins, such as the availability of the relevant data. Such issues are addressed by provisions such as Articles 2 and 6.8 of the *AD Agreement*.”⁵⁷⁵ The Panel thus rejected the argument that for the requirement under Article 6.10 to apply, the exporter or producer concerned should supply the documentation needed to determine an individual margin of dumping.

10. Article 6.13

(a) Relationship with paragraphs 2 and 5 of Annex II

439. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as regards cooperation in anti-dumping investigations. See paragraph 411 above.

11. Relationship with other Articles

(a) Article 1

440. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the AD Agreement, including Article 6. The Panel then opined that Mexico’s claims under other articles of the AD Agreement, including Article 1, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁷⁶ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(b) Article 2

441. In *US – Stainless Steel*, the Panel considered that it was unnecessary to examine Korea’s claim using Articles 6.1, 6.2 and 6.9 with respect to the United States’ methodologies which the Panel had already found in violation of Article 2.⁵⁷⁷

442. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, see paragraph 94 above.

443. In *Argentina – Ceramic Tiles*, the Argentine authorities had established a dumping margin for three size categories of ceramic tiles irrespective of the exporter. The Panel, when analysing the compatibility of Argentina’s measure with Article 6.10, acknowledged the “usefulness of grouping (by size, model, type) for

the purpose of making a fair comparison under Article 2.4” but indicated that this should not be confused with “the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole.”⁵⁷⁸

(c) Article 3

444. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 in interpreting Article 3.1. See paragraph 112 above.

(d) Article 9

445. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 9, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁷⁹ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

446. With respect to the relationship between Article 6.8 and Article 9.3 and 9.4, see paragraphs 476–477 below.

447. As regards the relationship between Article 9.4 and Article 6.10, see paragraphs 436–437 above.

(e) Article 12

448. In *Guatemala – Cement II*, the Panel referred to Article 12.2 in rejecting Mexico’s claim of a violation of Articles 6.1, 6.2 and 6.9. See paragraph 313 above.

449. The Panel, in *Argentina – Ceramic Tiles*, referred to Article 12 of the *Anti-Dumping Agreement* as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 417 above.

(f) Article 18

450. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico’s claims under other articles of the *Anti-*

⁵⁷⁵ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.215.

⁵⁷⁶ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁵⁷⁷ Panel Report on *US – Stainless Steel*, para. 6.137.

⁵⁷⁸ Panel Report on *Argentina – Ceramic Tiles*, para. 6.99.

⁵⁷⁹ Panel Report on *Guatemala – Cement II*, para. 8.296.

Dumping Agreement, including Article 18, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸⁰ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

12. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

451. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 6. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement* and under Article VI of GATT 1994, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸¹ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7 *Provisional Measures*

7.1 Provisional measures may be applied only if:

- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisal is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisal is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. General

452. In *Guatemala – Cement II*, after having found that the subject definitive measure was inconsistent with the *Anti-Dumping Agreement*, the Panel considered it unnecessary to address claims concerning the provisional measure, stating:

“At most, Mexico’s claims concerning the provisional measure could only result in a ruling with respect to part of the definitive measure insofar as it relates to retrospective collection of the provisional measure (i.e., where it is mandated that the ‘provisional anti-dumping duties collected would remain in favor of the treasury’). Since we have already made findings that give rise to a recommendation concerning the totality of the definitive measure, we do not consider it necessary to further address claims (i.e. concerning the provisional measure) that could only result in a ruling concerning only part of the definitive measure.”⁵⁸²

2. Relationship with other Articles

(a) Article 1

453. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸³ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

⁵⁸⁰ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁵⁸¹ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁵⁸² Panel Report on *Guatemala – Cement II*, para. 8.298.

⁵⁸³ Panel Report on *Guatemala – Cement II*, para. 8.296.

(b) Article 6

454. In *Guatemala – Cement II*, the Panel referred to Article 7.3 in examining Mexico’s claim under Article 6.1.3. See paragraph 325 above.

(c) Article 9

455. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 9, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸⁴ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(d) Article 17

456. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 7 (Articles 7.1 and 7.4) and Article 17.4. See paragraphs 615–616 below.

(e) Article 18

457. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 18, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸⁵ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

3. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

458. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 7. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement* and Article VI of GATT 1994 were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁵⁸⁶ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Price Undertakings

8.1 Proceedings may¹⁹ be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

(footnote original) ¹⁹ The word “may” shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not

⁵⁸⁴ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁵⁸⁵ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁵⁸⁶ Panel Report on *Guatemala – Cement II*, para. 8.296.

accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

459. The Panel on *US – Offset Act (Byrd Amendment)* considered the extent of the obligation under Article 8.3 of the *Anti-Dumping Agreement* concerning price undertakings. According to the Panel, under Article 8:

“[W]hen offered, the investigating authority need not accept the undertaking if it considers it impractical or if for other reasons it does not want to accept the undertaking. The decision to accept an undertaking or not under the Agreements is one the investigating authority is to take, and it may reject an undertaking for various reasons, including reasons of general policy. The fact that domestic producers may or may not be influenced by the CDSOA to suggest to the authority not to accept the undertaking, does not affect the possibility for interested parties concerned to offer an undertaking or for that undertaking to be accepted, in light of the non-decisive role of the domestic industry in this process.”⁵⁸⁷

IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9 *Imposition and Collection of* *Anti-Dumping Duties*

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the

margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.²⁰ Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

(*footnote original*)²⁰ It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized

⁵⁸⁷ Panel Report on *US – Offset Act (Byrd Amendment)*, para. 7.80.

should normally be made within 90 days of the above-noted decision.

- 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while

the review is being carried out. The authorities may, however, withhold appraisal and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

1. Article 9.2

(a) Relationship with Article 9.3

460. The Panel on *Argentina – Poultry Anti-Dumping Duties* made the following observations concerning the relationship between Article 9.2 and Article 9.3:

“We note that Article 9.3 contains a specific obligation regarding the amount of anti-dumping duty to be imposed, whereas Article 9.2 employs far more general language in referring to the collection of duties in ‘appropriate’ amounts. In particular, Article 9.2 provides no guidance on what an ‘appropriate’ amount of duty may be in a given case. In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be ‘appropriate’ within the meaning of Article 9.2. agreed with the argument made by one of the parties that a violation of Article 9.2 is entirely dependent on a violation of Article 9.3.”⁵⁸⁸

2. Article 9.3

(a) “*de minimis*” test

461. The Panel on *US – DRAMS* concluded that “Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures. As Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures, it certainly cannot require Members to apply a particular *de minimis* standard in such procedures.”⁵⁸⁹

462. The Panel on *US – DRAMS* further stated: “A *de minimis* test in the context of an Article 9.3 duty assessment will not remove an exporter from the scope of the order. Thus, the implication of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly.”⁵⁹⁰

463. The Panel on *US – DRAMS* discussed the different functions of the *de minimis* test in Article 5.8 and Article 9.3, respectively. See paragraph 289 above.

⁵⁸⁸ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.

⁵⁸⁹ Panel Report on *US – DRAMS*, para. 6.89.

⁵⁹⁰ Panel Report on *US – DRAMS*, para. 6.90.

(b) variable duties

464. The Panel on *Argentina – Poultry Anti-Dumping Duties* addressed the argument that variable anti-dumping duties are inconsistent with Article 9.3 because they are collected by reference to a margin of dumping established at the time of collection (i.e., the difference between a “minimum export price”, or reference normal value, and actual export price), rather than by reference to the margin of dumping established during the investigation. Brazil argued that from the moment the anti-dumping duty is imposed until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the margin assessed in the investigation, and found in the final determination. The Panel rejected this argument and concluded that Article 9.3 does not prohibit the use of variable anti-dumping duties:

“In addressing this claim, we note that nothing in the *AD Agreement* explicitly identifies the form that anti-dumping duties must take. In particular, nothing in the *AD Agreement* explicitly prohibits the use of variable anti-dumping duties. Brazil’s Claim 29 is based on Article 9.3 of the *AD Agreement*. As the title of Article 9 of the *AD Agreement* suggests, Article 9.3 is a provision concerning the imposition and collection of anti-dumping duties. Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. The modalities for ensuring compliance with this obligation are set forth in sub-paragraphs 1, 2 and 3 of Article 9.3, each of which addresses duty assessment and the reimbursement of excess duties. The primary focus of Article 9.3, read together with sub-paragraphs 1–3, is to ensure that final anti-dumping duties shall not be assessed in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected. Our understanding that Article 9.3 is concerned primarily with duty assessment is confirmed by the fact that the broadly equivalent provision in the *SCM Agreement* (i.e., Article 19.4) refers to the ‘lev[y]ing’ of duties, and footnote 51 to that provision states that “‘levy’ shall mean the definitive or final legal **assessment or collection** of a duty or tax’ (emphasis added).⁵⁹¹ When viewed in this light, it is not obvious that – as Brazil effectively argues – Article 9.3 prohibits variable anti-dumping duties by ensuring that anti-dumping duties do not exceed the margin of dumping established during ‘the investigation phase’ pursuant to Article 2.4.2. Neither the ordinary meaning of Article 9.3, nor its context (i.e., sub-paragraphs 1–3), supports that view. If Article 9.3 were designed to prohibit the use of variable customs duties, presumably that prohibition would have been clearly spelled out.”⁵⁹²

465. The Panel also pointed to Article 9.3.1 dealing with retrospective duty assessment as support for its

view that duties may be collected on the basis of a margin of dumping established after the end of the investigation.⁵⁹³ Similarly, the Panel considered that the Article 9.3.2 refund mechanism in the case of a prospective duty assessment would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected and drew the following conclusions:

“This therefore further undermines Brazil’s argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty refund is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty collection. Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer.⁵⁹⁴ While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant to the issue before us. Accordingly, we see no reason why it is not permissible⁵⁹⁵ for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection.”⁵⁹⁶

(c) Relationship with Article 9.2

466. In this regard, see paragraph 460 above.

3. Article 9.4

(a) Purpose of Article 9.4

467. In *US – Hot-Rolled Steel*, the Appellate Body indicated that “Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters.”⁵⁹⁷

⁵⁹¹ (*footnote original*) The Tokyo Round *AD Agreement* is also instructive, since Article 8.3 of that Agreement stated “[t]he amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. **Therefore**, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible” (emphasis added). This provision clearly demonstrates that the general requirement that anti-dumping duties shall not exceed the margin of dumping is concerned with duty assessment.

⁵⁹² Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.355.

⁵⁹³ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.

⁵⁹⁴ (*footnote original*) Brazil’s second written submission, para. 141.

⁵⁹⁵ (*footnote original*) We use this term with particular regard to the Article 17.6(ii) standard of review.

⁵⁹⁶ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.361.

⁵⁹⁷ Appellate Body Report on *US – Hot-Rolled Steel*, para. 123.

(b) Ceiling for “all others” rate

468. In *US – Hot-Rolled Steel*, the Appellate Body explained that Article 9.4 does not provide for a method to calculate “all others” rate but simply provides for a “ceiling “for such a rate and establishes two “prohibitions” on the use of certain margins in the calculation of the “all others” rate, i.e. not to use (i) zero or *de minimis* margins and (ii) margins established on the basis of best facts available:

“Article 9.4 does not prescribe any method that WTO Members must use to establish the ‘all others’ rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities ‘shall not exceed’ in establishing an ‘all others’ rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a ‘weighted average margin of dumping established’ with respect to those exporters or producers who were investigated. However, the clause beginning with ‘provided that’, which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, ‘for the purpose of this paragraph’, investigating authorities ‘shall disregard’, first, zero and *de minimis* margins and, second, ‘margins established under the circumstances referred to in paragraph 8 of Article 6.’ Thus, in determining the amount of the ceiling for the ‘all others’ rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the ‘all others’ ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using ‘margins established under the circumstances referred to’ in Article 6.8.”⁵⁹⁸

(i) Article 9.4(i): “weighted average margin of dumping with respect to selected exporters or producers”

“margins”

469. In *US – Hot-Rolled Steel*, the Appellate Body looked into the meaning of the word “margins” under Article 9.4. The Appellate Body recalled the interpretation made by the Panel of the word “margins” under Article 2.4.2 in *EC – Bed Linen* and considered that the same meaning should apply to the word “margins” under Article 9.4:

“[W]e recall that the word “margins”, which appears in Article 2.4.2 of that Agreement, has been interpreted in *European Communities – Bed Linen*. The Panel found, in that dispute, and we agreed, that “margins” means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.⁵⁹⁹ This margin reflects a comparison that is based upon examination of all of the relevant home market and

export market transactions. We see no reason, in Article 9.4, to interpret the word “margins” differently from the meaning it has in Article 2.4.2, and the parties have not suggested one.”⁶⁰⁰

“exporters or producers”

470. Referring to provisions which use the plural form, but which are also applicable in the singular case, the Panel on *EC – Bed Linen* stated that “Article 9.4(i) provides that the dumping duty applied to imports from producers/exporters not examined as part of a sample shall not exceed ‘the weighted average margin of dumping established with respect to the selected exporters or producers’. We consider that this provision does not become inoperative if there is only one selected exporter or producer – rather, the dumping margin for that exporter or producer may be applied.”⁶⁰¹ However, see paragraph 42 above for a reversal by the Appellate Body of a panel finding under Article 2.2.2(ii) that the plural form “other exporters and producers” could also be interpreted as referring to one single exporter or producer.

(ii) Prohibitions in the calculation of “all others” rate: zero and *de minimis* margins, margins based on facts availableMargins established under the circumstances referred to in paragraph 8 of Article 6

471. In *US – Hot-Rolled Steel*, Japan had claimed that the United States statutory method for calculating the “all others” rate in section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended⁶⁰², as well as the authorities’ application of the statutory method were inconsistent with Article 9.4 because they require the consideration of margins based in part on facts available in the calculation of the “all others” rate. The United States contended that only those margins which are calculated entirely on the basis of facts available could not be taken into account for the “all others” rate.⁶⁰³ The Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the “all others” rate, any

⁵⁹⁸ Appellate Body Report on *US – Hot-Rolled Steel*, para. 116.

⁵⁹⁹ (footnote original) Panel Report, *European Communities – Bed Linen*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, para. 6.118; Appellate Body Report, *European Communities – Bed Linen*, *supra*, footnote 36, para. 53.

⁶⁰⁰ Appellate Body Report on *US – Hot-Rolled Steel*, para. 118.

⁶⁰¹ Panel Report on *EC – Bed Linen*, para. 6.72.

⁶⁰² See also para. 597 of this Chapter.

⁶⁰³ The United States interpreted this sentence of Article 9.4 as meaning to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin – normal value and export price – are determined *exclusively* using facts available. Appellate Body Report on *US – Hot-Rolled Steel*, para. 117.

margins which are calculated, *even in part*, using facts available.⁶⁰⁴ The Appellate Body, which upheld the Panel's finding, found that "the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available":

"We proceed to examine the phrase 'margins established under the circumstances referred to in paragraph 8 of Article 6.' This provision permits investigating authorities, in certain situations, to reach "preliminary or final determinations . . . on the basis of the facts available". There is, however, no requirement in Article 6.8 that resort to facts available be limited to situations where there is *no* information whatsoever which can be used to calculate a margin. Thus, the application of Article 6.8, authorizing the use of facts available, is *not* confined to cases where the *entire* margin is established using *only* facts available. Rather, under Article 6.8, investigating authorities are entitled to have recourse to facts available *whenever* an interested party does not provide some necessary information within a reasonable period, or significantly impedes the investigation. Whenever such a situation exists, investigating authorities may remedy the lack of *any* necessary information by drawing appropriately from the "facts available". . .

Circumstances referred to in Article 6.8

472. On the basis of its conclusions above, the Appellate Body in *US – Hot-Rolled Steel* considered that the circumstances referred to in Article 6.8 cover all circumstances under which an investigating authority can have recourse to facts available, even if it involves only a small amount of information used in the calculation of an individual dumping margin:

"In consequence, we are of the view that the '*circumstances referred to*' in Article 6.8 are the circumstances in which the investigating authorities properly have recourse to 'facts available' to overcome a lack of necessary information in the record, and that these '*circumstances*' may, in fact, involve only a small amount of information to be used in the calculation of the individual margin of dumping for an exporter or producer."⁶⁰⁵

"established"

473. The Appellate Body in *US – Hot-Rolled Steel* then considered what "established" meant in the context of Article 9.4 as regards the "margins established under the circumstances referred to in Article 6.8". The Appellate Body concluded that "a margin does not cease to be "established under the circumstances referred to" in Article 6.8 simply because not every aspect of the calculation involved the use of "facts available"". The Appellate Body further concluded that the purpose of Article 9.4 is to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by

gaps or shortcomings in the information supplied by the investigated exporters:

"We turn to the word 'established' in the phrase 'margins established under the circumstances' referred to in Article 6.8. The essence of the United States' argument is that this word should be read as if it were qualified by the word 'entirely', or 'exclusively', or 'wholly': only where a margin is established 'entirely' under the 'circumstances' of Article 6.8 must that margin be disregarded.

We have noted that Article 9.4 establishes a prohibition, in calculating the ceiling for the all others rate, on using 'margins established under the circumstances referred to' in Article 6.8. Nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established 'entirely' on the basis of facts available. As noted earlier, Article 6.8 applies even in situations where only limited use is made of facts available. To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet, the text of Article 9.4 simply refers, in an open-ended fashion, to 'margins established under the circumstances' in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word 'entirely' as suggested by the United States. In our view, a margin does not cease to be 'established under the circumstances referred to' in Article 6.8 simply because not every aspect of the calculation involved the use of 'facts available'.

Our reading of Article 9.4 is consistent with the purpose of the provision. Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of, information supplied by the investigated exporters. Indeed, in some circumstances, as set forth in paragraph 7 of Annex II of the *Anti-Dumping Agreement*, 'if an interested party *does not cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is *less favourable* to the party than if the party did cooperate.' (emphasis added) Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to 'all others' were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins 'established' even in part on the basis of the facts available."⁶⁰⁶

⁶⁰⁴ As regards the use of facts available under Article 6.8, see paras. 375–425 of this Chapter.

⁶⁰⁵ Appellate Body Report on *US – Hot-Rolled Steel*, para. 120.

⁶⁰⁶ Appellate Body Report on *US – Hot-Rolled Steel*, paras. 121–123.

4. Relationship with other Articles

474. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of *GATT 1994*, if Guatemala were not found to have violated other provisions of the AD Agreement."⁶⁰⁷ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

(a) Article 9.3 with Article 5.8

475. The Panel on *US – DRAMS* discussed the relationship between Articles 5.8 and 9.3. See paragraphs 288–289 above.

(b) Article 9.3 with Article 6.8

476. With respect to the relationship between Article 6.8 and Article 9.3, the Panel on *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 9.3 (and Article 2.4 and Articles VI:1 and 2 of *GATT 1994*). In the Panel's view, findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated.⁶⁰⁸

(c) Article 9.4 with Article 6.8

477. In *US – Hot-Rolled Steel*, both the Panel and the Appellate Body analysed the relationship between Article 9.4 and Article 6.8 as regards the prohibition to calculate the "all others" rate in sample cases on the basis of margins calculated on facts available pursuant to Article 6.8. See 471–473 above.

(d) Article 9.4 with Article 6.10

478. In *Argentina – Ceramic Tiles*, the Panel analysed the relationship between Article 9.4 and Article 6.10 as regards the authorities' duty to calculate a dumping margin per known exporter (see paragraphs 436–437 above).

5. Relationship with other WTO Agreements

(a) Article VI:2 of the GATT 1994

479. The Appellate Body in *US – 1916 Act* addressed the argument that the phrase "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product" in Article VI:2 of the *GATT 1994* implies that a Member is permitted to impose a measure other than an anti-dumping measure:

"We believe that the meaning of the word "may" in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* Article VI of the *GATT 1994* and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9."⁶⁰⁹

X. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10 *Retroactivity*

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is

⁶⁰⁷ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁶⁰⁸ Panel Report on *US – Steel Plate*, para. 7.103.

⁶⁰⁹ Appellate Body Report on *US – 1916 Act*, para. 114.

made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
- (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisal or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Article 10.1

480. In *US – Hot-Rolled Steel*, Japan had challenged the consistency with Articles 10.6 and 10.7 of the United States statutory provisions on preliminary critical circumstances determination⁶¹⁰ and their application by the authorities in this case. Japan claimed that by violating these two provisions, the United States' authorities also acted inconsistently with Article 10.1. The Panel, in a finding not reviewed by the Appellate Body, concluded that neither the statutory provision nor its application in that case were inconsistent with Article

10.6 and Article 10.7. The Panel further found that the statutory provision was not, on its face, inconsistent with, *inter alia*, Article 10.1⁶¹¹ and that the authorities preliminary critical circumstances determination “was not inconsistent with Article 10.1 of the AD Agreement either since it complied with the conditions of Article 10.7 of the AD Agreement”⁶¹².

2. Article 10.6

481. In *US – Hot-Rolled Steel*, the Panel, in a finding not reviewed by the Appellate Body, analysed the conditions imposed by Article 10.6 in the context of the retroactive imposition of anti-dumping duties permitted by Article 10.7. This provision requires, *inter alia*, that national authorities provide sufficient evidence that all the conditions of Article 10.6 are satisfied. See paragraphs 482–488 below.

3. Article 10.7

(a) “such measures”

482. In *US – Hot-Rolled Steel*, the Panel, whose interpretation was not reviewed by the Appellate Body, interpreted Article 10.7 “as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6”:

“Article 10.7 provides that once the authorities have sufficient evidence that the conditions of Article 10.6 are satisfied, they may take such measures as, for example, the withholding of appraisal or assessment, as may be necessary to collect anti-dumping duties retroactively. We read this provision as allowing the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter. Measures taken under Article 10.7 are not based on evaluation of the same criteria as final measures that may be imposed at the end of the investigation. They are of a different kind – they preserve the possibility of imposing anti-dumping duties retroactively, on the basis of a determination additional to the ultimate final determination.

⁶¹⁰ Section 733(e)(1) of the Tariff Act of 1930, as amended, requires the United States' authorities to make certain preliminary determinations in a case in which a petitioner requests the imposition of anti-dumping duties retroactively for 90 days prior to a preliminary determination of dumping. Panel Report on *US – Hot-Rolled Steel*, para. 7.139.

⁶¹¹ Panel Report on *US – Hot-Rolled Steel*, para. 7.150.

⁶¹² Panel Report on *US – Hot-Rolled Steel*, para. 7.168.

Our understanding in this regard is confirmed by the fact that, unlike provisional measures, which can only be imposed after a preliminary affirmative determination of dumping and injury, Article 10.7 measures may be taken at any time ‘after initiating an investigation’⁶¹³

(b) “sufficient evidence” that the conditions of Article 10.6 are satisfied

(i) Concept of “sufficient evidence”

483. In *US – Hot-Rolled Steel*, the Panel interpreted the term “sufficient evidence” in Article 10.7. The Panel, whose interpretation was not reviewed by the Appellate Body, explained that Article 10.7 does not define “sufficient evidence”. The Panel then referred to Article 5.3 which also reflects this standard by requiring “sufficient evidence to initiate an investigation”. In this regard, the Panel considered past GATT and WTO Panels’ approach to this standard and concluded that “what constitutes “sufficient evidence” must be addressed in light of the timing and effect of the measure imposed or the determination made.” Furthermore, in the Panel’s view, “the possible effect of the measures an authority is entitled to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence” and it therefore “is not a standard that can be determined in the abstract”:

“Article 10.7 of the AD Agreement does not define ‘sufficient evidence’. However, Article 5.3 also reflects this standard, in requiring that the authorities examine the accuracy and adequacy of the evidence provided in the application ‘to determine whether there is sufficient evidence to justify the initiation of an investigation’. The Article 5.3 requirement of “sufficient evidence to initiate an investigation” has been addressed by previous GATT and WTO panels. Their approach to understanding this standard has been to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the determination.⁶¹⁴ These Panels have noted that what will be sufficient evidence varies depending on the determination in question. The Panel on *Mexico – HFCS* quoted with approval from the Panel’s report in the *Guatemala – Cement I* case that ‘the type of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less’.⁶¹⁵

. . . We are of the view that what constitutes ‘sufficient evidence’ must be addressed in light of the timing and effect of the measure imposed or the determination made. Evidence that is sufficient to warrant initiation of an investigation may not be sufficient to conclude that provisional measures may be imposed. In a similar vein, the possible effect of the measures an authority is enti-

led to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence. Whether evidence is sufficient or not is determined by what the evidence is used for. In sum, whether evidence is sufficient to justify initiation or to justify taking certain necessary precautionary measures under Article 10.7 is not a standard that can be determined in the abstract⁶¹⁶

(ii) Extent of the authorities’ determination

484. In *US – Hot-Rolled Steel*, the Panel, whose interpretation was not reviewed by the Appellate Body, considered that the requirement of “sufficient evidence that the conditions of Article 10.6 are satisfied” did not require the authorities to make a preliminary affirmative determination of dumping and consequent injury to the domestic industry:

“. . . In light of the timing and effect of the measures that are taken on the basis of Article 10.7, we consider that the Article 10.7 requirement of “sufficient evidence that the conditions of Article 10.6 are satisfied” does not require an authority to first make a preliminary affirmative determination within the meaning of Article 7 of the AD Agreement of dumping and consequent injury to a domestic industry. If it were necessary to wait until after such a preliminary determination, there would, in our view, be no purpose served by the Article 10.7 determination. The opportunity to preserve the possibility of applying duties to a period prior to the preliminary determination would be lost, and the provisional measure that could be applied on the basis of the preliminary

⁶¹³ Panel Report on *US – Hot-Rolled Steel*, paras. 7.155–7.156.

⁶¹⁴ (footnote original) Panel Report, *Mexico – HFCS*, para 7.95.

(referring to *Guatemala – Cement I*, para. 7.57 and *United States – Softwood Lumber*, SCM/162, BISD 40S/358, para. 335, (adopted 27–28 October 1993)). The Panel on *Guatemala – Cement I* also stated that “the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury and causation. made after investigation”, Panel Report, *Guatemala – Cement I*, para 7.57, referring to *United States – Softwood Lumber*, para 332.

⁶¹⁵ (footnote original) Panel Report, *Mexico – HFCS*, para. 7.97; Panel Report, *Guatemala – Cement I*, para 7.77

⁶¹⁶ Panel Report on *US – Hot-Rolled Steel*, paras. 7.153–7.154. The Panel considered that ““sufficient evidence” refers to the quantum of evidence necessary to make a determination.” The Panel made this statement in its analysis of the comparability of the terms “sufficient evidence” and the term used by the statutory provision at issue, namely “a reasonable basis to believe or suspect”. The Panel found that ““sufficient evidence” refers to the quantum of evidence necessary to make a determination. “A reasonable basis to believe or suspect” on the other hand, seems to refer to the conclusion reached on the basis of evidence presented, that is, a legal mindset that certain facts exist, based on the evidence presented. It appears that in past cases the US authorities have applied the standard as set out in the statute interchangeably with a standard expressed as “sufficient evidence” and have made affirmative determinations when sufficient evidence was adduced that the conditions of application were satisfied. We therefore consider that the US statute, as it has been applied is not inconsistent with the requirement of the AD Agreement that the investigating authority must have sufficient evidence of the conditions of Article 10.6 before taking measures necessary to collect the duties retroactively.” Panel Report on *US – Hot-Rolled Steel*, para. 7.144.

affirmative determination under Article 7 would prevent further injury during the course of the investigation. Moreover, the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation cannot be reconciled with the right, under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed, if a preliminary affirmative determination is a prerequisite to the Article 10.7 measures which preserve the possibility of retroactive application of duties under Article 10.6.”⁶¹⁷

(iii) Conditions of Article 10.6

485. The Panel, in *US – Hot-Rolled Steel*, noted that Japan had not challenged the initiation of the investigation which, pursuant to Article 5.3, was based on a determination that there was sufficient evidence of dumping, injury and causal link. The Panel, whose interpretation was not reviewed by the Appellate Body, indicated that, “given the precautionary nature of the measures that may be taken under Article 10.7”, it “can perceive of no reason . . . why that same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7.”⁶¹⁸

Importers’ knowledge of exporters’ dumping

486. The Panel, in *US – Hot-Rolled Steel*, commenced its analysis of whether the United States authorities had sufficient evidence that all conditions of Article 10.6 were satisfied by looking at the first condition: whether the importers knew or should have known that exporters were dumping and that such dumping would cause injury. The Panel considered that the evidence of dumping in the petition was “sufficient for an unbiased and objective investigating authority to reach this conclusion”. The Panel also noted that Japan, the complainant, had “not alleged that an imputed knowledge of dumping is, *per se*, inconsistent with Article 10.7, but rather argues that [the United States’ authorities] did not have sufficient evidence of dumping at all, for the purposes of Article 10.7.”⁶¹⁹

“injury caused”

487. In *US – Hot-Rolled Steel*, the United States authorities had adopted certain measures to collect anti-dumping duties retroactively. These authorities had made a preliminary determination of, *inter alia*, threat of serious injury. The Panel considered whether threat of serious injury fell within the concept of injury for the purpose of satisfying the conditions of Article 10.6 as required by Article 10.7. The Panel concluded that sufficient evidence of threat of injury is enough to justify a determination to apply protective measures under Article 10.7:

“[W]e note that Article 10.6 itself refers to a determination that an importer knew or should have known that there was dumping that would cause injury. The term “injury” is defined in footnote 9 to Article 3 of the Agreement to include threat of material injury or material retardation of the establishment of an industry, unless otherwise specified. Article 10.6 does not ‘otherwise specify’. Consequently, in our view, sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7.

The role of Article 10.7 in the overall context of the AD Agreement confirms this interpretation. This provision is clearly aimed at preserving the possibility to impose and collect anti-dumping duties retroactively to 90 days prior to the date of application of provisional measures. Thus, Article 10.7 preserves the option provided in Article 10.6 to impose definitive duties even beyond the date of provisional measures. Assume *arguendo* Article 10.7 were understood to require sufficient evidence of actual material injury. In a situation in which, at the time Article 10.7 measures are being considered, there is evidence only of threat of material injury, no measures under Article 10.7 could be taken. Assume further that in this same investigation, there was a final determination of actual material injury caused by dumped imports. At that point, it would be impossible to apply definitive anti-dumping duties retroactively, even assuming the conditions set out in Article 10.6 were satisfied, as the necessary underlying Article 10.7 measures had not been taken.⁶²⁰ Thus, in a sense, Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* – they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant.”⁶²¹

“massive imports in a relatively short period of time”

488. The Panel on *US – Hot-Rolled Steel*, in a conclusion not reviewed by the Appellate Body, analysed the third condition of Article 10.6 of which sufficient evidence is required by Article 10.7, namely that the injury be caused by massive dumped imports in a relatively short period of time. The Panel noted that the *Anti-Dumping Agreement* does not indicate what period should be used in order to assess whether there were massive imports over a short period of time. Nevertheless, the Panel concluded that “massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an

⁶¹⁷ Panel Report on *US – Hot-Rolled Steel*, para. 7.155.

⁶¹⁸ Panel Report on *US – Hot-Rolled Steel*, paras. 7.158.

⁶¹⁹ Panel Report on *US – Hot-Rolled Steel*, paras. 7.160.

⁶²⁰ (*footnote original*) We note that our findings concern the obligations regarding determinations of whether to apply “such measures . . . as may be necessary” under Article 10.7. We are not ruling on the obligations regarding retroactive application of final anti-dumping duties under Article 10.6.

⁶²¹ Panel Report on *US – Hot-Rolled Steel*, paras. 7.162–7.163.

investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed”:

“The Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan asserts that the latter part of Article 10.6 (ii) of the AD Agreement, referring to whether the injury caused by massive imports is likely to seriously undermine the remedial effect of the duty, implies that the period for comparison is the months before and after the initiation of the investigation. Japan argues that since the duty cannot be imposed retroactively to the period before the initiation, the remedial effect of the duty cannot be undermined by massive imports before initiation.

We disagree with this conclusion. Article 10.7 allows for certain necessary measures to be taken **at any time after initiation of the investigation**. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is obviously necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter, the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in place. Moreover, as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.

Moreover, in our view, it is not unreasonable to conclude that the remedial effect of the definitive duty could be undermined by massive imports that entered the country before the initiation of the investigation but at a time at which it had become clear that an investigation was imminent. We consider that massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed. Again, we emphasize that we are not addressing the question whether this would be adequate for purposes of the final determination to apply duties retroactively under Article 10.6.”⁶²²

4. Relationship with other Articles

489. In *US – Hot-Rolled Steel*, the Panel interpreted the term “sufficient evidence” of Article 10.7 by reference to Article 5.3. See paragraph 483 above.

XI. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.²¹ Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

(footnote original) ²¹ A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.²² The duty may remain in force pending the outcome of such a review.

(footnote original) ²² When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

⁶²² Panel Report on *US – Hot-Rolled Steel*, paras. 7.165–7.168.

B. INTERPRETATION AND APPLICATION OF
ARTICLE 11

1. Article 11.1

(a) Necessity

490. The Panel on *US – DRAMS* described the requirement in Article 11.1 whereby anti-dumping duties “shall remain in force only as long as and to the extent necessary” to counteract injurious dumping, as “a general necessity requirement.”⁶²³

491. In assessing the essential character of the necessity involved in Article 11.1, the Panel on *US – DRAMS* stated the following:

“We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.”⁶²⁴

492. The Panel on *US – DRAMS* held that “the necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping.”⁶²⁵ See paragraph 500 below.

493. With respect to the relationship between Article 11.1 and 11.2, see paragraph 494 below.

(b) Relationship with other paragraphs of
Article 11

494. The Panel on *US – DRAMS* examined the relationship between Articles 11.1 and 11.2 by considering whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recurrence of dumping is “not likely”. Referring to the general necessity requirement in Article 11.1, the Panel further noted that “the application of the general rule in Article 11.1 is specified in Article 11.2.”⁶²⁶

495. The Panel on *EC – Tube or Pipe Fittings* considered that “Article 11.1 does not set out an independent or additional obligation for Members”⁶²⁷ but rather “furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article.”⁶²⁸

2. Article 11.2

(a) “whether the continued imposition of the duty is necessary to offset dumping”

496. Considering whether Article 11.2 precludes an anti-dumping duty being deemed “necessary to offset dumping” where there is no present dumping to offset, the Panel on *US – DRAMS* addressed the issue as follows:

“First, we note that the second sentence of Article 11.2 refers to an examination of ‘whether the continued imposition of the duty is necessary to offset dumping.’ We note further that this sentence is expressed in the present tense. In addition, the second sentence of Article 11.2 does not explicitly include any reference to dumping being ‘likely’ to ‘recur’, as is the case with the injury review envisaged by that sentence.

However, the second sentence of Article 11.2 requires an investigating authority to examine whether the ‘continued imposition’ of the duty is necessary to offset dumping. The word ‘continued’ covers a temporal relationship between past and future. In our view, the word ‘continued’ would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset *present* dumping. Thus, the inclusion of the word ‘continued’ signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.

Furthermore, with regard to injury, Article 11.2 provides for a review of ‘whether the injury would be likely to continue or *recur* if the duty were removed or varied’ (emphasis supplied). In conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (*i.e.*, future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes *a priori* the justification of continued imposition of anti-dumping duties when there is no present dumping.

In addition, we note that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a ‘present’ analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review.”⁶²⁹

⁶²³ Panel Report on *US – DRAMS*, para. 6.41.

⁶²⁴ Panel Report on *US – DRAMS*, para. 6.42.

⁶²⁵ Panel Report on *US – DRAMS*, para. 6.43.

⁶²⁶ Panel Report on *US – DRAMS*, para. 6.41.

⁶²⁷ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.113.

⁶²⁸ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.113.

⁶²⁹ Panel Report on *US – DRAMS*, paras. 6.26–6.29.

497. The Panel on *US – DRAMS* considered Article 11.3 to be particularly relevant in giving support for, and reinforcing, its interpretation of Article 11.2 regarding the issue whether Article 11.2 precludes an anti-dumping duty being deemed “necessary to offset dumping” where there is no present dumping to offset.⁶³⁰ The Panel stated the following regarding Article 11.3:

“We note that with regard to dumping, the ‘sunset provision’ in Article 11.3 of the AD Agreement envisages *inter alia* an examination of whether the expiry of an anti-dumping duty would be likely to lead to ‘continuation or recurrence’ of dumping. If, as argued . . . , an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility (explicitly envisaged by Article 11.3) of the expiry of that duty causing dumping to *recur* could never arise. This is because the reference to ‘expiry’ in Article 11.3 assumes that the duty is still in force, and the reference to ‘recurrence’ of dumping assumes that dumping has ceased, but may ‘recur’ as a result of revocation. [This] textual interpretation of Article 11.2 would effectively exclude the possibility of an Article 11.3 review in circumstances where dumping has ceased but the duty remains in force. [This] interpretation therefore renders part of Article 11.3 ineffective. As stated by the Appellate Body in *Gasoline*, ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’. An interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation, and thus should be rejected.”⁶³¹

498. The Panel on *US – DRAMS* also rejected the argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of “no dumping”. The Panel opined that such interpretation would render footnote 22 under Article 11.3 meaningless:

“Furthermore, [the] argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of ‘no dumping’ (e.g., when a retrospective assessment finds that no duty is to be levied) is also inconsistent with note 22 of the AD Agreement. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, ‘a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty’. If [this] interpretation of Article 11.2 were accurate, then an investigating authority would be obligated under Article 11.2 to terminate an anti-dumping duty upon making such a finding, and note 22 would be meaningless. In our view, this confirms a finding that the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2.”⁶³²

499. As a result of its findings quoted in paragraphs 496–498 above, the Panel on *US – DRAMS* rejected the argument that “Article 11.2 of the AD Agreement requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping.”⁶³³

500. Referring to the general necessity requirement in Article 11, the Panel on *US – DRAMS* held that such necessity can only arise “in a defined situation pursuant to Article 11.2”. While “the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense”, it should nevertheless “be demonstrable on the basis of the evidence adduced”:

“The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be ‘necessary’ in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the ‘necessity’ standard, even where the need for the continued imposition of an anti-dumping duty is tied to the ‘recurrence’ of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping.”⁶³⁴

501. With respect to other findings of the Panel on *US – DRAMS* concerning “necessity” under Article 11, see paragraphs 490–491 above.

⁶³⁰ Panel Report on *US – DRAMS*, para. 6.30.

⁶³¹ Panel Report on *US – DRAMS*, para. 6.31.

⁶³² Panel Report on *US – DRAMS*, para. 6.32.

⁶³³ Panel Report on *US – DRAMS*, para. 6.34.

⁶³⁴ Panel Report on *US – DRAMS*, para. 6.43.

(b) “injury”

502. In *US – DRAMS*, the Panel stated that “by virtue of note 9 of the AD Agreement, the term ‘injury’ in Article 11.2 ‘shall be interpreted in accordance with the provisions of’ Article 3.”⁶³⁵ See further the excerpt quoted in paragraph 506 below.

(c) “likely to lead to continuation or recurrence”

503. The Panel on *US – DRAMS* considered Korea’s claim that the test applied by the United States’ authorities was inconsistent with the “likely to lead to continuation or recurrence” language of Article 11.2. The Panel noted that under United States’ law, the competent authority will not revoke anti-dumping duties unless it is “satisfied that future dumping is *not likely*.”⁶³⁶ (emphasis added) Korea argued that this “not likely” test is inconsistent with Article 11.2, because Article 11.2 mentions a likelihood test only with respect to *injury*. Furthermore, Korea argued that, even if the “likely” standard, established under Article 11.2 only in the context of *injury*, applied also in the context of *dumping*, the United States’ “not likely” test was in any case incompatible with the “likely” standard set forth in Article 11.2. The Panel found that the “‘not likely’-standard is not in fact equivalent to, and falls decisively short of, establishing that dumping is ‘likely to recur if the order is revoked.’”⁶³⁷ In reaching this finding, the Panel considered both the “clear conceptual difference between establishing something as a positive finding and failing to establish something as a negative finding”⁶³⁸, and the common usage of the relevant terms.⁶³⁹ The Panel noted that situations could exist where the “not likely” standard would be satisfied, while the “likely” standard would not be and concluded by stating that the United States’ “not likely” test did not provide a “demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied”.⁶⁴⁰

504. After finding that the United States’ test of “not likely” was inconsistent with the “likely” test mandated by the *Anti-Dumping Agreement*, the Panel on *US – DRAMS* decided not to address the issue whether the “likely” standard in the *dumping context* (as opposed to the injury context, where it is explicitly established) is consistent with the terms of Article 11.2 of the *Anti-Dumping Agreement*. The Panel then made the following observations, stating that a “likelihood” standard, applied in the context of injury under Article 11.2, could be applicable also in the anti-dumping context. More specifically, the Panel held, *inter alia*, that “there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews”:

“We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be ‘likely to lead to continuation or recurrence of dumping and injury.’ Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point. Second, Article 11.3 provides also for another situation whereby this five year period can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination. In the first case, we note that the provisions of Article 11.3 explicitly conditions the prolongation of the five year period on a finding that there is likelihood of dumping and injury continuing or recurring. In the second case, where there is reference to review under Article 11.2, there is no such explicit reference.

However, we note that both instances of review have the same practical effect of prolonging the application of anti-dumping duties beyond the five year point of an initial sunset review. This at the very least suggests, in our view, that there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews. There certainly appears to be nothing that explicitly provides to the contrary. Nor do we see any reason why this conclusion would be materially affected by whether or not the dumping review occurred in conjunction with an injury review. There is nothing in the text of Article 11 which suggests there should be some fundamental bifurcation of the applicable standard for dumping review contingent on whether there is also an Article 11.2 injury review being undertaken.

We also note that ‘likelihood’ or ‘likely’ carries with it the ordinary meaning of ‘probable’. That being so, it seems to us that a ‘likely standard’ amounts to the view that where recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force. Without prejudice to the legal status of such a view in terms of its consistency with the terms of Article 11.2 – a matter on which we are not required to rule as noted in the text above – we feel obliged to at least take note that, at least as a practical matter, rejection of such a

⁶³⁵ Panel Report on *US – DRAMS*, fn 501.

⁶³⁶ Panel Report on *US – DRAMS*, para. 6.38. (emphasis added)

⁶³⁷ Panel Report on *US – DRAMS*, para. 6.48.

⁶³⁸ Panel Report on *US – DRAMS*, para. 6.45.

⁶³⁹ Panel Report on *US – DRAMS*, para. 6.46.

⁶⁴⁰ Panel Report on *US – DRAMS*, para. 6.47.

view would effectively amount to a systematic requirement that reviewing authorities are obliged to revoke anti-dumping duties precisely where doing so would render recurrence of dumping probable.”⁶⁴¹

(d) “warranted”

505. In deciding whether “Article 11.2 necessarily requires an investigating authority, following three years and six months’ findings of no dumping, to find an ex officio Article 11.2 review of ‘whether the injury would be likely to continue or recur if the duty were removed or varied’ is ‘warranted’”⁶⁴², the Panel on *US – DRAMS* stated whether such “injury” review would be “warranted” would be entirely dependent upon a determination of whether dumping will recur:

“A review of ‘whether the injury would be likely to continue or recur if the duty were removed or varied’ could include a review of whether (1) injury that is (2) caused by dumped imports would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months’ no dumping, the issue of causality becomes whether injury caused by dumped imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the ‘injury’ review that [is believed to be] ‘warranted’ on the basis of three years and six months’ no dumping would be entirely dependent upon a determination of whether dumping will recur. . . . The mere fact of three years and six months’ findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of ‘whether the injury would be likely to continue or recur if the duty were removed or varied’.”⁶⁴³

506. In a footnote to the statement quoted in paragraph 507 below, the Panel on *US – DRAMS* noted:

“[B]y virtue of note 9 of the AD Agreement, the term ‘injury’ in Article 11.2 ‘shall be interpreted in accordance with the provisions of’ Article 3. Article 3.5 of the AD Agreement requires the establishment of a causal link between the dumped imports and the injury found to exist. Thus, we consider that the Article 11.2 examination of ‘whether the injury would be likely to continue or recur if the duty were removed or varied’ may also involve an examination of whether any injury that is found to be likely to continue or recur is caused by dumped imports. We can envisage circumstances, however, when an Article 11.2 injury review need not necessarily include an examination of causal link.”⁶⁴⁴

507. The Panel on *EC – Tube or Pipe Fittings* understood the “phrase ‘where warranted’ in Article 11.2 to denote circumstances furnishing good and sufficient grounds for, or justifying, the self-initiation of a review. Where an investigating authority determines such circumstances to exist, an investigating authority must self-initiate a review. Such a review, once initiated, will examine whether continued imposition of the duty is necessary to offset dumping, whether the dumping would be likely to continue or recur, or both. Article 11.2 therefore provides a review mechanism to ensure that Members comply with the rule contained in Article 11.1.”⁶⁴⁵ As the Panel pointed out, “the determination of whether or not good and sufficient grounds exist for the self-initiation of a review necessarily depends upon the factual situation in a given case and will necessarily vary from case to case.”⁶⁴⁶

(e) Relationship with other paragraphs of Article 11

508. The *US – DRAMS* Panel touched on the relationship between Article 11.1 and Article 11.2. See paragraph 494 above.

509. The relationship between Article 11.2 and Article 11.3 was also discussed in *US – DRAMS*. See the excerpts quoted in paragraphs 497 and 504 above. The relationship between Article 11.2 and footnote 22 to Article 11.3 was addressed by the Panel on *US – DRAMS*. See paragraph 498 above.

3. Article 11.3

(a) General

(i) Mandating rule / exception

510. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 lays down a mandatory rule with an exception and thus imposes a temporal limitation on the imposition of anti-dumping duties:

“Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition ‘unless’ the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that the expiry of the duty would be likely to

⁶⁴¹ Panel Report on *US – DRAMS*, para. 6.48, fn 494.

⁶⁴² Panel Report on *US – DRAMS*, para. 6.58.

⁶⁴³ Panel Report on *US – DRAMS*, para. 6.59.

⁶⁴⁴ Panel Report on *US – DRAMS*, fn 501.

⁶⁴⁵ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.112.

⁶⁴⁶ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.115.

lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.⁶⁴⁷⁶⁴⁸

511. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* also viewed the continuation of an anti-dumping duty as “an exception to the otherwise mandated expiry of the duty after five years”.⁶⁴⁹

(ii) *Difference between original investigation and sunset reviews*

512. With respect to the determination of a likelihood of recurrence or continuation of dumping and injury, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* noted that, as this likelihood determination is a prospective determination, “the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated”.⁶⁵⁰ In this respect, the Appellate Body pointed to the important difference between original investigations and sunset reviews:

“In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.”⁶⁵¹

(iii) *Active role of investigating authorities*

513. Based on an analysis of the various terms used in Article 11.3, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review*, then reached the following general conclusions:

“This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words ‘review’ and ‘determine’ in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word ‘likely’ in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible.”⁶⁵²

514. The Panel on *US – Corrosion-Resistant Steel Sunset Review* also underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

“The requirement to make a ‘determination’ concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.”⁶⁵³

(iv) *Positive evidence*

515. The Panel on *US – Corrosion-Resistant Steel Sunset Review* expressed its view on the use of historical data as a basis for the inherently prospective likelihood determination of Article 11.3:

“Future ‘facts’ do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated, to the present. We recall that one of the fundamental goals of the *Anti-dumping Agreement* as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts.⁶⁵⁴ Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation

⁶⁴⁷ (footnote original) We note that Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word “countervailing” is used in place of the word “anti-dumping” and the word “subsidization” is used in place of the word “dumping”. Given the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Carbon Steel*, paras. 63 and 88)

⁶⁴⁸ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 104.

⁶⁴⁹ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 178.

⁶⁵⁰ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

⁶⁵¹ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 107. The Panel on *US – Corrosion-Resistant Steel Sunset Review* also pointed to the fact that original investigations and sunset reviews are distinct processes with different purposes and it stated that “[I]n light of the fundamental qualitative differences in the nature of these two distinct processes, [...] it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ.” Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.8.

⁶⁵² Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 111. Also see Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 179.

⁶⁵³ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 114.

⁶⁵⁴ (footnote original) See Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (“*US – Carbon Steel*”), WT/DS213/R and Corr.1, adopted 19 December 2002 as modified by Appellate Body Report, *supra*, note 22, para. 8.94 and Panel Report, *US – Hot-Rolled Steel*, *supra*, note 204, para. 7.55.

relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.”⁶⁵⁵

516. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* adopted a similar approach to the need to base a prospective likelihood determination on “positive evidence”:

“The requirements of ‘positive evidence’ must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a ‘forward-looking analysis’.⁶⁵⁶ Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on ‘positive evidence’.”⁶⁵⁷

(b) No specific methodology

517. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review:

“Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member’s investigating authority in making such a “likelihood” determination.”⁶⁵⁸

518. This view was confirmed by the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review*. It thus considered that “no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.”⁶⁵⁹ According to the Appellate Body, “in a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping.”⁶⁶⁰

519. However, the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* added, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2 in general and Article 2.4 in particular:

“It follows that we disagree with the Panel’s view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood deter-

mination to be made in a sunset review under Article 11.3.”⁶⁶¹

520. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* came to a similar conclusion with respect to the likelihood of injury determination. According to the Panel, obligations contained in the various paragraphs of Article 3 do not “normally” apply to sunset reviews:

“Just as the Appellate Body stated that an investigating authority is not required to make a dumping determination in a sunset review, we consider that an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews”⁶⁶²

521. However, the Panel was of the view that, to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination:

“If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3.⁶⁶³ For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review. However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consis-

⁶⁵⁵ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279

⁶⁵⁶ (footnote original) Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

⁶⁵⁷ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

⁶⁵⁸ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.166.

⁶⁵⁹ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

⁶⁶⁰ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

⁶⁶¹ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 128.

⁶⁶² Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.273, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

⁶⁶³ (footnote original) We find support for this proposition in the Appellate Body’s findings in *US – Corrosion-Resistant Steel Sunset Review*. See, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 126–130.

tenacy of that calculation with the existing provisions of Article 3.”⁶⁶⁴

522. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* agreed with this approach by the Panel. The Appellate Body considered that “when Article 11.3 requires a determination as to the likelihood of continuation or recurrence of “injury”, the investigating authority must consider the continuation or recurrence of “injury” as defined in footnote 9.”⁶⁶⁵ According to the Appellate Body, “it does not follow, however, from this single definition of “injury”, that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3”⁶⁶⁶:

“In our view, however, the *Anti-Dumping Agreement* distinguishes between “determination[s] of injury”, addressed in Article 3, and determinations of likelihood of “continuation or recurrence . . . of injury”, addressed in Article 11.3. In addition, Article 11.3 does not contain any cross-reference to Article 3 to the effect that, in making the likelihood-of-injury determination, all the provisions of Article 3 – or any particular provisions of Article 3 – must be followed by investigating authorities. Nor does any provision of Article 3 indicate that, whenever the term “injury” appears in the *Anti-Dumping Agreement*, a determination of injury must be made following the provisions of Article 3.”⁶⁶⁷

523. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* concluded that “investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination”.⁶⁶⁸ However, the Appellate Body added, this does not imply that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3:

“Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a ‘reasoned conclusion’. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on ‘positive evidence’ and an ‘objective examination’ would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3* – not Article 3 – that a likelihood-of-injury determination rest on a ‘sufficient factual

basis’ that allows the agency to draw ‘reasoned and adequate conclusions’.”⁶⁶⁹

(c) Use of presumptions in a likelihood determination

524. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* clearly stated that the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. It considered “that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions.”⁶⁷⁰

525. The Appellate Body on *US – Corrosion-Resistant Steel Sunset Review* saw no problem in investigating authorities being instructed to examine, in every sunset review, dumping margin and import volumes.⁶⁷¹ However, it noted that the significance and probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case. It stated that it “would have difficulty accepting that dumping margins and import volumes are always “highly probative” in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping”⁶⁷² The Appellate Body thus concluded that the consistency of the provisions of a measure with Article 11.3 hinges upon whether those provisions instruct the investigating authority to treat “dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely

⁶⁶⁴ Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7. 274.

⁶⁶⁵ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 276.

⁶⁶⁶ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

⁶⁶⁷ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.

⁶⁶⁸ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 281.

⁶⁶⁹ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

⁶⁷⁰ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

⁶⁷¹ The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* was of the view that “‘volume of dumped imports’ and ‘dumping margins’, before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews, although other factors may also be as important, depending on the circumstances of the case”. Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 208.

⁶⁷² Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 177.

indicative or probative, on the other hand, of the likelihood of future dumping.”⁶⁷³

526. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* considered that a scheme that attributes a “determinative” / “conclusive” value to certain factors in sunset determinations – as opposed to only an indicative value – is likely to violate Article 11.3 of the *Anti-Dumping Agreement*.⁶⁷⁴ On appeal, the Appellate Body considered that the Panel had correctly articulated the standard for determining whether a measure was inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.⁶⁷⁵

527. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* considered that both the so-called deemed waiver and affirmative waiver provisions of United States law were inconsistent with Article 11.3 because they required an authority to make an affirmative determination of likelihood of continuation or recurrence of dumping, without taking into consideration the facts submitted by the exporter filing an incomplete submission, or without any further inquiry in the event where the exporter filed no submission or declared its intention not to participate in the review.⁶⁷⁶ On appeal, the Appellate Body agreed with the Panel’s analysis:

“Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. The United States contends that respondents waiving the right to participate in a sunset review do so ‘intentionally’, with full knowledge that, as a result of their failure to submit evidence, the evidence placed on the record by the domestic industry is likely to result in an unfavourable determination on an order-wide basis. In these circumstances, we see no fault in making an unfavourable order-wide determination by taking into account evidence provided by the domestic industry in support thereof. However, the USDOC also takes into account, in such circumstances, statutorily-mandated *assumptions*. Thus, even assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company’s likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to ‘arrive at a reasoned conclusion’ on the basis of ‘positive evidence’.”⁶⁷⁷

(d) Order-wide basis of a likelihood determination

528. In its report on *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body addressed the question whether authorities must make a separate determination, for each individual exporter or producer, on whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping by that exporter or producer or whether it would be possible to make a single order-wide determination on whether revocation of a particular anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. The Appellate Body considered that, on its face, Article 11.3 does not oblige investigating authorities in a sunset review to make “company-specific” likelihood determinations:

“We reiterate that Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review. In particular, Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. This contrasts with Article 11.2, which does refer to ‘any interested party’ and ‘[i]nterested parties’. We also note that Article 11.3 does not contain the word ‘margins’, which might implicitly refer to individual exporters or producers. On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make ‘company-specific’ likelihood determinations in the manner suggested by Japan.”⁶⁷⁸

⁶⁷³ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

⁶⁷⁴ Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.142–7.143.

⁶⁷⁵ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 197.

⁶⁷⁶ Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 7.93–7.99.

⁶⁷⁷ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 234.

⁶⁷⁸ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 149. The Appellate Body rejected the argument that Article 6.10 would require such company-specific sunset review determinations:

“We have already concluded that investigating authorities are not *required* to calculate or rely on *dumping margins* in making a likelihood determination in a sunset review under Article 11.3. This means that the requirement in Article 6.10 that dumping margins, “as a rule”, be calculated “for each known exporter or producer concerned” is not, in principle, relevant to sunset reviews. Therefore, the reference in Article 11.4 to “[t]he provisions of Article 6 regarding evidence and procedure” does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise) in a sunset review. Nor does Article 11.4 import into Article 11.3 an obligation for investigating authorities to make their likelihood determination on a company-specific basis.”

Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 155.

(e) No prescribed time-frame for likelihood of continuation or recurrence of injury

529. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* noted that Article 11.3 of the *Anti-Dumping Agreement* does not prescribe any time-frame for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based:

“As we already stated, Article 11.3 does not impose a particular time-frame on which the investigating authority has to base its likelihood determination. Further, in our view, the investigating authority does not have to base its likelihood determination on a uniform time-frame with respect to each injury factor that it takes into consideration. The time-frame regarding different injury factors may be different from one another depending on the circumstances of each sunset review. For instance, in a case where the exporters have excessive inventories, the investigating authority’s evaluation of likely volume of dumped imports can be based on a relatively short time-frame. On the other hand, an analysis regarding the cash flows or productivity of the domestic industry may necessarily have to be based on a longer time-frame.”⁶⁷⁹

530. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* agreed with the Panel that “an assessment regarding whether injury is likely to recur that focuses “too far in the future would be highly speculative”⁶⁸⁰, and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a “reasonably foreseeable time” set out in the United States statute is inconsistent with the requirements of Article 11.3.”⁶⁸¹ The Appellate Body rejected the argument that the requirement set out in Article 3.7 that the threat of material injury be “imminent” is to be imported into Article 11.3 in the form of a temporal limitation on the time-frame within which “injury” must be determined to continue or recur. The Appellate Body considered that “sunset reviews are not subject to the detailed disciplines of Article 3, which include the specific requirement of Article 3.7.”⁶⁸²

531. In addition, the Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* rejected the argument that an authority would be required to specify the relevant time-frame for injury to continue or recur for the authority’s determination to be a “properly reasoned and supported determination”:

“As we have noted above, the text of Article 11.3 does not establish any requirement for the investigating authority to specify the timeframe on which it bases its determination regarding injury. Thus, the mere fact that

the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the injury determination is not explicitly mentioned.”⁶⁸³

(f) Applicability of procedural obligations

(i) Evidentiary standards for initiation

532. The Panel on *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the same evidentiary standards that apply to the self-initiation of original investigations under Article 5.6 also apply to the self-initiation of sunset reviews under Article 11.3. The Panel based itself on the text of Article 11.3:

“As Japan concedes, Article 11.3, on its face, does not mention, either explicitly or by way of reference, any evidentiary standard that should or must apply to the self-initiation of sunset reviews. Article 11.3 contemplates initiation of a sunset review in two alternative ways, as is evident through the use of the word ‘or’. Either the authorities make their determination in a review initiated ‘on their own initiative’, or they make their determination in a review initiated ‘upon a duly substantiated request made by or on behalf of the domestic industry’. Although Article 11.3 provides for a certain qualification regarding initiations based on complaints lodged by the domestic industry – that such requests be ‘duly substantiated’ – the text clearly indicates that this qualification is germane only to that specific situation and does not apply to self-initiations. Consequently, since the drafters did not set forth any evidentiary requirements for the self-initiation of sunset reviews in the text of Article 11.3 itself, at first blush, it seems to us that they intended not to impose any evidentiary standards in respect of the self-initiation of a sunset review.”⁶⁸⁴

533. The Panel on *US – Corrosion-Resistant Steel Sunset Review* found further support for its conclusion in the absence of any cross-referencing in Article 11 to the evidentiary standards concerning original investigations in Article 5.6:

⁶⁷⁹ Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.187

⁶⁸⁰ (footnote original) Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.185.

⁶⁸¹ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 360.

⁶⁸² Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 358.

⁶⁸³ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 364.

⁶⁸⁴ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.26.

“Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles in the *Anti-Dumping Agreement*, no such cross-reference has been made in the text of Article 11 to Article 5.6. These cross-references (as well as other cross-references in the *Anti-Dumping Agreement*, such as, for example, in Article 12.3) indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews.”⁶⁸⁵

(ii) *De minimis standard in sunset reviews*

534. The Panel on *US – Corrosion-Resistant Steel Sunset Review* rejected the argument that the *Anti-Dumping Agreement* requires that the same *de minimis* standard that applies to investigating authorities under Article 5.8 also applies to sunset reviews under Article 11.3:

“On its face, Article 11.3 does not provide, either explicitly or by way of reference, for any *de minimis* standard in making the likelihood of continuation or recurrence of dumping determinations in sunset reviews. Therefore, Article 11.3 itself is silent as to whether the *de minimis* standard of Article 5.8 (or any other *de minimis* standard) is applicable to sunset reviews. However, [s]uch silence does not exclude the possibility that the requirement was intended to be included by implication.”

We therefore look to the context of Article 11.3. The immediate context of Article 11.3 does not, however, yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of that general rule under different circumstances. Article 11.4 contains a cross-reference to Article 6, which sets forth rules relating to evidence and procedure applicable to investigations. Given that, similar to Article 6, Article 5 also contains rules applicable to original investigations, we consider the absence in Article 11.4 of a similar cross-reference to Article 5 to indicate that the drafters did not intend to have the obligations in Article 5 apply also to sunset reviews.”⁶⁸⁶

535. In the view of the Panel on *US – Corrosion-Resistant Steel Sunset Review*, it was clear that Article 5.8 did not suggest that the *de minimis* standard set out for investigations also applied to sunset reviews:

“In particular, the text of paragraph 8 of Article 5 refers expressly to the termination of an *investigation* in the event of *de minimis* dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also

applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5.”⁶⁸⁷

536. On the basis of this textual analysis of the relevant provisions of the *Anti-Dumping Agreement*, the Panel on *US – Corrosion-Resistant Steel Sunset Review* concluded that the 2 per cent *de minimis* standard of Article 5.8 does not apply in the context of sunset reviews.⁶⁸⁸

(iii) *Cumulation*

Whether cumulation is permissible in sunset reviews

537. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* examined the question whether cumulation is permissible in sunset reviews. It found that, while Articles 3.3 and 11.3 are silent on this issue, this silence “cannot be understood to imply that cumulation is prohibited in sunset reviews.”⁶⁸⁹ The Appellate Body, recalling the apparent rationale behind the practice of cumulation in injury investigations as discussed by the Appellate Body on *EC – Tube or Tube or Pipe Fittings*⁶⁹⁰ considered that this rationale is equally applicable to likelihood of injury determinations in sunset reviews. The Appellate Body thus concluded that cumulation in sunset reviews is permissible:

“Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority’s determination as to whether to impose – or continue to impose – anti-dumping duties on products from those sources. Given the rationale for cumulation – a rationale that we consider applies to original investigations as well as to sunset reviews – we are of the view that it would be anomalous for Members to have limited authorization for cumulation in the *Anti-Dumping Agreement* to original investigations.”⁶⁹¹

⁶⁸⁵ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.27. With respect to Article 5.6, the Panel noted that “the text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations”. Panel Report on *United States – Corrosion Resistant Steel Sunset Review*, para. 7.36.

⁶⁸⁶ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.67–7.68.

⁶⁸⁷ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.70.

⁶⁸⁸ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85.

⁶⁸⁹ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 294.

⁶⁹⁰ See Appellate Body Report on *EC – Tube or Tube or Pipe Fittings*, para. 116.

⁶⁹¹ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 297.

Non-application of negligibility standards

538. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that the negligibility standards under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in original investigations, do not apply to sunset reviews under Article 11.3:

“Article 11.3 speaks of a review to determine, *inter alia*, the likelihood of continuation or recurrence of injury. On its face, Article 11.3 does not mention, either explicitly or by way of reference, any negligibility standard that applies to the likelihood of continuation or recurrence of injury determinations in sunset reviews. Nor does the immediate context of Article 11.3 yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Article 11.2 and 11.3 reflect the application of that general rule under different circumstances. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-Dumping Agreement*, no such cross-reference has been made to Articles 3.3 or 5.8.”⁶⁹²

539. The Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that “Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews”⁶⁹³

540. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* similarly found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3 because “by its own terms Article 3.3 limits its scope of application to investigations”.⁶⁹⁴ The Appellate Body agreed with the Panel “that the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews”.⁶⁹⁵

(g) “likely”

541. The *US – DRAMS* Panel interpreted the term “likely” in Article 11.2 with reference to Article 11.3. See paragraph 504 above.

542. The Appellate Body on *US – Oil Country Tubular Goods Sunset Reviews* considered “that the “likely” standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury”.⁶⁹⁶

(h) Relationship with other paragraphs of Article 11

543. The relationship between Article 11.3 and Article 11.2 was addressed in *US – DRAMS*. See paragraphs 497 and 504 above.

544. The Panel on *US – DRAMS* also referred to footnote 22 to Article 11.3 in interpreting Article 11.2. See paragraph 498 above.

4. Relationship with other Articles

(a) Article 3

545. The Panel on *US – DRAMS* discussed the relationship between footnote 9 to Article 3 and Article 11.2. See paragraph 506 above.

546. The Panel on *US – DRAMS* also discussed the relationship between Articles 3.5 and 11.2. See paragraph 506 above.

XII. ARTICLE 12

A. TEXT OF ARTICLE 12

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report²³, adequate information on the following:

(footnote original) ²³ Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

(i) the name of the exporting country or countries and the product involved;

⁶⁹² Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.95.

⁶⁹³ Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.102. The Panel was of the view that:

“even assuming *arguendo* that the provisions of Article 3 may be generally applicable throughout the *Anti-dumping Agreement*, an issue we need not and do not decide, this would not necessarily make every single provision in that article applicable throughout the Agreement. An article that has been found generally to apply throughout the Agreement may well contain certain specific provisions whose scope of application is limited, by their own terms, in certain respects. In our view, Article 3.3 is such a specific provision, which limits its scope of application by its own terms.”

Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.101.

⁶⁹⁴ Panel Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.336.

⁶⁹⁵ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 302.

⁶⁹⁶ Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 323

- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed;
- (vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Article 12.1

(a) General

547. In *Guatemala – Cement II*, Mexico argued that Guatemala had acted inconsistently with the requirements of Article 12.1 by failing to publish a notice of initiation and notify Mexico and its exporter when the Guatemalan authority was satisfied that there was sufficient evidence to justify the initiation of an investigation. The Panel clarified the meaning of Article 12.1:

“[T]his provision can most reasonably be read to require notification and public notice once a Member has decided to initiate an investigation. This interpretation is confirmed by the fact that the public notice to be provided is a ‘notice of initiation of an investigation’. We can conceive of no logical reason why the AD Agreement would require a Member to publish a notice of the initiation of an investigation *before* the decision had been taken that such an investigation should be initiated.”⁶⁹⁷

⁶⁹⁷ Panel Report on *Guatemala – Cement II*, para. 8.87.

548. The Panel further rejected Mexico's argument that Guatemala was in violation of Article 12.1 by failing to satisfy itself as to the sufficiency of the evidence before giving notice of initiation, stating:

"Given the function and context of Article 12.1 in the AD Agreement, we interpret this provision as imposing a procedural obligation on the investigating agency to publish a notice and notify interested parties after it has taken a decision that there is sufficient evidence to proceed with an initiation. The Panel is of the view that Article 12.1 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3. By issuing a public notice of initiation in the case before us, the Guatemalan authorities complied with their procedural obligation under Article 12.1 to notify known interested parties and publish a public notice after they had decided to initiate an investigation. Whether or not Guatemala was justified in initiating an investigation on the basis of the evidence before it is an issue governed by Article 5.3."⁶⁹⁸

549. The Panel on *Argentina – Poultry Anti-Dumping Duties* rejected the argument that by fulfilling the requirement to publish a notice of initiation of an investigation, a Member has fulfilled the obligation to notify. According to the Panel, Article 12.1 clearly imposes two separate obligations, one to notify and another to give public notice, and it considered that these separate obligations "must both be fulfilled in any given investigation."⁶⁹⁹

(b) Obligation to notify "interested parties known to the investigating parties to have an interest" in the investigation

550. The Panel on *Argentina – Poultry Anti-Dumping Duties* considered that, by definition, "interested parties" necessarily have an interest in the investigation and should therefore be notified if they are known to the investigating authorities. The Panel rejected the argument that absence of contact details for such interested parties implied that the authority was not able to comply with its notification obligation:

"We accept that there may be circumstances in which an investigating authority may not have sufficient information to allow it to notify all interested parties known to have an interest in an investigation. In this sense, the fact that an exporter is 'known' by the investigating authority to have an interest in an investigation does not necessarily mean that sufficient details concerning the exporter are 'known' to the investigating authority such that it may make the Article 12.1 notification. In other words, knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter. In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating

authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter with only a very general request for assistance, without specifying the exporters for which contact details are required, does not satisfy the need to make all reasonable efforts"⁷⁰⁰

(c) Article 12.1.1

(i) General

551. In *Guatemala – Cement II*, Guatemala argued that even if a public notice itself is insufficient, a separate report can satisfy the requirements of Article 12.1.1. The Panel disagreed on the basis of the following analysis:

"There is no reference to a separate report in the public notice of initiation. Under Article 12.1.1, it is the 'public notice', and not the Member, that must 'make available through a separate report', certain information. We take this to mean that the public notice must at a minimum refer to a separate report. This conclusion is logical in that the separate report is a substitute for certain elements of the public notice and thus should perform a notice function comparable to that of the public notice itself. If there were no reference to a separate report in the public notice, how would the public and the interested parties concerned become aware of its existence? If the public and interested parties do not know of the existence of the report, how can it be considered that the required information was properly made available to them?"⁷⁰¹

552. In support of its proposition that in order to fulfil the requirements of Article 12.1.1, the public notice must, at a minimum, refer to a separate report, the Panel referred to footnote 23 of the *Anti-Dumping Agreement*, and stated that "[i]t cannot be said that the separate report was 'readily available' to the public, if the public is not informed about where, when and how to have access to this report, leave alone if they were not even publicly informed of its existence."⁷⁰²

553. In *Guatemala – Cement II*, the Panel rejected Guatemala's argument that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, even if found to be violations, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of harmless error; (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of

⁶⁹⁸ Panel Report on *Guatemala – Cement II*, para. 8.89.

⁶⁹⁹ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.133.

⁷⁰⁰ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.132.

⁷⁰¹ Panel Report on *Guatemala – Cement II*, para. 8.95.

⁷⁰² Panel Report on *Guatemala – Cement II*, para. 8.96.

benefits accruing to Mexico under the *Anti-Dumping Agreement*. See paragraphs 276–279 above.

(ii) *Article 12.1.1(iv): “a summary of the factors on which the allegation of injury is based”*

554. The Panel on *Mexico – Corn Syrup* rejected the argument that the notice of initiation of an investigation must set forth the investigating authority’s conclusion regarding the relevant domestic industry, and the bases on which that conclusion was reached. The Panel stated:

“Article 12.1.1(iv) merely requires that the notice of initiation contain ‘a summary of the factors on which the allegation of injury is based’ (emphasis added). It does not require a summary of the *conclusion* of the investigating authority regarding the definition of the relevant domestic industry. Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion. Still less does it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry. In other words, in our view, Article 12.1.1 cannot reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority’s conclusion regarding, the definition of the relevant domestic industry.”⁷⁰³

555. The Panel on *Mexico – Corn Syrup* noted that “a notice of preliminary or final determination must set forth explanations for *all* material elements of the determination. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain explanations of or reasons for the resolution of *all* questions of fact underlying the determination that there is sufficient evidence to justify initiation.”⁷⁰⁴

2. Article 12.2

(a) General

556. Regarding an explanation in public notices of the reason for a particular period for data collection, the Committee on Anti-Dumping Practices adopted a recommendation at its meeting of 4–5 May 2000. See paragraph 8 above.

(b) Article 12.2.1

557. In *Guatemala – Cement II*, Article 12.2.1 was referred to as part of the context of Article 6.1. See paragraph 310 above.

(c) Article 12.2.2

558. Rejecting the view that Article 12.2.2 requires explanations relating to initiation of the investigation to

be set out in the notice of final determination, the Panel on *EC – Bed Linen* stated:

“There is no reference to the initiation decision among the elements to be addressed in notices under Article 12.2. Moreover, in our view, it would be anomalous to interpret Article 12.2 as also requiring, in addition to the detailed information concerning the decisions of which notice is being given, explanations concerning the initiation of the investigation, of which notice has previously been given under Article 12.1. This is particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself.”⁷⁰⁵

559. The Panel on *EC – Bed Linen* concluded that “[w]e do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place.”⁷⁰⁶

560. The Panel on *EC – Tube or Pipe Fittings* considered that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered “material” by the investigating authority:

“We understand a “material” issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased (“all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking”). Nevertheless, the phrase “have led to”, implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. While it would certainly be desirable for an investigating authority to set out steps it has taken with a view to exploring possibilities of constructive remedies, such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties.”⁷⁰⁷

3. Relationship with other Articles

(a) General

561. In *Guatemala – Cement II*, the Panel considered it unnecessary to examine Mexico’s claim of a violation

⁷⁰³ Panel Report on *Mexico – Corn Syrup*, para. 7.87.

⁷⁰⁴ Panel Report on *Mexico – Corn Syrup*, para. 7.103.

⁷⁰⁵ Panel Report on *EC – Bed Linen*, para. 6.260.

⁷⁰⁶ Panel Report on *EC – Bed Linen*, para. 6.260.

⁷⁰⁷ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.424.

of Articles 12.2 and 12.2.2 because “the issue of Guatemala’s compliance with the transparency obligations deriving from its decision to impose definitive anti-dumping measures on imports of cement from Mexico would only be relevant if the decision to impose the measure itself had been consistent with the AD Agreement.”⁷⁰⁸

562. The Panel on *US – Softwood Lumber VI* held a similar view, considering that if it were to find no violation with respect to a particular specific claim, such a conclusion would be based on the USITC’s published determination which was then *ipso facto* sufficient. On the contrary, the Panel considered that if it did find a violation of a specific substantive requirement, the question of whether the notice of the determination “sufficient” under Article 12.2.2 of the AD Agreement would be immaterial:

“In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC’s published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC’s determination are consistent with the relevant provisions of the Agreements. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC’s published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is “sufficient” under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.”⁷⁰⁹

(b) Article 1

563. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, including Article 1, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement.”⁷¹⁰ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(c) Article 2

564. In *US – Stainless Steel*, after having found that there was inconsistency with Article 2.4.1 if an unnecessary “double conversion” was carried out in order to calculate the prices of local sales which were to be compared to alleged dumping exports (see paragraphs 69–70 above and paragraph 634 below), the Panel considered it unnecessary to examine the claim on the same factual basis under Article 12, referring to a finding of the Appellate Body concerning judicial economy.⁷¹¹

(d) Article 3

565. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Article 3.1. See paragraph 112 above.

566. The Panel on *EC – Bed Linen*, after finding a violation of Article 3.4 by the European Communities, found it “neither necessary nor appropriate” to make a finding with respect to a claim of inadequate notice under Article 12.2.2. The Panel held that while a notice may adequately explain the determination that was made, the adequacy of the notice is nevertheless meaningless where the determination was substantively inconsistent with the relevant legal obligations. Furthermore, even if the notice itself was inconsistent with the *Anti-Dumping Agreement*, such a finding “does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement.”⁷¹²

(e) Article 5

567. The Panel on *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1. See paragraph 548 above.

568. The Panel on *Thailand – H-Beams* compared the notification requirements under Articles 5.5 and 12. See paragraph 304 above.

(f) Article 6

569. In *Guatemala – Cement II*, the Panel referred to Article 12.2 in rejecting Mexico’s claim of a violation of Articles 6.1, 6.2 and 6.9. See paragraph 313 above.

⁷⁰⁸ Panel Report on *Guatemala – Cement II*, para. 8.291. Also see Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.207.

⁷⁰⁹ Panel Report on *US – Softwood Lumber VI*, para. 7.41.

⁷¹⁰ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁷¹¹ Panel Report on *US – Stainless Steel*, para. 6.55. The Panel cited Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19. With respect to judicial economy in general, see the Chapter on the DSU, Section XXXVLF.

⁷¹² Panel Report on *EC – Bed Linen*, para. 6.259. See also Panel Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 6.40; and Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.293.

570. The Panel, in *Argentina – Ceramic Tiles*, referred to Articles 6.5 and Article 12 of the *Anti-Dumping Agreement* as support of its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 416 above.

(g) Article 9

571. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."⁷¹³ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

(h) Article 15

572. The Panel on *EC – Tube or Pipe Fittings* considered that while it would certainly be desirable for an investigating authority to set out the steps it has taken with a view to exploring the possibilities for constructive remedies, but that "such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties."⁷¹⁴ The Panel concluded that the elements of Article 15 were not of a "material" nature and thus did not consider that "the European Communities erred by not treating these elements as "material" within the meaning of that term used in Article 12 and [we] thus do not view it as having erred by not having included these in its published final determination."⁷¹⁵

(i) Article 17

573. In *Thailand – H-Beams*, the Appellate Body referred to Article 12 in interpreting Articles 17.5 and 17.6. See paragraph 633 below.

(j) Article 18

574. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that Mexico's claims under other articles of the *Anti-Dumping Agreement*, including Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."⁷¹⁶ In light of this dependent nature

of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

4. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

575. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the *Anti-Dumping Agreement*, including Article 12. The Panel then opined that that Mexico's claims under other articles of the *Anti-Dumping Agreement* and Article VI of GATT 1994 were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."⁷¹⁷ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims. See paragraph 5 above.

XIII. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13 *Judicial Review*

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14 *Anti-Dumping Action on Behalf of a Third Country*

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged

⁷¹³ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁷¹⁴ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.424.

⁷¹⁵ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.425.

⁷¹⁶ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁷¹⁷ Panel Report on *Guatemala – Cement II*, para. 8.296.

dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

XV. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. General

(a) The Doha Mandate

576. Paragraph 7.2 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns states that the Ministerial Conference “recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.”

2. First sentence

(a) Extent of Members' obligation

577. In *US – Steel Plate*, in a decision not reviewed by the Appellate Body, the Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, “Members cannot be expected to comply with an obligation whose parameters are entirely undefined”. According to the Panel, “the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action.”⁷¹⁸⁷¹⁹

578. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings* as follows:

“We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required. Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a “reduction” of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence.”⁷²⁰

(b) When and to whom “special regard” should be given

579. In *US – Steel Plate*, in a decision not reviewed by the Appellate Body, the Panel addressed the question of

⁷¹⁸ (*footnote original*) In this regard, we note the decision of the GATT Panel that considered similar arguments in the *EEC-Cotton Yarn* dispute. That Panel, in considering Article 13 of the Tokyo Round Agreement, which is substantively identical to its successor, Article 15 of the AD Agreement, stated:

“582. . . . The Panel was of the view that Article 13 should be interpreted as a whole. In the view of the Panel, assuming arguendo that an obligation was imposed by the first sentence of Article 13, its wording contained no operative language delineating the extent of the obligation. Such language was only to be found in the second sentence of Article 13 whereby it is stipulated that ‘possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries.’”

Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* (“*EEC – Cotton Yarn*”), adopted 30 October 1995, BISD 42S/17, para. 582 (emphasis added).

⁷¹⁹ Panel Report on *US – Steel Plate*, para. 7.110.

⁷²⁰ Panel Report on *EC – Tube or Pipe Fittings*, para. 7.68.

when and to whom special regard should be given under Article 15. The Panel concluded that Article 15 only requires special regard in respect of the final decision whether to apply a final measure and that such a special regard is to be given to the situation of developing country Members, and not to the situation of companies operating in developing countries:

“India’s arguments as to when and to whom this ‘special regard’ must be given disregard the text of Article 15 itself. Thus, the suggestion that special regard must be given throughout the course of the investigation, for instance in deciding whether to apply facts available, ignores that Article 15 only requires special regard ‘when considering the application of anti-dumping measures under this Agreement’. In our view, the phrase ‘when considering the application of anti-dumping measures under this Agreement’ refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation. Finally, India’s argument focuses on the exporter, arguing that special regard must be given in considering aspects of the investigation relevant to developing country exporters involved in the case. However, Article 15 requires that special regard must be given ‘to the special situation of developing country Members’. We do not read this as referring to the situation of companies operating in developing countries. Simply because a company is operating in a developing country does not mean that it somehow shares the “special situation” of the developing country Member.”⁷²¹

3. Second sentence

(a) “constructive remedies provided for by this Agreement”

580. The Panel on *EC – Bed Linen*, in a decision not reviewed by the Appellate Body, rejected the argument that a “constructive remedy” might be a decision not to impose anti-dumping duties at all. The Panel stated that “Article 15 refers to ‘remedies’ in respect of injurious dumping. A decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the *Anti-Dumping Agreement*, is not a ‘remedy’ of any type, constructive or otherwise” for injurious dumping:

“‘Remedy’ is defined as, *inter alia*, ‘a means of counteracting or removing something undesirable; redress, relief’.⁷²² ‘Constructive’ is defined as ‘tending to construct or build up something non-material; contributing helpfully, not destructive’.⁷²³ The term ‘constructive remedies’ might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies ‘provided for under this Agreement’.

... In our view, Article 15 refers to ‘remedies’ in respect of injurious dumping.”⁷²⁴

581. Discussing what might be encompassed by the phrase “constructive remedies provided for by this Agreement”, the Panel on *EC – Bed Linen* mentioned the examples of the imposition of a “lesser duty” or a price undertaking:

“The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute ‘constructive remedies’ within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute ‘constructive remedies’ under Article 15, as none have been proposed to us.”⁷²⁵

(b) “shall be explored”

582. The Panel on *EC – Bed Linen*, in interpreting the term “explore”, stated that, while the concept of “explore” does not imply any particular outcome, the developed country authorities must actively undertake the exploration of possibilities with a willingness to reach a positive outcome:

“In our view, while the exact parameters of the term are difficult to establish, the concept of ‘explore’ clearly does not imply any particular outcome. We recall that Article 15 does not require that ‘constructive remedies’ must be explored, but rather that the ‘possibilities’ of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the ‘exploration’ of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive

⁷²¹ Panel Report on *US – Steel Plate*, para. 7.111.

⁷²² (*footnote original*) The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

⁷²³ (*footnote original*) *Id.*

⁷²⁴ Panel Report on *EC – Bed Linen*, para. 6.228. In *US – Steel Plate*, the Panel agreed with the above conclusions and, applying it in the circumstances of this case, “consider[ed] that the possibility of applying different choices of methodology is not a “remedy” of any sort under the AD Agreement” Panel Report on *US – Steel Plate*, para. 7.112.

⁷²⁵ Panel Report on *EC – Bed Linen*, para. 6.229. A similar view was expressed by the Panel on *EC – Tube or Pipe Fittings*, para. 7.71–7.72. The Panel on *EC – Tube or Pipe Fittings* considered that Article 15 does not impose any obligation to explore undertakings other than price undertakings in the case of developing country Members. Panel Report on *EC – Tube or Pipe Fittings*, para. 7.78.

outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.⁷²⁶ It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.”⁷²⁷

583. The Panel on *EC – Bed Linen* concluded that “[p]ure passivity is not sufficient, in our view, to satisfy the obligation to ‘explore’ possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.” The Panel consequently regarded the failure of a Member “to respond in some fashion other than bare rejection *particularly once the desire to offer undertakings had been communicated to it*” as a failure to “explore constructive remedies.”⁷²⁸

584. In *US – Steel Plate*, India had argued that the United States authorities should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. The Panel, in a decision not reviewed by the Appellate Body, noted that “consideration and application of a lesser duty is deemed desirable by Article 9.1 of the [Anti-Dumping] Agreement, but is not mandatory.” Therefore, it stated, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. The Panel concluded that “the second sentence of Article 15 [cannot] be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law.”⁷²⁹

(c) “before applying anti-dumping duties”

585. The Panel on *EC – Bed Linen*, in a decision not reviewed by the Appellate Body, interpreted the phrase “before applying anti-dumping duties” as follows:

“In our view, [Article 1] implies that the phrase ‘before applying anti-dumping duties’ . . . means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term ‘provisional measures’ is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term ‘anti-dumping duties’ is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term ‘anti-dumping duties’ in Article 15 is clear – it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.

Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer’s or exporter’s interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to *require* developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a ‘provisional’ price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.”⁷³⁰

4. Relationship with other Articles

586. The *EC – Bed Linen* Panel touched on the relationship between Article 15 and Article 1. See the first paragraph of the quote in paragraph 585 above.

PART II

XVI. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as

⁷²⁶ (footnote original) We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

“The Panel noted that if the application of anti-dumping measures ‘would affect the essential interests of developing countries’, the obligation that then arose was to explore the ‘possibilities’ of ‘constructive remedies’. *It was clear from the words ‘[p]ossibilities’ and ‘explored’ that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.*’ *EC – Cotton Yarn*, para. 584 (emphasis added).

⁷²⁷ Panel Report on *EC – Bed Linen*, para. 6.233. See also Panel Report on *US – Steel Plate*, paras. 7.113–7.115 and Panel Report on *EC – Tube or Pipe Fittings*, para. 7.72. With respect to the related concept of good faith in general, see Chapter on *DSU*, Section III.B.1(vi).

⁷²⁸ Panel Report on *EC – Bed Linen*, para. 6.238.

⁷²⁹ Panel Report on *US – Steel Plate*, para. 7.116.

⁷³⁰ Panel Report on *EC – Bed Linen*, paras. 6.231–6.232. Also see Panel Report on *EC – Tube or Pipe Fittings*, para. 7.82.

the “Committee”) composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and (b) its domestic procedures governing the initiation and conduct of such investigations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

1. Article 16.1

(a) Rules of procedure

587. At its meeting of 22 May 1996, the Council for Trade in Goods approved rules of procedure for the meetings of the Committee on Anti-Dumping Practices (the “Rules of Procedure”).⁷³¹

(b) “shall meet not less than twice a year and otherwise”

588. The Rules of Procedure require that the Committee “shall meet not less than twice a year in regular session, and otherwise as appropriate.”⁷³²

2. Article 16.4

(a) Minimum information to be provided in reporting without delay all preliminary or final anti-dumping actions

589. At its meeting of 30 October 1995, the Committee on Anti-Dumping Practices adopted guidelines for the minimum information to be provided under Article 16.4 of the Agreement in the reports on all preliminary or final anti-dumping actions.⁷³³

(b) “The semi-annual reports shall be submitted on an agreed standard form”

590. At its meeting of 30 October 1995, the Committee on Anti-Dumping Practices adopted guidelines for the format of, and information to be provided in, the semi-annual reports.⁷³⁴

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.⁷³⁵

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if

⁷³¹ G/C/M/10, section 1(ii). The text of the adopted rules of procedure can be found in G/ADP/4 and G/L/143.

⁷³² G/L/143, chapter I, rule 1.

⁷³³ G/ADP/M/4, section D. The text of the adopted guidelines can be found in G/ADP/2.

⁷³⁴ G/ADP/M/4, section D. The text of the adopted format and guidelines can be found in G/ADP/1.

⁷³⁵ With respect to dispute settlement, in Marrakesh, the Ministers adopted the Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures. See Section XXII.

final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body (“DSB”). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.⁷³⁶

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. General

- (a) Concurrent application of Article 17 of the *Anti-Dumping Agreement* and the rules and procedures of the *DSU*

591. The Appellate Body in *Guatemala – Cement I* rejected the finding by the Panel that “the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, . . . that *replaces* the more general approach of the DSU (emphasis added).”⁷³⁷ The Appellate Body first held that the special or additional rules within the meaning of Article 1.2 shall prevail over the provisions of the *DSU* only “to the extent that there is a difference between the two sets of provisions”:

“Article 1.2 of the DSU provides that the ‘rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.’ (emphasis added) It states, furthermore, that these special or additional rules and procedures ‘shall prevail’ over the provisions of the DSU ‘[t]o the extent that there is a *difference* between’ the two sets of provisions (emphasis added) Accordingly, if there is no ‘difference’, then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.

We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. The special or additional provisions listed in Appendix 2 of the DSU are

⁷³⁶ With respect to Article 17.6, in Marrakesh, the Ministers adopted the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. See Section XXIII.

⁷³⁷ Appellate Body Report on *Guatemala – Cement I*, para. 58, quoting from the Panel Report on *Guatemala – Cement I*, para 7.16.

designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU.⁷³⁸

592. The Appellate Body in *Guatemala – Cement I* then found that Article 17 of the *Anti-Dumping Agreement* does not replace the “more general approach of the DSU”.

“Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. To read Article 17 of the *Anti-Dumping Agreement* as *replacing* the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU. To suggest, as the Panel has, that Article 17 of the *Anti-Dumping Agreement* replaces the ‘more general approach of the DSU’ is also to deny the application of the often more detailed provisions of the DSU to anti-dumping disputes. The Panel’s conclusion is reminiscent of the fragmented dispute settlement mechanisms that characterized the previous GATT 1947 and Tokyo Round agreements; it does not reflect the *integrated* dispute settlement system established in the WTO.”⁷³⁹

(b) Challenge against anti-dumping legislation as such

593. One of the main issues which arose in the *US – 1916 Act* dispute was whether an anti-dumping statute could, in the light of Article 17 of the *Anti-Dumping Agreement*, be challenged “as such”, rather than a specific *application* of such a statute in a particular anti-dumping investigation. Discussing the legal basis for claims brought under the *Anti-Dumping Agreement*, the Appellate Body in *US – 1916 Act* stated:

“Article 17 of the *Anti-Dumping Agreement* addresses dispute settlement under that Agreement. Just as Articles XXII and XXIII of the GATT 1994 create a legal basis for claims in disputes relating to provisions of the GATT 1994, so also Article 17 establishes the basis for dispute settlement claims relating to provisions of the *Anti-Dumping Agreement*. In the same way that Article XXIII of the GATT 1994 allows a WTO Member to challenge *legislation* as such, Article 17 of the *Anti-Dumping Agreement* is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such *express* exclusion is

found in Article 17 or elsewhere in the *Anti-Dumping Agreement*.”⁷⁴⁰

594. In considering whether Article 17 contains an implicit restriction on challenges to anti-dumping legislation as such, the Appellate Body, in *US – 1916 Act*, noted the following:

“Article 17.1 refers, without qualification, to ‘the settlement of disputes’ under the *Anti-Dumping Agreement*. Article 17.1 does not distinguish between disputes relating to Anti-Dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. Article 17.1 therefore implies that Members can challenge the consistency of legislation as such with the *Anti-Dumping Agreement* unless this action is excluded by Article 17.

Similarly, Article 17.2 of the *Anti-Dumping Agreement* does not distinguish between disputes relating to anti-dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. On the contrary, it refers to consultations with respect to ‘any matter affecting the operation of this Agreement’.⁷⁴¹

...

Article 17.3 does not explicitly address challenges to legislation as such. . . . Articles XXII and XXIII allow challenges to be brought under the GATT 1994 against legislation as such. Since Article 17.3 is the ‘equivalent provision’ to Articles XXII and XXIII of the GATT 1994, Article 17.3 provides further support for our view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such unless such challenges are otherwise excluded.”⁷⁴²

595. After finding that Article 17.3 supported its view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such, unless such challenges are explicitly excluded, the Appellate Body also addressed Article 17.4:

“Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect Member’s right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such.”⁷⁴³

⁷³⁸ Appellate Body Report on *Guatemala – Cement I*, paras. 65–66.

⁷³⁹ Appellate Body Report on *Guatemala – Cement I*, para. 67. The Panels on *US – 1916 Act* followed the approach of the Appellate Body. Panel Report on *US – 1916 Act (EC)*, para. 5.21; and Panel Report on *US – 1916 Act (Japan)*, para. 6.85. See also Appellate Body Report on *US – Hot-Rolled Steel*, para. 51.

⁷⁴⁰ Appellate Body Report on *US – 1916 Act*, para. 62.

⁷⁴¹ Appellate Body Report on *US – 1916 Act*, paras. 64–65.

⁷⁴² Appellate Body Report on *US – 1916 Act*, para. 68.

⁷⁴³ Appellate Body Report on *US – 1916 Act*, para. 74.

596. The Appellate Body in *US – 1916 Act* finally referred to Articles 18.1 and 18.4 of the *Anti-Dumping Agreement* as contextual support for its reading of Article 17 as allowing Members to bring claims against anti-dumping legislation as such:

“Nothing in Article 18.4 or elsewhere in the *Anti-Dumping Agreement* excludes the obligation set out in Article 18.4 from the scope of matters that may be submitted to dispute settlement.

If a Member could not bring a claim of inconsistency under the *Anti-Dumping Agreement* against legislation as such until one of the three anti-dumping measures specified in Article 17.4 had been adopted and was also challenged, then examination of the consistency with Article 18.4 of anti-dumping legislation as such would be deferred, and the effectiveness of Article 18.4 would be diminished.

...

Article 18.1 contains a prohibition on ‘specific action against dumping’ when such action is not taken in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Specific action against dumping could take a wide variety of forms. If specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, such action will violate Article 18.1. We find nothing, however, in Article 18.1 or elsewhere in the *Anti-Dumping Agreement*, to suggest that the consistency of such action with Article 18.1 may only be challenged when one of the three measures specified in Article 17.4 has been adopted. Indeed, such an interpretation must be wrong since it implies that, if a Member’s legislation provides for a response to dumping that does *not* consist of one of the three measures listed in Article 17.4, then it would be impossible to test the consistency of that legislation, and of particular responses thereunder, with Article 18.1 of the *Anti-Dumping Agreement*.

Therefore, we consider that Articles 18.1 and 18.4 support our conclusion that a Member may challenge the consistency of legislation as such with the provisions of the *Anti-Dumping Agreement*.⁷⁴⁴

597. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, which provided for a method for calculating the “all others” rate (see paragraphs 471–473 above) as inconsistent with Article 9.4. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 “in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate”. The Panel further found that, in maintaining this Section following the entry into force of the *Anti-Dumping Agreement*, the

United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.⁷⁴⁵ The Appellate Body upheld these findings.⁷⁴⁶

598. For more information about challenging legislation as such, see Section VI.B.3(c)(ii) of the Chapter on *DSU*.

(c) Mandatory versus discretionary legislation⁷⁴⁷

(i) General

599. The Appellate Body and the Panels addressed the issue of mandatory versus discretionary legislation with respect to the United States Antidumping Act of 1916. This United States legislation provided for civil and criminal proceedings to counteract predatory pricing from abroad. In addition, the Panel on *US – 1916 Act (EC)*, in a finding explicitly endorsed by the Appellate Body⁷⁴⁸, rejected the United States’ argument, according to which the 1916 Act was a non-mandatory law, because the US Department of Justice had the discretion to initiate, or not, a case under the 1916 Act:

“The EC also refers to the panel report in *EC – Audio Cassettes*, which was not adopted.⁷⁴⁹ This report stated why the mere fact that the initiation of anti-dumping investigations was discretionary would not make the EC legislation non-mandatory. The panel stated that:

‘[it] did not consider in any event that its task in this case was to determine whether the EC’s Basic Regulation was non-mandatory in the sense that the initiation of investigations and impositions of duties were not mandatory functions. Should panels accept this approach, they would be precluded from ever reviewing the content of a party’s anti-dumping legislation.’⁷⁵⁰

The *EC – Audio Cassettes* panel based its reasoning on the fact that this would undermine the obligation contained in Article 16.6 of the Tokyo Round Anti-Dumping Agreement. That provision provided that parties had to bring their laws, regulations and administrative procedures into conformity with the provisions of the Tokyo

⁷⁴⁴ Appellate Body Report on *US – 1916 Act*, paras. 78–82.

⁷⁴⁵ Panel Report on *US – Hot-Rolled Steel*, para. 7.90.

⁷⁴⁶ Appellate Body Report on *US – Hot-Rolled Steel*, para. 129.

⁷⁴⁷ This Section only refers to the analysis of this issue in anti-dumping-related disputes. For a detailed analysis of this issue in the WTO jurisprudence, see paras. VI.B.3(c)(ii).

⁷⁴⁸ Appellate Body Report on *US – 1916 Act*, para. 91.

⁷⁴⁹ (footnote original) Panel Report on *EC – Audio Cassette*, para. 4.1. On the legal value of unadopted panel reports, see footnote 358 above and its reference to the Appellate Body Report on *Japan – Alcoholic Beverages II*.

⁷⁵⁰ (footnote original) Panel Report on *EC – Audio Cassette*, para. 362.

Round Anti-Dumping Agreement.⁷⁵¹ We note that almost identical terms are found in Article 18.4 of the WTO Anti-Dumping Agreement, . . .

...

Since we found that Article VI and the WTO Anti-Dumping Agreement are applicable to the 1916 Act, we consider that the reasoning of the panel in the *EC – Audio Cassettes* case should apply in the present case. Interpreting the provisions of Article 18.4 differently would undermine the obligations contained in that Article and would be contrary to the general principle of useful effect by making all the disciplines of the Anti-Dumping Agreement non-enforceable as soon as a Member would claim that the investigating authority has discretion to initiate or not an anti-dumping investigation.”⁷⁵²

600. In *US – DRAMS*, Korea challenged certain certification requirements under the United States anti-dumping law. The provision challenged by Korea required exporters to certify, upon removal of anti-dumping duties, that they agree to the reinstatement of the anti-dumping duties on the products of their company if, after revocation of the original anti-dumping duties, the United States authorities find dumping. The Panel rejected the Korean arguments, noting that the certification requirement was not a mandatory requirement for revocation under United States anti-dumping law in general. The Panel held that other provisions of United States anti-dumping law and regulations of the United States authorities make revocation of an anti-dumping order possible contingent upon a different set of requirements, not including the certification requirement:

“We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC’s regulations, whereby an anti-dumping order may be revoked on the basis of “changed circumstances”. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement.”⁷⁵³

601. In *US – Section 129(c)(1) URAA*, Canada had claimed that certain United States legislation as such violated WTO law. The Panel⁷⁵⁴ decided to analyse first whether the United States legislation at issue was

mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.⁷⁵⁵

(ii) *Rejection of the distinction?*

602. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, for the first time, did not follow the traditional mandatory v. discretionary rule and found that it saw no reason for concluding that, in principle, non-mandatory measures cannot be challenged “as such”. In this case, the measure at issue was the United States Sunset Policy Bulletin which the Panel had found not to be challengeable as such because it was not mandatory for the competent authorities. The Appellate Body obviously disagreed:

“We also believe that the provisions of Article 18.4 of the Anti-Dumping Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to “take all necessary steps, of a general or particular character” to ensure that their “laws, regulations and

⁷⁵¹ (*footnote original*) Article 16.6(a) (“National Legislation”) of the Tokyo Round Anti-Dumping Agreement provided as follows:

“Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Party in question.”

⁷⁵² Panel Report on *US – 1916 Act (EC)*, para. 6.168. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.188–6.189. See also, Panel Report on *US – Steel Plate*, paras. 7.88–7.89 and 8.3. In this case, the Panel concluded that the “practice” of the US authorities concerning the application of “total facts available” (Article 6.8 Anti-dumping Agreement) is not a measure which can give rise to an independent claim of violation of the AD Agreement. See also, Panel Report on *US – Section 129(c)(1) URAA*, para.6.22.

⁷⁵³ Panel Report on *US – DRAMS*, para. 6.53.

⁷⁵⁴ The Panel decided not to follow the approach of the Panel on *US – Export Restraints*, which had considered that identifying and addressing the relevant WTO obligations first would facilitate its assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved (Panel Report on *US – Export Restraints*, paras. 8.10–8.13). The Panel on *US – Section 129(c)(1) URAA* justified the different approach as follows: “We note that the Panel on *United States – Measures Treating Exports Restraints as Subsidies* first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action. . . . In the circumstances of the case at hand, where there is a major *factual* dispute regarding whether section 129(c)(1) requires and/or precludes certain action, we think that a panel is of most assistance to the DSB if it examines the factual issues first. Moreover, we do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action. Finally, we have taken into account the fact that, in the present case, our ultimate conclusions with respect to Canada’s claims would not differ depending on the order of analysis we decided to follow”. Panel Report on *US – Section 129(c)(1) URAA*, footnote 72.

⁷⁵⁵ Panel Report on *US – Section 129(c)(1) URAA*, para. 6.22–6.25.

administrative procedures” are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase “laws, regulations and administrative procedures” seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.⁷⁵⁶ If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of “conformity” set forth in Article 18.4.

This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged “as such”. To the extent that the Panel’s findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to “preserve [their] rights and obligations . . . under the covered agreements, and to clarify the existing provisions of those agreements”.⁷⁵⁷ As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their “judgement as to whether action under these procedures would be fruitful” and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member

considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel’s assessment of whether the measure is, as such, inconsistent with particular obligations. It is to this issue that we now turn.”⁷⁵⁸

603. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, referring to its previous report in *US – 1916 Act* where it did follow mandatory/discretionary rule, indicated that it had yet to pronounce itself generally upon the continuing relevance of such a distinction and warned against its “mechanic application”:

“We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such.⁷⁵⁹ As the Panel seemed to acknowledge⁷⁶⁰, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction.⁷⁶¹ Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the “mandatory/discretionary distinction” may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.”⁷⁶²

(d) Challenge of a “practice” as such

604. In *US – Steel Plate*, the United States, referring to the Panel’s decision in *US – Export Restraints*⁷⁶³, argued that United States “practice” (in this case its practice as

⁷⁵⁶ (footnote original) We observe that the scope of each element in the phrase “laws, regulations and administrative procedures” must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member’s domestic law and practice.

⁷⁵⁷ Article 3.2 of the DSU.

⁷⁵⁸ Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 87–89.

⁷⁵⁹ (footnote original) Appellate Body Report, *US – 1916 Act*, paras. 61 and 88.

⁷⁶⁰ (footnote original) In footnote 95 to para. 7.114, the Panel quoted the following statement from para. 7.88 of the Panel Report in *US – Steel Plate*: “[t]he Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations.”

⁷⁶¹ (footnote original) In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged “discretionary” elements of that legislation were not of a type that, even under the mandatory/discretionary distinction, would have led to the measure being classified as “discretionary” and therefore consistent with the *Anti-Dumping Agreement*. In other words, we assumed that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We

specifically indicated that it was not necessary, in that appeal, for us to answer “the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*”. (Appellate Body Report, *US – 1916 Act*, para. 99) We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

⁷⁶² Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

⁷⁶³ In *US – Export Restraints*, Canada had claimed that the US “practice” of treating export restraints as meeting the “financial contribution” requirement of Article 1.1(a)(1)(iv) of the *SCM Agreement* was a measure and could be challenged as such. Canada defined US “practice” as “an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations” and claimed that this “practice” has an “operational existence in and of itself”. The Panel considered whether the alleged US practice required the US authorities to treat export restraints in a certain way and therefore had “independent operational status”. The Panel, which concluded that there was no measure in the form of US practice, indicated:

regards total facts available)⁷⁶⁴ could not be the subject of a claim because it does not have “independent operational status” and therefore it is not a “measure”.⁷⁶⁵ India, on the contrary, claimed that a “practice” becomes a “measure” through repeated similar responses to the same situation.⁷⁶⁶ The Panel concluded that “[t]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something.”⁷⁶⁷

2. Article 17.1

(a) “settlement of disputes”

605. Article 17.1 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 594 above.

3. Article 17.2

(a) “any matter affecting the operation of this Agreement”

606. Article 17.2 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 594 above.

4. Article 17.3

(a) Exclusion of Article 17.3 of the Anti-Dumping Agreement from Appendix 2 of the DSU

607. In analysing the Panel’s interpretation of the relationship between Article 17 of the *Anti-Dumping Agreement* and the *DSU*, the Appellate Body in *Guatemala – Cement I* referred to the exclusion of Article 17.3 from Appendix 2 of the *DSU*, which lists the special or additional rules and procedures contained in the covered agreements:

“The *Anti-Dumping Agreement* is a covered agreement listed in Appendix 1 of the *DSU*; the rules and procedures of the *DSU*, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement . . . [Article 17.3] is not listed [in Appendix 2 of the *DSU*,] precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994, under most of the other agreements in Annex 1A of the . . . *WTO Agreement*, and under the . . . *TRIPS Agreement*.”⁷⁶⁸

5. Article 17.4

(a) General

608. In *US – 1916 Act*, the Panel and the Appellate Body were called upon to determine whether the *Anti-Dumping Agreement* allowed challenges to anti-dumping legislation “as such”, rather than merely to the specific application of such legislation in individual anti-dumping investigations. The Panel on *US – 1916 Act* found that it had jurisdiction to consider claims “as such”.⁷⁶⁹ The United States based its objections to the Panel’s jurisdiction on Article 17.4. More specifically, the United States argued that Members could not bring a claim of inconsistency with the *Anti-Dumping Agreement* “against legislation as such independently from a claim with respect to one of the three measures identified in Article 17.4, i.e. a definitive anti-dumping duty, a price undertaking, or a provisional measure.”⁷⁷⁰ Moreover, the United States relied on the Appellate Body’s findings in *Guatemala – Cement I*, where the Appellate Body had held that “[a]ccording to Article 17.4, a ‘matter’ may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the *DSU* requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the

Footnote 763 (cont.)

“[W]hile Canada may be right that under US law, ‘practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be’, past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC “normally” follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC’s references in its determinations to its practice gives “legal effect to that ‘practice’ as determinative of the interpretations and methodologies it applies”. US “practice” therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.”

Panel Report on *US – Export Restraints*, para. 8.126.

⁷⁶⁴ In *US – Hot-Rolled Steel*, Japan had also challenged the “general” practice of the US investigating authorities regarding total facts available. The Panel did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based because it concluded that Japan’s claim in this regard was outside its terms of reference. Indeed, the Panel found that there was no mention of such a claim in Japan’s request for the establishment of a panel. Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

⁷⁶⁵ Panel Report on *US – Steel Plate*, para. 7.14.

⁷⁶⁶ Panel Report on *US – Steel Plate*, para. 7.15.

⁷⁶⁷ Panel Report on *US – Steel Plate*, para. 7.23.

⁷⁶⁸ Appellate Body Report on *Guatemala – Cement I*, para. 64.

⁷⁶⁹ Panel Report on *US – 1916 Act (EC)*, para. 5.27; Panel Report on *US – 1916 Act (Japan)*, para. 6.91.

⁷⁷⁰ Appellate Body Report on *US – 1916 Act*, para. 55

specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.”⁷⁷¹ The Appellate Body upheld the Panels’ findings; in doing so, it first clarified its own findings in *Guatemala – Cement I*:

“In *Guatemala – Cement*, Mexico had challenged Guatemala’s initiation of anti-dumping proceedings, and its conduct of the investigation, without identifying any of the measures listed in Article 17.4 . . .

. . .

Nothing in our Report in *Guatemala – Cement* suggests that Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala’s initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction.”⁷⁷²

609. After clarifying its own findings in *Guatemala – Cement I* with respect to Article 17.4, the Appellate Body turned to the considerations underlying the restrictions contained in Article 17.4:

“In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member’s right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.⁷⁷³ In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a Member’s request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure⁷⁷⁴, Article 17.4 strikes a balance between these competing considerations.

Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member’s right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such.”⁷⁷⁵

610. After setting out the function of Article 17.4 within the *Anti-Dumping Agreement*, the Appellate Body also stated that it failed to see, in the light of firmly established GATT and WTO jurisprudence according to which claims can be brought against legislation as such, which particular characteristics should distinguish

anti-dumping legislation from other legislation so as to render the established case law practice inapplicable in the context of anti-dumping legislation. Finally, the Appellate Body also referred to Articles 18.1 and 18.4 as context for its findings.⁷⁷⁶

611. Noting that Article 17.4 does not refer to “claims”, the Panel on *Mexico – Corn Syrup* stated that “Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.”⁷⁷⁷ The Panel concluded that “a request for establishment that satisfies the requirements of Article 6.2 of the *DSU* in this regard also satisfies the requirements of Article 17.4 of the *AD Agreement*.”⁷⁷⁸

(b) Panel terms of reference

(i) Concept of “matter”

612. In *Guatemala – Cement I*, Mexico’s complaint related to various aspects of the anti-dumping investigation by Guatemala applied in a specific case. Guatemala requested that the complaint be rejected, because (i) while a provisional anti-dumping measure was identified in the request for panel establishment, Mexico had not asserted and demonstrated that the measure had had a “significant impact” as required under Article 17.4, and (ii) neither of a final anti-dumping measure and a price undertaking had been identified in Mexico’s request for the establishment of the panel. The Appellate Body described the word “matter” in paragraphs 2, 3, 4, 5 and 6 of Article 17 as “the key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a Panel’s terms of reference in an anti-dumping dispute.”⁷⁷⁹

⁷⁷¹ Appellate Body Report on *Guatemala – Cement I*, para. 79. (See also para. 614 of this Chapter).

⁷⁷² Appellate Body Report on *US – 1916*, paras. 71–72.

⁷⁷³ (footnote original) An unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation.

⁷⁷⁴ (footnote original) Once one of the three types of measure listed in Article 17.4 is identified in the request for establishment of a panel, a Member may challenge the consistency of any preceding action taken by an investigating authority in the course of an anti-dumping investigation.

⁷⁷⁵ Appellate Body Report on *US – 1916 Act*, paras. 73–74.

⁷⁷⁶ Appellate Body Report on *US – 1916 Act*, paras. 75–83.

⁷⁷⁷ Panel Report on *Mexico – Corn Syrup*, para. 7.14.

⁷⁷⁸ Panel Report on *Mexico – Corn Syrup*, para. 7.14. With respect to specificity of requests for the establishment of a panel pursuant to Article 6.2 of the *DSU*, see Chapter on *DSU*, Sections VI.B.3(d) and XXII.3(a).

⁷⁷⁹ Appellate Body Report on *Guatemala – Cement I*, para. 70.

613. Regarding the ordinary meaning of “matter”, the Appellate Body in *Guatemala – Cement I* stated that “the most appropriate [ordinary meaning] in this context is ‘substance’ or ‘subject-matter’. Although the ordinary meaning is rather broad, it indicates that the ‘matter’ is the substance or subject-matter of the dispute.”⁷⁸⁰ The Appellate Body then linked the term “matter” to a panel’s terms of reference under Article 7 of the DSU and defined matter as consisting of (i) the specific measures at issue and (ii) the legal basis of the complaint or the claims:

“The word ‘matter’ appears in Article 7 of the DSU, which provides the standard terms of reference for Panels. Under this provision, the task of a Panel is to examine ‘the matter referred to the DSB’. These words closely echo those of Article 17.4 of the *Anti-Dumping Agreement* and, in view of the integrated nature of the dispute settlement system, form part of the context of that provision. Article 7 of the DSU itself does not shed any further light on the meaning of the term ‘matter’. However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term ‘matter’ becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a ‘matter’ to the DSB: in order to establish a Panel to hear its complaint, a Member must make, in writing, a ‘request for the establishment of a Panel’ (a ‘Panel request’). In addition to being the document which enables the DSB to establish a Panel, the Panel request is also usually identified in the Panel’s terms of reference as the document setting out ‘the matter referred to the DSB’. Thus, ‘the matter referred to the DSB’ for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the ‘matter’ identified in the request for the establishment of a Panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a Panel request, to ‘identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.’ (emphasis added) The ‘matter’ referred to the DSB’, therefore, consists of two elements: the *specific measures at issue* and the *legal basis of the complaint* (or the *claims*).

In our Report in *Brazil – Coconut*, we agreed with previous Panels established under the GATT 1947, as well as under the [AD Agreement], ‘that the ‘matter’ referred to a Panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference.’⁷⁸¹ Statements in two of the Panel reports cited by us in that case clarify further the relationship between the ‘matter’, the ‘measures’ at issue and the ‘claims’. In *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*⁷⁸², the Panel found that “the “matter” consisted of the *specific claims* stated by Norway . . . with respect to the *imposition of*

these duties’. (emphasis added) A distinction is therefore to be drawn between the ‘measure’ and the ‘claims’. Taken together, the ‘measure’ and the ‘claims’ made concerning that measure constitute the ‘matter’ referred to the DSB’, which forms the basis for a Panel’s terms of reference.”⁷⁸³

Concept of “measure”

Relationship with Article 6.2 of the DSU: “specific measure at issue”

614. The Panel on *Guatemala – Cement I* found that Article 17.4 of the *Anti-Dumping Agreement* is a “timing provision”, meaning that Article 17.4 established *when* a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel.⁷⁸⁴ The Appellate Body disagreed with this finding and stated that “Article 6.2 of the DSU requires ‘the specific measures at issue’ to be identified in the Panel request.”⁷⁸⁵ In determining what may constitute a “specific measure” for the purposes of the *Anti-Dumping Agreement*, the Appellate Body in *Guatemala – Cement I* stated:

“According to Article 17.4, a ‘matter’ may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a Panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a Panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measures at issue – in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 – and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement.

[I]n disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance

⁷⁸⁰ Appellate Body Report on *Guatemala – Cement I*, para. 71.

⁷⁸¹ (footnote original) Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.

⁷⁸² (footnote original) Panel Report on *US – Norwegian Salmon AD*, para. 342.

⁷⁸³ Appellate Body Report on *Guatemala – Cement I*, paras. 72–73.

⁷⁸⁴ Appellate Body Report on *Guatemala – Cement I*, para. 77, quoting the Panel Report on *Guatemala – Cement I*, para. 7.15.

⁷⁸⁵ Appellate Body Report on *Guatemala – Cement I*, para. 77.

of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU.⁷⁸⁶

615. In *Mexico – Corn Syrup*, the question arose whether, in a dispute where the specific measure challenged is a definitive anti-dumping duty, a Member may assert a claim of violation of Article 7.4 of the *Anti-Dumping Agreement*, a provision establishing maximum time-periods for the imposition of provisional measures. Article 17.4 establishes the possibility of challenging definitive anti-dumping duties, price undertakings or provisional measures; with respect to the latter, Article 17.4 establishes that “[w]hen a provisional measure has a significant impact and [a] Member . . . considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB”. The Panel, in a decision not reviewed by the Appellate Body, discussed to what extent the United States’ claim under Article 7.4 was “related to” Mexico’s definitive anti-dumping duty:

“The Appellate Body Report in *Guatemala – Cement* indicates that a complainant may, having identified a specific anti-dumping duty in its request for establishment, bring any claims under the AD Agreement *relating to* that specific measure. That there should be a relationship between the measure challenged in a dispute and the claims asserted in that dispute would appear necessary, given that Article 19.1 of the DSU requires that, ‘where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with the agreement’.

[W]e consider that the United States’ claim under Article 7.4 of the AD Agreement is nevertheless *related to* Mexico’s definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the AD Agreement, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the AD Agreement, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty.⁷⁸⁷

616. The Panel on *Mexico – Corn Syrup* then considered the fact that Article 17.4 refers only to paragraph 1 of Article 7 and decided that it would be incorrect to

interpret Article 17.4 in a manner “which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement”:

“Read literally, this provision could be taken to mean that in a dispute where the specific measure being challenged is a provisional measure, the *only* claim that a Member may pursue is a claim under Article 7.1 of the AD Agreement (and not a claim under Article 7.4 of the AD Agreement). If this conclusion is correct, a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim. In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement.”⁷⁸⁸

Measure not identified in terms of reference

617. In *US – Hot-Rolled Steel*, the issue arose as to whether the “general” practice of the United States investigating authorities regarding best facts available was within the terms of reference of the Panel. The Panel, which did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based, concluded that Japan’s claim in this regard was outside its terms of reference because there was no mention of such a claim in Japan’s request for the establishment of a panel.⁷⁸⁹

Claims

618. As regards the concept of claims or legal basis of the complaint, see paragraphs 161–169 of the Chapter on the DSU.

Abandoned claims

619. In *US – Steel Plate*, India indicated in its first written submission that it would not pursue several claims that had been set out in its request for establishment of the Panel. However, India changed its position later on and informed the Panel of its intention to pursue one of these claims during the first substantive meeting of the Panel with the parties and in its rebuttal submission. In spite of the lack of specific objection by the US which had noted that the claim was within the Panel’s terms of reference, the Panel, in a decision not reviewed by the Appellate Body, concluded that it would not rule on India’s abandoned claim:

⁷⁸⁶ Appellate Body Report on *Guatemala – Cement I*, paras. 79–80.

⁷⁸⁷ Panel Report on *Mexico – Corn Syrup*, paras. 7.52–7.53.

⁷⁸⁸ Panel Report on *Mexico – Corn Syrup*, para. 7.54.

⁷⁸⁹ Panel Report on *US – Hot-Rolled Steel*, para. 7.22.

"This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment.⁷⁹⁰ One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of Appendix 3 to the DSU provide that parties shall "present the facts of the case and their arguments" in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.

With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim.⁷⁹¹ Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition.⁷⁹² ⁷⁹³

6. Article 17.5

(a) Article 17.5(i)

620. In considering what requirements, if any, must be fulfilled by virtue of Article 17.5(i) of the *Anti-Dumping Agreement* in addition to requirements existing under Article 6.2 of the DSU, the Panel on *Mexico – Corn Syrup* stated:

"In our view, Article 17.5(i) does not require a complaining Member to use the words 'nullify' or 'impair' in a request for establishment. However, it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired."⁷⁹⁴

621. The Panel on *Mexico – Corn Syrup* went on to state that, in their view, "a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired."⁷⁹⁵

(b) Article 17.5(ii)

(i) Documents not available to the investigating authorities

622. In *US – Hot-Rolled Steel*, the Panel found that, under Article 17.5(ii), "a panel may not, when examining a claim of violation of the AD Agreement⁷⁹⁶ in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation"⁷⁹⁷ The Panel further concluded that its duty not to consider new evidence with respect to claims under the *Anti-Dumping Agreement* "flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities"⁷⁹⁸

⁷⁹⁰ (footnote original) Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC – Bananas III"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at para. 143.

⁷⁹¹ (footnote original) This is **not**, for example, a case where a complainant obtained, through the dispute settlement process, information in support of a claim to which it did not otherwise have access.

⁷⁹² (footnote original) We note that, since we do not reach India's alternative claims in this dispute, as discussed below in para. 7.80, we also would not have reached this claim in any event.

⁷⁹³ Panel Report on *US – Steel Plate*, paras. 7.27–7.29.

⁷⁹⁴ Panel Report on *Mexico – Corn Syrup*, para. 7.26.

⁷⁹⁵ Panel Report on *Mexico – Corn Syrup*, para. 7.28.

⁷⁹⁶ (footnote original) We note that there is no claim under Article VI of GATT 1994 in this case, so we need not consider whether Article 17.5(ii) has implications for the evidence a panel may consider in that context.

⁷⁹⁷ Panel Report on *US – Hot-Rolled Steel*, para. 7.6.

⁷⁹⁸ Panel Report on *US – Hot-Rolled Steel*, para. 7.7. See also Panel Report on *Egypt – Steel Rebar*, paras. 7.15–7.21.

(ii) Undisclosed facts

623. In *Thailand – H-Beams*, in reversing the Panel's finding that an injury determination must be based exclusively upon evidence disclosed to, or discernible by, the parties to the investigation, the Appellate Body explained the scope of facts which panels are required to review pursuant to Article 17.5(ii), as follows:

"Article 17.5 specifies that a panel's examination must be based upon the 'facts made available' to the domestic authorities. Anti-dumping investigations frequently involve both confidential and non-confidential information. The wording of Article 17.5 does not specifically exclude from panel examination facts made available to domestic authorities, but not disclosed or discernible to interested parties by the time of the final determination. Based on the wording of Article 17.5, we can conclude that a panel must examine the facts before it, whether in confidential documents or non-confidential documents."⁷⁹⁹

See also paragraphs 111–114 above.

(iii) Documents created for the purpose of a dispute

624. In deciding whether a document created *post hoc* for the purposes of a dispute could be considered by the Panel, the Panel on *EC – Bed Linen* stated that Article 17.5(ii) "does not require . . . that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion to elucidate the parties' positions and in support of their arguments."⁸⁰⁰ The Panel concluded that "the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation."⁸⁰¹

(c) Relationship with other paragraphs of Article 17

625. In *Thailand – H-Beams*, the Appellate Body discussed the relationship between Articles 17.5 and 17.6. See paragraphs 113–114 above and 633 below.

7. Article 17.6*(a) Relationship with the standard of review in Article 11 of the DSU*

626. In *US – Hot Rolled Steel*, the Appellate Body compared the standards of review under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU when considering to what extent Article 17.6 may conflict with Article 11 of the DSU.⁸⁰² The Appellate Body explained that, whilst Article 17.6 lays down rules relating to a panel's examination of "matters" arising under

only one of the covered agreement, *i.e.* the *Anti-Dumping Agreement*, Article 11 of the DSU rules applies to a panel's examination of "matters" arising under any of the covered agreements.⁸⁰³ The Appellate Body then focussed on the different structure of both provisions and indicated:

"Article 11 of the DSU imposes upon panels a comprehensive obligation to make an 'objective assessment of the matter', an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal. . . . Article 17.6 is divided into two separate subparagraphs, each applying to different aspects of the panel's examination of the matter. The first subparagraph covers the *panel's 'assessment of the facts of the matter'*, whereas the second covers its '*interpret[ation of] the relevant provisions'*. (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*."⁸⁰⁴

627. The Panel on *US – Softwood Lumber VI* addressed the question whether the application of the standard of review under Article 11 of the DSU to a determination could, in appropriate factual circumstances, lead to differing outcomes compared to the application of the Article 11 of the DSU and Article 17.6(i) of the *Anti-Dumping Agreement* standards together to the same determination:

"Under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the AD Agreement depends on whether the investigating authority properly established the facts, and evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.

Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a panel's role is not to substitute

⁷⁹⁹ Appellate Body Report on *Thailand – H-Beams*, para. 115.

⁸⁰⁰ Panel Report on *EC – Bed Linen*, para. 6.43.

⁸⁰¹ Panel Report on *EC – Bed Linen*, para. 6.43.

⁸⁰² In this analysis, the Appellate Body applied its conclusions on the relationship between the provisions of the DSU and the special or additional rules and procedures of a covered agreement developed in *Guatemala – Cement II*, paras. 65–67. See para. 591 of this Chapter.

⁸⁰³ Appellate Body Report on *US – Hot Rolled Steel*, para. 53.

⁸⁰⁴ Appellate Body Report on *US – Hot Rolled Steel*, para. 54.

its analysis for that of the investigating authority.⁸⁰⁵ The Appellate Body has stated:

“We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities”.⁸⁰⁶

In light of Canada’s clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the AD Agreement, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.

We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations,⁸⁰⁷ it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada’s claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions.”⁸⁰⁸

628. As regards the relationship of Article 11 of the DSU with Articles 17.6(i) and 17.6(ii) respectively, see paragraphs 640–641 and 644 below respectively.

⁸⁰⁵ (footnote original) Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (“US – Cotton Yarn”), WT/DS192/AB/R, adopted 5 November 2001, para. 74; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (“US – Lamb”), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

⁸⁰⁶ (footnote original) Appellate Body Report, *US – Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US – Lamb*, para. 106.

⁸⁰⁷ (footnote original) Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“US – Lead and Bismuth II”), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para 49.

⁸⁰⁸ Panel Report on *US – Softwood Lumber VI*, paras. 7.15–7.18.

⁸⁰⁹ (footnote original) We note that, in the context of safeguard measures, the panel in *Korea – Dairy*, said the following of the need for a panel to perform an objective assessment pursuant to Article 11 of the DSU:

“7.30 We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an “objective assessment” as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel’s function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment

(b) Article 17.6(i)

(i) General

629. In *Guatemala – Cement II*, the Panel defined the standard of review applicable by virtue of Article 17.6(i):

“We consider that it is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective.⁸⁰⁹ In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities’ evaluation of the facts, we will first need to examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation.”⁸¹⁰⁸¹¹

630. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body stated clearly that it “will not interfere lightly with [a] panel’s exercise of its discretion’ under Article 17.6(i) of the *Anti-Dumping Agreement*.”⁸¹² In that appeal, it also explained that “[a]n appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel’s assessment of the facts or inter-

entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities’ determinations and the evidence it had collected.”

⁸¹⁰ (footnote original) We note that this standard is consistent with the approach followed by the panel in *Guatemala – Cement I* in para. 7.57 of its report. In that instance the panel was of the opinion that its role was:

“... to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation.”

⁸¹¹ Panel Report on *Guatemala – Cement II*, para. 8.19. See also Panel Report on *US – Stainless Steel*, para. 6.18, Panel Report on *Argentina – Ceramic Tiles*, paras. 6.2 – 6.3 and Panel Report on *Egypt – Steel Rebar*, paras. 7.8–7.14.

⁸¹² Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 169, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151.

fere with a panel's discretion as the trier of facts.⁸¹³ Applying this standard in the case of *EC – Tube or Pipe Fittings*, the Appellate Body rejected Brazil's claim that the Panel failed to assess whether the establishment of the facts was proper pursuant to Article 17.6(i) of the *Anti-Dumping Agreement*, when it found that an internal note which contained analysis of certain injury factors and which was not disclosed to the interested parties during the investigation, was part of the record of the underlying anti-dumping investigation. The Appellate Body considered highly relevant the fact that the Panel had not just accepted at face value the assertion of the EC that this internal note was contemporaneous to the investigation and formed part of the record of the investigation, but had taken steps to assure itself of the validity of this exhibit and of the fact that it formed part of the contemporaneous written record of the EC investigation.⁸¹⁴

(ii) “*establishment of the facts was proper*”

Record of the investigating authority

631. In *Guatemala – Cement I*, in order to examine the claim that the initiation of an investigation was not consistent with Article 5, the Panel “scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry.”⁸¹⁵ The Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17 by the Panel.⁸¹⁶ Accordingly, the Panel Report on *Guatemala – Cement I* was adopted as reversed by the Appellate Body.⁸¹⁷ However, the panels on *EC – Bed Linen*, *US – Stainless Steel*, *Guatemala – Cement II*, and *Thailand – H-Beams* also based their factual review of decisions of the investigating authority on the evidence before the authority at the time of the determination.⁸¹⁸ See also paragraphs 622–624 above dealing with Article 17.5(ii) which orders Panels to consider a dispute under the *Anti-Dumping Agreement* on the basis of the facts made available to the investigating authorities.

Treatment of undisclosed facts

632. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body interpreted the term “establishment of the facts was proper”, as follows:

“The ordinary meaning of ‘establishment’ suggests an action to ‘place beyond dispute; ascertain, demonstrate, prove’; the ordinary meaning of ‘proper’ suggests ‘accurate’ or ‘correct’. Based on the ordinary meaning of these words, the proper establishment of the facts appears to

have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination.”⁸¹⁹

633. The Appellate Body elaborated on the aim of Article 17.6(i), stating that its function is to “prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective”:

“There is a clear connection between Articles 17.6(i) and 17.5(ii). The facts of the matter referred to in Article 17.6(i) are ‘the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member’ under Article 17.5(ii). Such facts do not exclude confidential facts made available to the authorities of the importing Member. Rather, Article 6.5 explicitly recognizes the submission of confidential information to investigating authorities and its treatment and protection by those authorities. Article 12, in paragraphs 2.1, 2.2 and 2.3, also recognizes the use, treatment and protection of confidential information by investigating authorities. The ‘facts’ referred to in Articles 17.5(ii) and 17.6(i) thus embrace ‘all facts confidential and non-confidential’, made available to the authorities of the importing Member in conformity with the domestic procedures of that Member. Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure and due process*. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*.”⁸²⁰

(iii) “*the evaluation of facts was unbiased and objective*”

634. In *US – Stainless Steel*, the Panel examined the determinations of the United States authorities on the issue of whether certain local sales were in dollars or

⁸¹³ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.

⁸¹⁴ Appellate Body Report on *EC – Tube or Pipe Fittings*, para. 127.

⁸¹⁵ Panel Report on *Guatemala – Cement I*, para. 7.60.

⁸¹⁶ Appellate Body Report on *Guatemala – Cement I*, para. 89.

⁸¹⁷ WT/DSB/M/51, section 9(a).

⁸¹⁸ Panel Report on *EC – Bed Linen*, para. 6.45; Panel Report on *US – Stainless Steel*, para. 6.3; Panel Report on *Guatemala – Cement II*, para. 8.19; and Panel Report on *Thailand – H-Beams*, para. 7.51; Panel Report on *Argentina – Ceramic Tiles*, para. 6.27.

⁸¹⁹ Appellate Body Report on *Thailand – H-Beams*, para. 116. With respect to a related topic under Article 3.1, see also paras. 111–114 of this Chapter.

⁸²⁰ Appellate Body Report on *Thailand – H-Beams*, para. 117. With respect to a related topic under Article 3.1, see also paras. 111–114 of this Chapter.

won. The Panel rejected Korea's argument that Article 17.6(i) did not apply to the examination of this issue because the United States decision on this point was not a factual determination. The Panel stated:

"Korea's view appears to be that Article 17.6(i) applies only in respect of the establishment of certain objectively-ascertainable underlying facts, e.g., did the invoices express the sales values in terms of dollars or won, in what currency payment was made, etc. We consider that this interpretation does not however coincide with the language of Article 17.6(i). That Article speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation."⁸²¹

635. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body touched on the term "unbiased and objective". The Appellate Body stated that "[t]he ordinary meaning of the words 'unbiased' and 'objective' also appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation at the time of the final determination."⁸²² See also the excerpt from the Appellate Body Report on *Thailand – H-Beams* referenced in paragraph 633 above.

(iv) *Relevance of the different roles of panels and investigating authorities*

636. In *US – Hot-Rolled Steel*, when defining the task of panels under Article 17.6(i), the Appellate Body recalled the importance "to bear in mind the different roles of panels and investigating authorities."⁸²³

"Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels 'shall' make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their 'establishment' and 'evaluation' of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*."⁸²⁴

637. As regards the different roles of investigating authorities and panels in the context of Article 3.7 (threat of serious injury), see paragraph 199 above.

(v) *No ex post rationalization*

638. On the question of whether *ex post* rationalization should be taken into account in order to assess an authority's compliance with the provisions of the *Anti-Dumping Agreement*, the Panel on *Argentina – Ceramic Tiles* stated:

"Under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made."⁸²⁵ (emphasis in original)

639. The Panel on *Argentina – Poultry Anti-Dumping Duties* agreed with the view expressed by the Panel on *Argentina – Ceramic Tiles*, concluding that as a panel reviewing the evaluation of the investigating authority, it did not believe it was to "take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority"⁸²⁶

(vi) *Relationship of Article 17.6(i) with Article 11 of the DSU*

640. In *US – Hot-Rolled Steel*, the Appellate Body defined the task of panels under Article 17.6(i) by comparing it to their task under Article 11 of the DSU:

"Under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and

⁸²¹ Panel Report on *US – Stainless Steel*, para. 6.18.

⁸²² Appellate Body Report on *Thailand – H-Beams*, para. 116.

⁸²³ Appellate Body Report on *US – Hot Rolled Steel*, para. 55.

⁸²⁴ Appellate Body Report on *US – Hot Rolled Steel*, para. 56.

⁸²⁵ Panel Report on *Argentina – Ceramic Tiles*, para. 6.27.

⁸²⁶ Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.49. The Panel thus rejected various arguments that were based on an *ex post* rationalization by the defendant, such as those put forward with respect to the evaluation of the magnitude of the margin of dumping as an Article 3.4 factor:

"We note that Argentina has failed to indicate where such arguments are set forth in the CNCE's Record No. 576, or to point us to any other document in which the CNCE is alleged to have considered such arguments. Such arguments therefore constitute *ex post* rationalization which we are precluded from taking into account. [...]"

Panel Report on *Argentina – Poultry Anti-Dumping Duties*, para. 7.321.

'evaluation' of the facts. To that end, Article 17.6(i) requires panels to make an 'assessment of the facts'. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an 'objective assessment of the facts'. Thus the text of both provisions requires panels to 'assess' the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is 'objective'. However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'. In this respect, we see no 'conflict' between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.⁸²⁷

641. In *US – Steel Plate*, India requested the Panel to conduct an "active review" of the facts before the US investigating authorities pursuant to both Article 11 of the DSU and Article 17.6(i). India based its request in the Appellate Body's decisions on the application of Article 11 in *US – Cotton Yarn*⁸²⁸ and of Article 17.6(i) in *US – Hot-Rolled Steel*.⁸²⁹ The US was opposed to such a request since it considered that India was trying to add to the obligations of investigating authorities. The Panel considered that there was no question that it had to apply Article 17.6 to the dispute and recalled the Appellate Body's decision in *US – Hot-Rolled Steel* to the effect that Article 17.6(i) is not in conflict with Article 11 of the DSU⁸³⁰ and that Article 17.6(ii) supplemented Article 11 of the DSU.^{831 832} The Panel found:

"[W]e do not consider that India's reference to Article 11 of the DSU constitutes an argument that we apply some other or different standard of review in considering the factual aspects of this dispute than that set out in Article 17.6 of the AD Agreement, which India recognizes is applicable in all anti-dumping disputes. That standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the AD Agreement establishes that we are to examine the matter based upon 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.'⁸³³

(c) Article 17.6(ii)

(i) *First sentence: customary rules of interpretation*

642. In *US – Hot-Rolled Steel*, the Appellate Body looked into the first sentence of Article 17.6(ii) which

provides that the Panel "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation"; and considered that it echoed closely Article 3.2 of the DSU (See Section III.B.1 of the Chapter on the DSU). The Appellate Body stated that such customary rules are embodied in Article 31 and 32 of the Vienna Convention on the Law of the Treaties. On a further note, the Appellate Body indicated that "[c]learly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*".⁸³⁴

(ii) *Second sentence: more than one permissible interpretation*

643. The second sentence of Article 17.6(ii) deals with the situation where there is more than one permissible interpretation of a provision of the *Anti-Dumping Agreement*.⁸³⁵ In *US – Hot-Rolled Steel*, the Appellate Body defined the term "permissible interpretation" as "one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*".⁸³⁶ The Appellate Body considered:

"This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."

It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is

⁸²⁷ Appellate Body Report on *US – Hot Rolled Steel*, para. 55.

⁸²⁸ See Section XI of the Chapter on DSU.

⁸²⁹ See para. 640 of this Chapter.

⁸³⁰ See para. 640 of this Chapter.

⁸³¹ See para. 644 of this Chapter.

⁸³² Panel Report on *US – Steel Plate*, paras. 7.1–7.5.

⁸³³ Panel Report on *US – Steel Plate*, para. 7.6.

⁸³⁴ Appellate Body Report on *US – Hot Rolled Steel*, para. 57. See also Panel Report on *US – Steel Plate*, para. 7.7.

⁸³⁵ In *EC – Bed Linen*, the EC argued that the Panel had failed to apply the standard of review laid down in Article 17.6(ii) because it had not established that the interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* was "impermissible". The Appellate Body upheld the Panel's finding and indicated that the Panel had not viewed the interpretation given by the EC of Article 2.4.2 as a "permissible interpretation" within the meaning of Article 17.6(ii). The Appellate Body considered that "the Panel was not faced with a choice of multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, . . . , "impermissible". Appellate Body Report on *EC – Bed Linen*, paras. 63 – 66.

⁸³⁶ Appellate Body Report on *US – Hot Rolled Steel*, para. 60.

permissible under the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*.⁸³⁷

(iii) *Relationship with standard of review in Article 11 of the DSU*

644. In *US – Hot-Rolled Steel*, the Appellate Body considered the relationship between Article 17.6(ii) and the DSU, in particular Article 11. The Appellate Body stated:

“[A]lthough the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an ‘objective assessment of the matter’ as a whole. Thus, under the DSU, in examining claims, panels must make an ‘objective assessment’ of the legal provisions at issue, their ‘applicability’ to the dispute, and the ‘conformity’ of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an ‘objective assessment’ of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement.”⁸³⁸

645. With respect to the question of the legal interpretation under Article 17.6 (ii), the Panel on *US – Softwood Lumber VI* considered that under the *Anti-Dumping Agreement*, a panel is to follow the same rules of treaty interpretation as in any other dispute:

“Thus, it is clear to us that under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute. The difference is that if a panel finds more than one permissible interpretation of a provision of the AD Agreement, it may uphold a measure that rests on one of those interpretations. It is not clear whether the same result could be reached under Articles 3.2 and 11 of the DSU. However, it seems to us that there might well be cases in which the application of the Vienna Convention principles together with the additional provisions of Article 17.6 of the AD Agreement could result in a different conclusion being reached in a dispute under the AD Agreement than under the SCM Agreement. In this case, it has not been necessary for us to resolve this question, as we did not find any instances where the question of violation turned on the question whether there was more than one permissible interpretation of the text of the relevant Agreements.”⁸³⁹

(d) *Relationship between subparagraphs (i) and (ii) of Article 17.6*

646. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body ruled that “the requirements of the standard of review provided for in Article 17.6(i) and 17.6(ii) are cumulative. In other words, a panel must find a determination made by the investigating authorities to be consistent with relevant provisions of the *Anti-Dumping Agreement* if it finds that those investigating authorities have properly established the facts and evaluated those facts in an unbiased and objective manner, and that the determination rests upon a “permissible” interpretation of the relevant provisions.”⁸⁴⁰

8. Relationship with other Articles

(a) *Article 3*

647. In *Thailand – H-Beams*, the Appellate Body addressed the relationship between Articles 3.1, and 17.5 and 17.6. See paragraph 113 above.

(b) *Article 5*

648. The Panel on *Guatemala – Cement I* addressed the relationship between Articles 5.3 and 17.6. In determining what constitutes “sufficient evidence to justify the initiation of an investigation” under Article 5.3, the Panel on *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i).⁸⁴¹ The Panel also considered that the standard of review for the initiation of an investigation under Article 5 is less strict than that for preliminary or final determination of dumping, injury and causation.⁸⁴² However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17.6. See paragraph 256 above.

(c) *Article 7*

649. The relationship between Articles 7.1 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraph 616 above.

650. Also, the relationship between Articles 7.4 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraphs 615–616 above.

(d) *Article 18*

651. Further, the relationship between Articles 17.4, and 18.1 and 18.4 was discussed in *US – 1916 Act*. See paragraph 596 above.

⁸³⁷ Appellate Body Report on *US – Hot Rolled Steel*, paras. 59–60.

⁸³⁸ Appellate Body Report on *US – Hot Rolled Steel*, para. 62.

⁸³⁹ Panel Report on *US – Softwood Lumber VI*, para. 7.22.

⁸⁴⁰ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 130.

⁸⁴¹ Panel Report on *Guatemala – Cement I*, para. 7.57.

⁸⁴² Panel Report on *Guatemala – Cement I*, para. 7.57.

9. Relationship with other WTO Agreements

(a) GATT 1994

(i) Articles XXII and XXIII

652. The Appellate Body in *Guatemala – Cement I* noted the following regarding the relationship between Article 17 and Articles XXII and XXIII of the GATT 1994:

“Articles XXII and XXIII of the GATT 1994 are *not* expressly incorporated by reference into the *Anti-Dumping Agreement* as they are into all of the other Annex 1A agreements As a result, . . . Article XXIII of the GATT 1994 does *not* apply to disputes brought under the *Anti-Dumping Agreement*. On the contrary, Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are the ‘consultation and dispute settlement provisions’ pursuant to which disputes may be brought under that covered agreement.”⁸⁴³

653. The Appellate Body, in *Guatemala – Cement I*, further addressed this issue. See paragraph 607 above. Also, this issue was addressed in *US – 1916 Act*. See paragraphs 593–594 above.

(b) DSU

(i) Article 1

654. The Appellate Body in *Guatemala – Cement I* considered the concurrent application of Article 17 and the rules and procedures of the DSU. See paragraph 591 above.

(ii) Article 3.8

655. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 17.5 of the *Anti-Dumping Agreement* and Article 3.8 of the *DSU*. See paragraph 621 above.

(iii) Article 6.2

656. The Appellate Body in *Guatemala – Cement I* rejected the Panel’s conclusion that Article 17.5 of the *Anti-Dumping Agreement* prevails over Article 6.2 of the *DSU* and went on to state that both provisions apply cumulatively:

“The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the *DSU*, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the *DSU* in disputes brought under the *Anti-Dumping Agreement*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the *DSU*. On the contrary, they are complementary and should be applied together. A Panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the *DSU*. Thus, when a ‘matter’ is referred to the DSB by

a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the *DSU*.”⁸⁴⁴

657. The Panel on *Mexico – Corn Syrup* discussed the relationship between Article 17.4 of the *Anti-Dumping Agreement*, and Article 6.2 of the *DSU*. See paragraph 611 above.

658. This issue was also discussed by the Appellate Body in *Guatemala – Cement I*. See paragraph 656 above.

(iv) Article 7

659. The Appellate Body in *Guatemala – Cement I* linked the term “matter” in Article 7 of the *DSU*, which provides the standard terms of reference for Panels, to the same word in Article 17.4 of the *Anti-Dumping Agreement*.⁸⁴⁵ It specifically stated:

“[T]he word ‘matter’ has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the *DSU*. It consists of two elements: the specific ‘measure’ and the ‘claims’ relating to it, both of which must be properly identified in a Panel request as required by Article 6.2 of the *DSU*.”⁸⁴⁶

660. The Appellate Body addressed further this issue. See paragraph 613 above.

(v) Article 11

661. For the relationship between Article 17.6 and the standard of review provision of the *DSU*, i.e. Article 11, see paragraphs 626, 640, 644 and 627 above. See also Section XI of the Chapter on the *DSU*.

(vi) Article 19.1

662. In *Guatemala – Cement I*, it was disputed whether a complaint of non-compliance in an anti-dumping investigation should be examined even if neither a final anti-dumping measure, a provisional measure nor a price undertaking is identified in the request for panel establishment, as referenced in paragraph 612 above. In this regard, the Panel rejected Guatemala’s argument that a final or provisional duty or a price undertaking must be identified in a request for panel establishment in order for a panel to be able to issue a recommendation in terms of Article 19.1 of the *DSU*:

“This [argument] is clearly in conflict with our conclusion regarding the interpretation of the provisions of the ADP Agreement as *not* limited to disputes involving only specific ‘measures’. A restrictive reading of Article 19.1

⁸⁴³ Appellate Body Report on *Guatemala – Cement I*, para. 64, fn 43.

⁸⁴⁴ Appellate Body Report on *Guatemala – Cement I*, para. 75.

⁸⁴⁵ Appellate Body Report on *Guatemala – Cement I*, para. 72.

⁸⁴⁶ Appellate Body Report on *Guatemala – Cement I*, para. 76.

would mean that, while the ADP Agreement provides for consultations and establishment of a Panel to consider a matter without limitation to a specific 'measure', the Panel so established is not empowered to make a recommendation with respect to that matter. This would clearly run counter to the intention of the drafters of the DSU to establish an effective dispute resolution system for the WTO. In addition, it would undermine the special or additional rules for dispute settlement in anti-dumping cases provided for in the ADP Agreement. A broader reading of Article 19.1, on the other hand, *would* give effect to the special or additional dispute settlement provisions of the ADP Agreement, by allowing Panels in anti-dumping disputes to consider the 'matter' referred to them, and issue a recommendation with respect to that matter. As discussed below, the DSU provisions relied on . . . do not, in our view, limit Panels to the consideration only of certain types of specified 'measures' in disputes."⁸⁴⁷

663. The Appellate Body in *Guatemala – Cement I* found that the dispute was not properly before the Panel and therefore did not come to any conclusion as to the broad reading of Article 19.1 by the Panel.⁸⁴⁸ The Appellate Body concluded that the Panel did not consider whether the complainant, Mexico, had properly identified a relevant anti-dumping measure in its panel request, and the Panel had therefore erred in finding the dispute properly before it.⁸⁴⁹

10. List of disputes under the Anti-Dumping Agreement

664. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the *Anti-Dumping Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 <i>Guatemala – Cement I</i>	WT/DS60	Articles 5.3 and 5.5
2 <i>US – DRAMS</i>	WT/DS99	Articles 2, 3, 5.3 and 7.1
3 <i>Thailand – H-Beams</i>	WT/DS122	Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.2, 5.5 and 5.5
4 <i>Mexico – Corn Syrup</i>	WT/DS132	Articles 5.1, 5.2, 5.3, 5.4, 5.8, 10.2, 10.4, 17.4 and 17.5
5 <i>US – 1916 Act</i>	WT/DS136, WT/DS162	Articles 1, 2.1, 2.2, 3, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4
6 <i>EC – Bed Linen</i>	WT/DS141	Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 5.3, 5.5, 6.10, 6.11, 12.2.1, 12.2.2 and 15
7 <i>Guatemala – Cement II</i>	WT/DS156	Articles 1, 2, 2.1, 2.2, 3, 5, 6.1, 6.1.2, 6.1.3, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9, 9, 12 and 18
8 <i>US – Stainless Steel</i>	WT/DS179	Articles 2.3, 2.4, 2.4.1, 2.4.2, 6.1, 6.2, 6.9, and 12.2
9 <i>US – Hot-Rolled Steel</i>	WT/DS184	Articles 2.1, 3.1, 3.4, 3.5, 4, 6.8, 9.4, 10, 17.5(i), 17.6, 17.6(i), 17.6(ii), 18, Annex I, Annex II
10 <i>Argentina – Ceramic Tiles</i>	WT/DS189	Articles 2, 6.5, 6.8, 6.9, 6.10, 17.5(ii), 17.6(i), 17.6(ii)
11 <i>US – Steel Plate</i>	WT/DS206	Articles 1, 2.2, 2.4, 6.6, 6.8, 9.3, 12, 15, 17.6(i), 17.6(ii), 18, Annex II
12 <i>Egypt – Steel Rebar</i>	WT/DS211	Articles 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 6.1, 6.2, 6.8, 17.6, 17.6(i), 17.6(ii), Annex I, Annex II
13 <i>EC – Tube or Pipe Fittings</i>	WT/DS219	Articles 1, 2.2, 2.4, 2.4.1, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.2, 5.3, 5.8, 6.2, 6.4, 6.6, 6.9, 9.3, 11.1, 11.2, 12.2, 12.2.2
14 <i>US – Section 129(c)(1) URAA</i>	WT/DS221	Articles 1, 9.3, 11.1, 18.1, 18.4
15 <i>US – Offset Act (Byrd Amendment)</i>	WT/DS234, WT/DS217	Articles 5.4, 8, 18.1, 18.4
16 <i>Argentina – Poultry Anti-Dumping Duties</i>	WT/DS241	Articles 2.4, 5.2, 5.3, 5.7, 5.8, 6.1.1, 6.1.2, 6.1.3, 6.2, 6.8, 6.9, 6.10, 12.2.2, Annex II
17 <i>US – Corrosion-Resistant Steel Sunset Review</i>	WT/DS244	Articles 2, 2.4, 3.3, 5.6, 5.8, 6.1, 6.2, 6.6, 6.10, 11.1, 11.2, 11.3, 12.1, 12.3, 18.3, 18.4
18 <i>US – Softwood Lumber V</i>	WT/DS264	Articles 1, 2, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 2.4.2, 3, 4.1, 5, 5.2, 5.3, 5.8, 6.10, 9, 9.3, 18.1
19 <i>US – Oil Country Tubular Goods Sunset Reviews</i>	WT/DS268	Articles 2, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 6.1, 6.2, 6.8, 6.9, 11.1, 11.3, 11.4, 12.2, 12.2.2, 18, Annex II
20 <i>US – Softwood Lumber VI</i>	WT/DS277	Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 12 and 18.1

⁸⁴⁷ Panel Report on *Guatemala – Cement I*, para. 7.21. With respect to the issue of repayment of anti-dumping duties under Article 19.1 of the DSU, see Panel Report on *Guatemala – Cement II*, paras. 9.4–9.7.

⁸⁴⁸ Appellate Body Report on *Guatemala – Cement I*, para. 89.

⁸⁴⁹ Appellate Body Report on *Guatemala – Cement I*, para. 88.

PART III

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18
Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.²⁴

(footnote original) ²⁴ This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. General

(a) Rules on interpretation of the Anti-Dumping Agreement

665. Regarding the interpretation of the *Anti-Dumping Agreement*, the Panel on *US – DRAMS* referred to Article 3.2 of the *DSU*:

“[W]e bear in mind that Article 3.2 of the *DSU* requires Panels to interpret ‘covered agreements’, including the *AD Agreement*, ‘in accordance with customary rules of interpretation of public international law’. We recall that the rules of treaty interpretation set forth in Article 31 of the *Vienna Convention* expressly defines the context of the treaty to include the text of the treaty. Thus, the entire text of the *AD Agreement* may be relevant to a proper interpretation of any particular provision thereof.”⁸⁵⁰

2. Article 18.1

(a) “specific action against dumping”

666. The Appellate Body in *US – 1916 Act* considered that “the scope of application of Article VI [of the *GATT 1994*] is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*”.⁸⁵¹ The Appellate Body then found “that Article 18.1 of the *Anti-Dumping Agreement* requires that any ‘specific action against dumping’ be in accordance with the provisions of Article VI of the *GATT 1994* concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*”:

“In our view, the ordinary meaning of the phrase ‘specific action against dumping’ of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of ‘dumping’. ‘Specific action against dumping’ of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of ‘dumping’ are present. Since intent is not a constituent element of ‘dumping’, the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is ‘specific action against dumping’ of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement*.

...

We note that footnote 24 refers generally to ‘action’ and not, as does Article 18.1, to ‘specific action against dumping’ of exports. ‘Action’ within the meaning of footnote 24 is to be distinguished from ‘specific action against dumping’ of exports, which is governed by Article 18.1 itself.

⁸⁵⁰ Panel Report on *US – DRAMS*, para. 6.21.

⁸⁵¹ Appellate Body Report on *US – 1916 Act*, para. 121.

Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any ‘specific action against dumping’ of exports when such specific action is not ‘in accordance with the provisions of GATT 1994, as interpreted by this Agreement’. Since the only provisions of the GATT 1994 ‘interpreted’ by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any ‘specific action against dumping’ of exports from another Member be in accordance with the relevant provisions of Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.

We recall that footnote 24 to Article 18.1 refers to ‘other relevant provisions of GATT 1994’ (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the ‘provisions of GATT 1994’ referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.

We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any ‘specific action against dumping’ be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any ‘specific action against dumping’ of exports, i.e., action that is taken in response to situations presenting the constituent elements of ‘dumping’.⁸⁵²

667. In *US – Offset Act (Byrd Amendment)*, the Appellate Body reiterated its view that “a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a “specific action” in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*”.⁸⁵³ This implied that the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping. According to the Appellate Body, “such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself”.⁸⁵⁴ However, not all action taken *in response to* dumping is necessarily action *against* dumping.⁸⁵⁵ The Panel on *US – Offset Act (Byrd Amendment)* took the position that an action operates “against” dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* if it has an *adverse bearing on* dumping.⁸⁵⁶ The Appellate Body agreed with the Panel’s interpretation of the term “against” and reached the following conclusion with respect to the Continued Dumping and Subsidy Offset Act (CDSOA):

“All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties

collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action ‘against’ dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.”⁸⁵⁷

668. In *US – Offset Act (Byrd Amendment)*, the Appellate Body also emphasized that in order to determine whether a specific action is “against” dumping or subsidization, it is neither necessary, nor relevant, to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them. An analysis of the term “against”, in the view of the Appellate Body, “is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete”.⁸⁵⁸ However, as the Appellate Body also clearly stated, “a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent”⁸⁵⁹, such as the filing of anti-dumping applications.

(b) “except in accordance with the provisions of GATT 1994”

669. The Panel on *US – 1916 Act (EC)* considered that Article 18.1 of the *Anti-Dumping Agreement* confirms the

⁸⁵² Appellate Body Report on *US – 1916 Act*, paras. 122–126. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.214–218 and 6.264; and Panel Report on *US – 1916 Act (EC)*, paras. 6.197–6.199.

⁸⁵³ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 239.

⁸⁵⁴ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 239. As the Appellate Body underlined,

“Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy.”

Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 244.

⁸⁵⁵ See Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 247.

⁸⁵⁶ Panel Report on *US – Offset Act (Byrd Amendment)*, paras. 7.17–7.18.

⁸⁵⁷ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 256.

⁸⁵⁸ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 257.

⁸⁵⁹ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 258.

purpose of Article VI as “to define the conditions under which counteracting dumping *as such* is allowed.”⁸⁶⁰

(c) Footnote 24

670. The Panel on *US – 1916 Act (Japan)* considered that “footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement. Such a possibility does not affect our conclusion that, when a law of a Member addresses the type of price discrimination covered by Article VI and makes it the cause for the imposition of anti-dumping measures, that Member has to abide by the requirements of Article VI and the *Anti-Dumping Agreement*.”⁸⁶¹

671. The Appellate Body on *US – Offset Act (Byrd Amendment)* clarified that footnotes 24 and 56 are clarifications of the main provisions, and were added so as to avoid ambiguity:

“[T]hey confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* ‘specific’ within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.”⁸⁶²

672. In *US – 1916 Act*, the Appellate Body referred to footnote 24 in order to clarify the scope of Article VI of *GATT 1994*. See paragraph 666 above.

3. Article 18.3

(a) “reviews of existing measures”

673. Referring to its statement that the *Anti-Dumping Agreement* applies only to “reviews of existing measures” initiated pursuant to applications made on or after the date of entry into force of the *Anti-Dumping Agreement* for the Member concerned, the Panel on *US – DRAMS* drew a comparison with the findings of the Panel on *Brazil – Desiccated Coconut*:

“We note that this approach is in line with that adopted by the Panel on *Desiccated Coconut* in respect of Article 32.3 of the *SCM Agreement*, which is virtually identical to Article 18.3 of the *AD Agreement*. That Panel stated that ‘Article 32.3 defines comprehensively the situations in which the *SCM Agreement* applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the *SCM Agreement* applies to reviews of existing measures initiated pursuant to applications made on or after the date of entry into force of the *WTO Agreement*. It is thus through the mechanism of reviews provided for in the *SCM Agree-*

ment, and only through that mechanism, that the *Agreement* becomes effective with respect to measures imposed pursuant to investigations to which the *SCM Agreement* does not apply’ (*Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, para. 230, upheld by the Appellate Body in WT/DS22/AB/R, adopted on 20 March 1997).”⁸⁶³

(b) Application of the Anti-Dumping Agreement

674. Regarding the application of the *Anti-Dumping Agreement* to pre- and post-WTO measures, the Panel on *US – DRAMS* emphasized that the *Anti-Dumping Agreement* applies only to reviews and existing measures initiated pursuant to applications made on or after the date of entry into force of the *Agreement* with respect to the Member concerned:

“In our view, pre-WTO measures do not become subject to the *AD Agreement* simply because they continue to be applied on or after the date of entry into force of the *WTO Agreement* for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the *AD Agreement* applies only to ‘reviews of existing measures’ initiated pursuant to applications made on or after the date of entry into force of the *AD Agreement* for the Member concerned (‘post-WTO reviews’). However, we do not believe that the terms of Article 18.3 provide for the application of the *AD Agreement* to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the *AD Agreement* to the post-WTO review. In other words, the scope of application of the *AD Agreement* is determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the *AD Agreement* only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the *AD Agreement* by virtue of Article 18.3 of the *AD Agreement*. By way of example, a pre-WTO injury determination does not become subject to the *AD Agreement* merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping.”⁸⁶⁴

4. Article 18.4

(a) Maintenance of inconsistent legislation after entry into force of *WTO Agreement*

675. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of

⁸⁶⁰ Panel Report on *US – 1916 Act (EC)*, para. 6.114.

⁸⁶¹ Panel Report on *US – 1916 Act (Japan)*, para. 6.218.

⁸⁶² Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 262.

⁸⁶³ Panel Report on *US – DRAMS*, para. 6.14, fn 477.

⁸⁶⁴ Panel Report on *US – DRAMS*, para. 6.14.

1930, as amended, which provided for a method for calculating the “all others” rate (see paragraphs 471–473 above) as inconsistent with Article 9.4 and, accordingly with Articles XVI:4 of the WTO Agreement and 18.4 of the *Anti-Dumping Agreement*. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 “in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate”. The Panel further found that, in maintaining this Section following the entry into force of the *Anti-Dumping Agreement*, the United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.⁸⁶⁵ The Appellate Body upheld these findings.⁸⁶⁶

(b) Mandatory versus discretionary legislation

676. In *US – 1916 Act (EC)*, the Panel referred to Article 18.4 in stating that the mere fact that the initiation of anti-dumping investigations was discretionary would not make the legislation at issue non-mandatory. See paragraph 599 above.

(c) Measures subject to dispute settlement

677. In the view of the Appellate Body on *US – Corrosion-Resistant Steel Sunset Review*, all laws, regulations and administrative procedures mentioned in Article 18.4 may, as such, be submitted to dispute settlement. The Appellate Body considered that “the phrase ‘laws, regulations and administrative procedures’ seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.”⁸⁶⁷ If some of these types of measure could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of “conformity” set forth in Article 18.4.”⁸⁶⁸

678. As regards, the concept of measures subject to WTO dispute settlement, see Section VI.B.3(c) of the Chapter on the *DSU*. See also Sections XVII.B.1(b) and (c) of this Chapter.

5. Article 18.5

679. Article 18.5 of the Agreement provides that “Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations”. Pursuant to a decision of the Committee in February 1995, all Members having new or existing legislation and/or regulations which apply in whole or in part to anti-dumping duty investigations or reviews covered by the Agreement are requested to notify the full and integrated text of such legislation and/or regulations to the

Committee. Changes in a Member’s legislation and/or regulations are to be notified to the Committee as well. Pursuant to that same decision of the Committee, if a Member has no such legislation or regulations, the Member is to inform the Committee of this fact. The Committee also decided that Observer governments should comply with these notification obligations.

680. As of 29 October 2004, 105 Members had notified the Committee regarding their domestic anti-dumping legislation.⁸⁶⁹ Of these 105 Members, 29 had notified the Committee that they had no anti-dumping legislation. Members’ communications in this regard can be found in document series G/ADP/N/1/. . . 28 Members had not, as yet, made any notification of anti-dumping legislation and/or regulations. Annex A sets out the status of notifications concerning legislation under Article 18.5 of the Agreement, and sets out the reference symbol of the document(s) containing each Member’s current notification in this regard.

6. Article 18.6

(a) Annual reviews

681. Paragraph 7.4 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns states that the Ministerial Conference “[t]akes note that Article 18.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires the Committee on Anti-Dumping Practices to review annually the implementation and operation of the Agreement taking into account the objectives thereof. The Committee on Anti-dumping Practices is instructed to draw up guide-

⁸⁶⁵ Panel Report on *US – Hot-Rolled Steel*, para. 7.90.

⁸⁶⁶ Appellate Body Report on *US – Hot-Rolled Steel*, para. 129.

⁸⁶⁷ (*footnote original*) We observe that the scope of each element in the phrase “laws, regulations and administrative procedures” must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member’s domestic law and practice.

⁸⁶⁸ Appellate Body Report on *United States – Corrosion Resistant Steel Sunset Review*, para. 87.

⁸⁶⁹ The European Communities is counted as one Member. Prior to 1 May 2004, the member-States of the EC were the following: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. As of 1 May 2004, the member-States of the EC included in addition to the afore-listed, the following: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. This annual report includes a period both before and after the accession of these Members to the European Communities. Therefore, these Members’ separate notifications of legislation, submitted prior to their accession to the EC, are listed in this report. See document G/ADPN/1/EEC/2/Suppl.6 for updated information on the current status of laws and regulations of these Members.

lines for the improvement of annual reviews and to report its views and recommendations to the General Council for subsequent decision within 12 months.”⁸⁷⁰

682. Further to the Doha mandate, the Committee on Anti-Dumping Practices adopted on 27 November 2002, the “Recommendation regarding Annual Reviews of the Anti-Dumping Agreement.”⁸⁷¹ In its recommendation, the Committee on Anti-Dumping Practices considers that “improvements in the reporting of anti-dumping activity under the Agreement and in the Committee’s annual reviews are important to promoting transparency”. Accordingly, the Recommendation includes the following improvements aimed at providing useful information to Members and the public, and enhancing transparency under the Agreement:

“1. The Committee’s annual report under Article 18.6 should include in the Summary of Anti-Dumping Actions⁸⁷², in addition to the column currently included that lists the initiations reported by each Member, a comparable column listing the number of anti-dumping revocations reported by each Member during the reporting period. Where a Member has not provided such information, the report should note this omission. Members are already requested to report the number of revocations in a separate table as an annex to their semi-annual reports of anti-dumping activity. Consequently, such information should be included in the Article 18.6 annual report.

2. The Committee’s Article 18.6 annual report should also include a chart comparing for each Member the number of preliminary and final measures reported in its semi-annual reports with the number of notices of preliminary and final measures the Member submitted to the Secretariat for the comparable period.

3. Developed country Members should include, when reporting anti-dumping actions in the semi-annual report that Members are required to submit under Article 16.4, the manner in which the obligations of Article 15 have been fulfilled. Without prejudice to the scope and application of Article 15, price undertakings and lesser duty rules are examples of constructive remedies that could be included in such Members’ semi-annual reports. The Committee’s annual report under Article 18.6 should include, in a separate table, a compilation of the information reported by each Member in this respect during the reporting period. Where a Member has not provided such information, the report should note this omission.

4. This recommendation does not prejudge the ability of Members to submit other proposals and to agree in the future on other recommendations aimed at improving annual reviews in the Committee on Anti-dumping Practices.”⁸⁷³

7. Relationship with other Articles

(a) General

683. The relationship between Article 18.1 and other provisions in the *Anti-Dumping Agreement* was discussed in *Guatemala – Cement II*. The Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico’s claims under other articles of the *Anti-Dumping Agreement*, among them Article 18, were “dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico’s claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement.”⁸⁷⁴ In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims.

684. The Panel on *US – 1916 Act (Japan)* stated that “[t]he meaning of Article 18.4 which immediately comes to mind when reading that Article is that when a law, regulation or administrative procedure of a Member has been found incompatible with the provisions of the *Anti-Dumping Agreement*, that Member is also in breach of its obligations under Article 18.4.”⁸⁷⁵

685. The Panel on *US – 1916 Act (Japan)* stated in a footnote that “we did not exercise judicial economy with respect to Article 18.4 because, in that context, a violation of Article 18.4 automatically results from the breach of another provision of the *Anti-Dumping Agreement*.”⁸⁷⁶

(b) Article 17

686. In *US – 1916 Act*, the Appellate Body referred to Article 18.1 and 18.4 as contextual support for its reading of Article 17.4 as allowing Members to bring claims against anti-dumping legislation as such.⁸⁷⁷

8. Relationship with other WTO Agreements

(a) Article VI of the GATT 1994

687. The relationship between Article 18 and Article VI of the *GATT 1994* was discussed in *US – 1916 Act*. See paragraphs 666–670 above and 707 below.

⁸⁷⁰ WT/MIN(01)/17.

⁸⁷¹ G/ADP/9.

⁸⁷² (*footnote original*) See Report (2001) of the Committee on Anti-Dumping Practices, Annex C, G/L/495 (31 October 2001).

⁸⁷³ G/ADP/9.

⁸⁷⁴ Panel Report on *Guatemala – Cement II*, para. 8.296.

⁸⁷⁵ Panel Report on *US – 1916 Act (Japan)*, para. 6.286.

⁸⁷⁶ Panel Report on *US – 1916 Act (Japan)*, para. 6.286, fn 595.

⁸⁷⁷ Appellate Body Report on *US – 1916 Act*, paras. 78–82. See also paras. 596 and 610 of this Chapter.

(b) SCM Agreement

688. The Panel on *US – DRAMS* referred to the applicability of the *SCM Agreement* to measures initiated before the entry into force of the *WTO Agreement*, in deciding on a similar issue under the *Anti-Dumping Agreement*. See paragraph 673 above.

XIX. ANNEX I**A. TEXT OF ANNEX I****ANNEX I**

*PROCEDURES FOR ON-THE-SPOT
INVESTIGATIONS PURSUANT TO PARAGRAPH 7
OF ARTICLE 6*

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.
2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.
4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
5. Sufficient advance notice should be given to the firms in question before the visit is made.
6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the Member in question and (b) the latter do not object to the visit.
7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

B. INTERPRETATION AND APPLICATION OF ANNEX I**1. On-the-spot verifications as an option**

689. The Panel on *Argentina – Ceramic Tiles*, indicated in a footnote that, although common practice, there is no requirement to carry out on-the-spot verifications. See paragraph 369 above.

2. Participation of non-governmental experts in the on-the-spot verification

690. In *Guatemala – Cement II*, Mexico claimed that a verification visit by Guatemala's authority to a Mexican producer's site was inconsistent with Article 6.7 and Annex I(2), (3), (7) and (8) because the authority included non-governmental experts with an alleged conflict of interest in its verification team. See paragraphs 372–374 above.

3. Information verifiable on-the-spot

691. In *Guatemala – Cement II*, Mexico argued that in violation of Article 6.7 and paragraph 7 of Annex I, the Guatemalan authority sought to verify certain information not submitted by the Mexican producer under investigation because it pertained to the period of investigation newly added during the course of the investigation. See paragraph 371 above.

4. Relationship with other Articles

692. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the *Anti-Dumping Agreement*. The Panel then opined that Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement." In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.⁸⁷⁸

693. With respect to the relationship of Annex I and Article 6.7, in *Egypt – Steel Rebar*, the Panel came to the same conclusion as with the relationship between Arti-

⁸⁷⁸ Panel Report on *Guatemala – Cement II*, para. 8.296.

cle 6.8 and Annex II (see paragraph 379 above), i.e. that Annex I is incorporated by reference into Article 6.7. See paragraph 368 above.

XX. ANNEX II

A. TEXT OF ANNEX II

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

B. INTERPRETATION AND APPLICATION OF ANNEX II

1. “best information available”

694. With respect to Annex II and recourse to “best information available” pursuant to Article 6.8, see paragraphs 375–425 above.

2. Paragraph 1

695. As regards the interpretation of paragraph 1 of Annex II, see paragraphs 381–383, 397–398 and 400–403 above.

3. Paragraph 3

696. As regards the interpretation of paragraph 3, see paragraphs 378 and 388–395 above.

4. Paragraph 5

697. Concerning the interpretation of the concept of cooperation “to the best of its ability”, see paragraphs 406–409 above. As regards co-operation as a two-way process, see paragraph 411 above.

5. Paragraph 6

- (a) Duty to inform of reasons for disregarding evidence or information

698. See paragraphs 395 and 414–415 above.

- (b) “reasonable period, due account being taken of the time-limits of the investigation”

699. In *Egypt – Steel Rebar*, the Panel considered that the text of paragraph 6 of Annex II “makes clear that the obligation for an investigating authority to provide a reasonable period for the provision of further explanations is not open-ended or absolute. Rather, this obligation exists within the overall time constraints of the investigation.” The Panel concluded that “in determining a “reasonable period” an investigating authority must balance the need to provide an adequate period for the provision of the explanations referred to against the time constraints applicable to the various phases of the investigation and to the investigation as a whole.”⁸⁷⁹

700. In *Egypt – Steel Rebar*, the Panel considered that the issue of whether the two-to-five day deadline fixed by the investigating authority was unreasonable “must be judged on the basis of the overall factual situation that existed at the time”. In this case, the Panel considered whether the information requested was new information, whether any of the other respondents received a longer period in which to respond and what was the attitude of the respondents concerned, and concluded that the deadline in question was not unreasonable.⁸⁸⁰

6. Paragraph 7

701. As regards the possibility of resorting to a “secondary source”, see paragraph 412 above.

702. Concerning the concept of cooperation, see paragraphs 405–406 above.

7. Relationship with Article 6

- (a) Relationship with Article 6.1

703. In *Egypt – Steel Rebar*, Turkey had claimed a violation of paragraph 1 of Annex II outside the context of Article 6.8. The Panel decided not to rule on whether paragraph 1 could be invoked separately from Article 6.8.⁸⁸¹

- (b) Relationship with Article 6.2

704. In *Egypt – Steel Rebar*, Turkey had made a number of claims of violation of both paragraph 6 of Annex II and Article 6.2. The Panel, who did not take a position on whether paragraph 6 of Annex II can be invoked separately from Article 6.8, considered as follows.

“As for the claim of violation of the requirement in Annex II, paragraph 6 to provide a ‘reasonable period’,

we recall that this provision forms part of the required procedural and substantive basis for a decision as to whether resort to facts available pursuant to Article 6.8. We further recall that we have found, *supra*⁸⁸², that the [investigating authority]’s decision to resort to facts available . . . did not violate Article 6.8, based on considerations under Annex II, paragraphs 3 and 5. Thus, we would not necessarily need to address this aspect of this claim for its own sake. Nonetheless, a full analysis of Annex II, paragraph 6 as it pertains to the factual basis of this claim, appears necessary to evaluate the merits of the claimed violation of Article 6.2 resulting from the deadline for responses to the 23 September requests. In performing this analysis, however, we note that we again do not here take a position on whether Annex II, paragraph 6 can be invoked separately from Article 6.8. We would need to do so only if we find that as a factual matter, the deadline in question was unreasonable.”⁸⁸³

- (c) Relationship with Article 6.8

705. As regards the relationship between Annex II and Article 6.8, see paragraphs 375–425 above.

XXI. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. ARTICLE VI OF THE GATT 1994

706. Regarding the relationship between Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (EC)*, referring to the Appellate Body Report on *Argentina – Footwear (EC)*, used the term an “inseparable package of rights and disciplines”:

“In our opinion, Article VI and the Anti-Dumping Agreement are part of the same treaty or, as the panel and the Appellate Body put it in *Argentina – Footwear (EC)* with respect to Article XIX and the Agreement on Safeguards, an ‘inseparable package of rights and disciplines’. In application of the customary rules of interpretation of international law, we are bound to *interpret* Article VI of the GATT 1994 as part of the WTO Agreement and the Anti-Dumping Agreement is part of the context of Article VI. This implies that Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning. Rather, we should give meaning and legal effect to all the relevant provisions. However, the requirement does not prevent us from making *findings* in relation to Article VI only, or in relation to specific provisions of the Anti-Dumping Agreement, as required by our terms of reference.”⁸⁸⁴

⁸⁷⁹ Panel Report on *Egypt – Steel Rebar*, para. 7.282.

⁸⁸⁰ Panel Report on *Egypt – Steel Rebar*, paras. 7.289–7.295.

⁸⁸¹ Panel Report on *Egypt – Steel Rebar*, para. 7.321.

⁸⁸² (*footnote original*) Para.7.248.

⁸⁸³ Panel Report on *Egypt – Steel Rebar*, para. 7.288.

⁸⁸⁴ Panel Report on *US – 1916 Act (EC)*, para. 6.97. See also *US – 1916 Act (Japan)*, para. 6.93.

707. The Panel on *US – 1916 Act (EC)* considered the *Anti-Dumping Agreement* as context in interpreting Article VI of the *GATT 1994* and explained its reasoning as follows:

“The official title of the Anti-Dumping Agreement is ‘Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994’. This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconuts* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that ‘the context for the purpose of the interpretation of a treaty shall comprise, [. . .] the text [of the treaty], including its preamble and annexes. . .’. We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law.”⁸⁸⁵

708. In examining the scope of Article VI of the *GATT 1994*, the Panel on *US – 1916 Act (EC)* stated that Article 1 of the *Anti-Dumping Agreement* “supports the view that Article VI is about what Members are entitled to do when they counteract dumping within the meaning of Article VI . . . by referring to ‘anti-dumping measure[s]’ which may be applied by Members.”⁸⁸⁶ (emphasis in original) The Panel concluded that “a law that would counteract ‘dumping’ as defined in Article VI:1 would fall within the scope of Article VI.”⁸⁸⁷

709. The Appellate Body in *US – 1916 Act* concluded that “[s]ince an ‘Anti-dumping measure’ must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the *GATT 1994* and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to ‘an anti-dumping measure’, i.e., a measure against dumping.”⁸⁸⁸

710. The Panel on *US – 1916 Act (EC)* considered that the first sentence of Article 1 of the *Anti-Dumping Agreement* confirms the purpose of Article VI as “to define the conditions under which counteracting dumping *as such* is allowed.”⁸⁸⁹

711. Regarding the relationship between Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*, the Panel on *US – 1916 Act (Japan)* noted that “Article 1.1 of the *Anti-Dumping Agreement* establishes a link between Article VI and the *Anti-Dumping Agreement*.”⁸⁹⁰

712. The Appellate Body in *US – 1916 Act* agreed with the Panel’s conclusion that “[g]iven the link between Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*, we find that the applicability of Article VI to the 1916 Act also implies the applicability of the *Anti-Dumping Agreement*.”⁸⁹¹

B. ARTICLE XI OF THE GATT 1994

713. The Panel on *US – 1916 Act (Japan)*, after finding that the measure at issue was inconsistent with provisions of the *Anti-Dumping Agreement* (and Article VI of *GATT*), exercised judicial economy with respect to a claim under Article XI of *GATT*.⁸⁹²

C. ARTICLE 3.2 OF THE DSU

714. The Panel on *US – DRAMS* discussed the interpretation of provisions of the *Anti-Dumping Agreement* in the light of the wording of Article 3.2 of the *DSU*.

D. ARTICLE 11 OF THE DSU

715. As regards the different standard of review under Article 17.6 of the *Anti-Dumping Agreement* and the general standard of review of Article 11 of the *DSU*, see paragraphs 626–627 above.

E. AGREEMENT ON SAFEGUARDS

716. The Appellate Body in *US – Hot-Rolled Steel* supported its interpretation of the non-attribution language of Article 3.5 by referring to its decisions in two safeguards Reports, *US – Wheat Gluten* and *US – Lamb* where it interpreted the non-attribution language in Article 4.2(b) of the Agreement on Safeguards in a similar manner. See paragraph 183 above. See also the Panel Report in *Guatemala – Cement II*, paragraph 152 above.

F. SCM AGREEMENT

717. The Panel on *US – DRAMS* referred to the applicability of the *SCM Agreement* to measures initiated before the entry into force of the *WTO Agreement*, in deciding on a similar issue under the *Anti-Dumping Agreement*. See paragraph 673 above.

⁸⁸⁵ Panel Report on *US – 1916 Act (EC)*, para. 6.195. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.108.

⁸⁸⁶ Panel Report on *US – 1916 Act (EC)*, para. 6.106.

⁸⁸⁷ Panel Report on *US – 1916 Act (EC)*, para. 6.107.

⁸⁸⁸ Appellate Body Report on *US – 1916 Act*, para. 120.

⁸⁸⁹ Panel Report on *US – 1916 Act (EC)*, para. 6.114. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.240.

⁸⁹⁰ Panel Report on *US – 1916 Act (Japan)*, para. 6.108. See also Panel Report on *US – 1916 Act (EC)*, para. 6.165.

⁸⁹¹ Appellate Body Report on *US – 1916 Act*, para. 133.

⁸⁹² Panel Report on *US – 1916 Act (Japan)*, paras. 6.276–6.281.

XXII. DECLARATION ON DISPUTE SETTLEMENT PURSUANT TO THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 OR PART V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

A. TEXT

Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXIII. DECISION ON REVIEW OF ARTICLE 17.6 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. TEXT

Ministers decide as follows:

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

B. INTERPRETATION AND APPLICATION

No jurisprudence or decision of a competent WTO body.

XXIV. DECISION ON ANTI-CIRCUMVENTION

A. TEXT OF THE DECISION ON ANTI-CIRCUMVENTION

DECISION ON ANTI-CIRCUMVENTION

Ministers,

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.

B. INTERPRETATION AND APPLICATION OF THE DECISION ON ANTI-CIRCUMVENTION

No jurisprudence or decision of a competent WTO body.

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Agreement)

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(a) Observer status	703	1. The primary basis for customs value under this Agreement is "transaction value" as defined in Article 1. Article 1 is to be read together with Article 8 which provides, <i>inter alia</i> , for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money. Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1.	
(b) Rules of procedure	703		
(c) Monitoring of the Agreement on Preshipment Inspection	703	2. Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.	
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		3. Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.	
		4. Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.	

Members,

Having regard to the Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994 and to secure additional benefits for the international trade of developing countries;

Recognizing the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Recognizing the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values;

Recognizing that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued;

Recognizing that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply;

Recognizing that valuation procedures should not be used to combat dumping;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE GENERAL INTRODUCTORY COMMENTARY

1. General

(a) Implementation of the Agreement

1. At its meeting of 18–19 October 2000, the General Council requested the Committee on Customs Valuation to consider three proposals relating to the implementation of the *Customs Valuation Agreement*.¹

(b) Adoption of the decisions of the Tokyo Round Committee

2. At its meeting of 12 May 1995, the Committee on Customs Valuation also agreed, *inter alia*, to adopt the decisions adopted by the Tokyo Round Committee on Customs Valuation relating to the interpretation and administration of the of the *Customs Valuation Agreement*.²

PART I RULES ON CUSTOMS VALUATION

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

(i) are imposed or required by law or by the public authorities in the country of importation;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond.

¹ WT/GC/M/59, paras. 22–26.

² G/VAL/M/1, Section J. Those decisions are referred to in paragraphs 3, 4, 9, 10, 11, 20, 26, 33 and 34 of this Chapter.

If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;
- (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
- (iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 1

Note to Article 1

Price Actually Paid or Payable

1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.
2. Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in Article 8, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.
3. The customs value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:

- (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
- (b) the cost of transport after importation;
- (c) duties and taxes of the country of importation.

4. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

Paragraph 1(a)(iii)

Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

Paragraph 1(b)

1. If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include:

- (a) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;
- (b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;
- (c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that the seller will receive a specified quantity of the finished goods.

2. However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in the country of importation shall not result in rejection of the transaction value for the purposes of Article 1. Likewise, if the buyer undertakes on the buyer's own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the customs value nor shall such activities result in rejection of the transaction value.

Paragraph 2

1. Paragraphs 2(a) and 2(b) provide different means of establishing the acceptability of a transaction value.

2. Paragraph 2(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the customs administration may have previously examined the relationship, or it may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

3. Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale. In this context, the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced.

4. Paragraph 2(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the customs administration and is therefore acceptable under the provisions of Article 1. Where a test under paragraph 2(b) is met, it is not necessary to examine the question of influence under paragraph 2(a).

If the customs administration has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in paragraph 2(b) has been met, there is no reason for it to require the importer to demonstrate that the test can be met. In paragraph 2(b) the term "unrelated buyers" means buyers who are not related to the seller in any particular case.

Paragraph 2(b)

A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported, and, whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the "test" values set forth in paragraph 2(b) of Article 1.

C. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Valuation of carrier media bearing software for data-processing equipment

3. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on the valuation of carrier media bearing software for data-processing equipment.³

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable

³ G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.4. The text of the decision can be found in G/VAL/5, Section A.4.

to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 2

Note to Article 2

1. In applying Article 2, the customs administration shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:

- (a) a sale at the same commercial level but in different quantities;
- (b) a sale at a different commercial level but in substantially the same quantities; or
- (c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:

- (a) quantity factors only;
- (b) commercial level factors only; or
- (c) both commercial level and quantity factors.

3. The expression "and/or" allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.

4. For the purposes of Article 2, the transaction value of identical imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.

5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease

in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical imported goods for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 2 is not appropriate.

C. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Rectification of the French text of paragraph 1 of the Note to Article 2

4. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the rectification of the French text of paragraph 1 of the Note to Articles 2 and 3.⁴

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which

⁴ G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.5. The decision can be found in G/VAL/5, Section A.5.

clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.
3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 3

Note to Article 3

1. In applying Article 3, the customs administration shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of similar goods that takes place under any one of the following three conditions may be used:

- (a) a sale at the same commercial level but in different quantities;
- (b) a sale at a different commercial level but in substantially the same quantities; or
- (c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:

- (a) quantity factors only;
- (b) commercial level factors only; or
- (c) both commercial level and quantity factors.

3. The expression "and/or" allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.

4. For the purpose of Article 3, the transaction value of similar imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.

5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quan-

ties. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only similar imported goods for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 3 is not appropriate.

C. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. General

(a) Rectification of the French text of paragraph 1 of the Note to Article 3

5. With respect to the rectification of the French text of paragraph 1 of the Note to Article 3, see paragraph 4 above.

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3, the customs value shall be determined under the provisions of Article 5 or, when the customs value cannot be determined under that Article, under the provisions of Article 6 except that, at the request of the importer, the order of application of Articles 5 and 6 shall be reversed.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

6. Paragraph 3 of Annex III allows developing countries to make a reservation that would allow customs administrations the right to deny an importer's request to reverse the sequential order of the Articles 5 and 6. See interpretation and application of paragraph 3 of Annex III paragraph 40 below.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this

Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

- (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
- (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
- (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
- (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 5

Note to Article 5

1. The term "unit price at which . . . goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place.
2. As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

<i>Sale quantity</i>	<i>Unit price</i>	<i>Number of sales</i>	<i>Total quantity sold at each price</i>
1–10 units	100	10 sales of 5 units 5 sales of 3 units	65
11–25 units	95	5 sales of 11 units	55
over 25 units	90	1 sale of 30 units 1 sale of 50 units	80

The greatest number of units sold at a price is 80; therefore, the unit price in the greatest aggregate quantity is 90.

3. As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is 95.

4. A third example would be the following situation where various quantities are sold at various prices.

<i>(a) Sales</i>	
<i>Sale quantity</i>	<i>Unit price</i>
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100

<i>(b) Totals</i>	
<i>Total quantity sold</i>	<i>Unit price</i>
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65; therefore, the unit price in the greatest aggregate quantity is 90.

5. Any sale in the importing country, as described in paragraph 1 above, to a person who supplies directly or indirectly free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods any of the elements specified in paragraph 1(b) of Article 8, should not be taken into account in establishing the unit price for the purposes of Article 5.

6. It should be noted that "profit and general expenses" referred to in paragraph 1 of Article 5 should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless the importer's figures are inconsistent with those

obtained in sales in the country of importation of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

7. The "general expenses" include the direct and indirect costs of marketing the goods in question.

8. Local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5.

9. In determining either the commissions or the usual profits and general expenses under the provisions of paragraph 1 of Article 5, the question whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis by reference to the circumstances involved. Sales in the country of importation of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 5, "goods of the same class or kind" includes goods imported from the same country as the goods being valued as well as goods imported from other countries.

10. For the purposes of paragraph 1(b) of Article 5, the "earliest date" shall be the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price.

11. Where the method in paragraph 2 of Article 5 is used, deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis of the calculations.

12. It is recognized that the method of valuation provided for in paragraph 2 of Article 5 would normally not be applicable when, as a result of the further processing, the imported goods lose their identity. However, there can be instances where, although the identity of the imported goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty. On the other hand, there can also be instances where the imported goods maintain their identity but form such a minor element in the goods sold in the country of importation that the use of this valuation method would be unjustified. In view of the above, each situation of this type must be considered on a case-by-case basis.

C. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.2

7. Paragraph 4 of Annex III allows developing countries to make a reservation with respect to the application of paragraph 2. See interpretation and application of paragraph 4 of Annex III, paragraph 41 below.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

- (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
- (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;
- (c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.

2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 6

Note to Article 6

1. As a general rule, customs value is determined under this Agreement on the basis of information readily available in the country of importation. In order to determine a computed value, however, it may be necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside the country of importation. Furthermore, in most cases the producer of the goods will be outside the jurisdiction of the authorities of the country of importation. The use

of the computed value method will generally be limited to those cases where the buyer and seller are related, and the producer is prepared to supply to the authorities of the country of importation the necessary costings and to provide facilities for any subsequent verification which may be necessary.

2. The "cost or value" referred to in paragraph 1(a) of Article 6 is to be determined on the basis of information relating to the production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.

3. The "cost or value" shall include the cost of elements specified in paragraphs 1(a)(ii) and (iii) of Article 8. It shall also include the value, apportioned as appropriate under the provisions of the relevant note to Article 8, of any element specified in paragraph 1(b) of Article 8 which has been supplied directly or indirectly by the buyer for use in connection with the production of the imported goods. The value of the elements specified in paragraph 1(b)(iv) of Article 8 which are undertaken in the country of importation shall be included only to the extent that such elements are charged to the producer. It is to be understood that no cost or value of the elements referred to in this paragraph shall be counted twice in determining the computed value.

4. The "amount for profit and general expenses" referred to in paragraph 1(b) of Article 6 is to be determined on the basis of information supplied by or on behalf of the producer unless the producer's figures are inconsistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation.

5. It should be noted in this context that the "amount for profit and general expenses" has to be taken as a whole. It follows that if, in any particular case, the producer's profit figure is low and the producer's general expenses are high, the producer's profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in the country of importation and the producer accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on sales of the imported goods because of particular commercial circumstances, the producer's actual profit figures should be taken into account provided that the producer has valid commercial reasons to justify them and the producer's pricing policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur, for example, where producers have been forced to lower prices temporarily because of

an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in the country of importation and accept a low profit to maintain competitiveness. Where the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the producer of the goods.

6. Where information other than that supplied by or on behalf of the producer is used for the purposes of determining a computed value, the authorities of the importing country shall inform the importer, if the latter so requests, of the source of such information, the data used and the calculations based upon such data, subject to the provisions of Article 10.

7. The "general expenses" referred to in paragraph 1(b) of Article 6 covers the direct and indirect costs of producing and selling the goods for export which are not included under paragraph 1(a) of Article 6.

8. Whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis with reference to the circumstances involved. In determining the usual profits and general expenses under the provisions of Article 6, sales for export to the country of importation of the narrowest group or range of goods, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 6, "goods of the same class or kind" must be from the same country as the goods being valued.

C. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

- (a) the selling price in the country of importation of goods produced in such country;

- (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
- (c) the price of goods on the domestic market of the country of exportation;
- (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
- (e) the price of the goods for export to a country other than the country of importation;
- (f) minimum customs values; or
- (g) arbitrary or fictitious values.

3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 7

Note to Article 7

1. Customs values determined under the provisions of Article 7 should, to the greatest extent possible, be based on previously determined customs values.
2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.
3. Some examples of reasonable flexibility are as follows:
 - (a) *Identical goods* – the requirement that the identical goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.
 - (b) *Similar goods* – the requirement that the similar goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.
 - (c) *Deductive method* – the requirement that the goods shall have been sold in the “condition as

imported” in paragraph 1(a) of Article 5 could be flexibly interpreted; the “90 days” requirement could be administered flexibly.

C. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.2(f)

8. Developing countries can suspend the application of this paragraph making a reservation to established minimum values, in accordance with paragraph 2 of Annex III. See below interpretation and application of paragraph 2 of Annex III, paragraphs 38–39 below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

- (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
 - (i) commissions and brokerage, except buying commissions;
 - (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
 - (iii) the cost of packing whether for labour or materials;
- (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
 - (i) materials, components, parts and similar items incorporated in the imported goods;
 - (ii) tools, dies, moulds and similar items used in the production of the imported goods;
 - (iii) materials consumed in the production of the imported goods;
 - (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;

- (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
 - (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.
2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:
- (a) the cost of transport of the imported goods to the port or place of importation;
 - (b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and
 - (c) the cost of insurance.
3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.
4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 8

Note to Article 8

Paragraph 1(a)(i)

The term “buying commissions” means fees paid by an importer to the importer’s agent for the service of representing the importer abroad in the purchase of the goods being valued.

Paragraph 1(b)(ii)

1. There are two factors involved in the apportionment of the elements specified in paragraph 1(b)(ii) of Article 8 to the imported goods – the value of the element itself and the way in which that value is to be apportioned to the imported goods. The apportionment of these elements should be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.
2. Concerning the value of the element, if the importer acquires the element from a seller not related to the importer at a given cost, the value of the element is that cost. If the element was produced by the importer or by a person related to the importer, its value would be the cost of producing it. If the element had been previously used by the importer, regardless of whether it had been acquired or produced by such importer, the original cost of acquisition or production would have to be

adjusted downward to reflect its use in order to arrive at the value of the element.

3. Once a value has been determined for the element, it is necessary to apportion that value to the imported goods. Various possibilities exist. For example, the value might be apportioned to the first shipment if the importer wishes to pay duty on the entire value at one time. As another example, the importer may request that the value be apportioned over the number of units produced up to the time of the first shipment. As a further example, the importer may request that the value be apportioned over the entire anticipated production where contracts or firm commitments exist for that production. The method of apportionment used will depend upon the documentation provided by the importer.

4. As an illustration of the above, an importer provides the producer with a mould to be used in the production of the imported goods and contracts with the producer to buy 10,000 units. By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units. The importer may request the customs administration to apportion the value of the mould over 1,000 units, 4,000 units or 10,000 units.

Paragraph 1(b)(iv)

1. Additions for the elements specified in paragraph 1(b)(iv) of Article 8 should be based on objective and quantifiable data. In order to minimize the burden for both the importer and customs administration in determining the values to be added, data readily available in the buyer’s commercial record system should be used in so far as possible.
2. For those elements supplied by the buyer which were purchased or leased by the buyer, the addition would be the cost of the purchase or the lease. No addition shall be made for those elements available in the public domain, other than the cost of obtaining copies of them.
3. The ease with which it may be possible to calculate the values to be added will depend on a particular firm’s structure and management practice, as well as its accounting methods.
4. For example, it is possible that a firm which imports a variety of products from several countries maintains the records of its design centre outside the country of importation in such a way as to show accurately the costs attributable to a given product. In such cases, a direct adjustment may appropriately be made under the provisions of Article 8.
5. In another case, a firm may carry the cost of the design centre outside the country of importation as a general overhead expense without allocation to specific products. In this instance, an appropriate adjustment could be made under the provisions of Article 8 with

respect to the imported goods by apportioning total design centre costs over total production benefiting from the design centre and adding such apportioned cost on a unit basis to imports.

6. Variations in the above circumstances will, of course, require different factors to be considered in determining the proper method of allocation.

7. In cases where the production of the element in question involves a number of countries and over a period of time, the adjustment should be limited to the value actually added to that element outside the country of importation.

Paragraph 1(c)

1. The royalties and licence fees referred to in paragraph 1(c) of Article 8 may include, among other things, payments in respect to patents, trade marks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

2. Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods.

Paragraph 3

Where objective and quantifiable data do not exist with regard to the additions required to be made under the provisions of Article 8, the transaction value cannot be determined under the provisions of Article 1. As an illustration of this, a royalty is paid on the basis of the price in a sale in the importing country of a litre of a particular product that was imported by the kilogram and made up into a solution after importation. If the royalty is based partially on the imported goods and partially on other factors which have nothing to do with the imported goods (such as when the imported goods are mixed with domestic ingredients and are no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.

C. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.1

(a) Treatment of interest charges in the customs value of imported goods

9. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo

Round Committee on Customs Valuation relating to the treatment of interest charges in the customs value of imported goods.⁵

(b) Article 8.1(b)(iv)

10. At its meeting of 12 May 1995, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the interpretation of the term “undertaken” used in Article 8.1(b)(iv).⁶

11. At the same meeting, the Committee on Customs Valuation adopted the decision of the Tokyo Round Committee on Customs Valuation relating to the linguistic consistency of the item “development” in Article 8.1(b)(iv).⁷

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

1. Where the conversion of currency is necessary for the determination of the customs value, the rate of exchange to be used shall be that duly published by the competent authorities of the country of importation concerned and shall reflect as effectively as possible, in respect of the period covered by each such document of publication, the current value of such currency in commercial transactions in terms of the currency of the country of importation.

2. The conversion rate to be used shall be that in effect at the time of exportation or the time of importation, as provided by each Member.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 9

Note to Article 9

For the purposes of Article 9, “time of importation” may include the time of entry for customs purposes.

C. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

⁵ G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.3. The text of the decision can be found in G/VAL/5, Section A.3.

⁶ G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.1. The text of the decision can be found in G/VAL/5, Section A.1.

⁷ G/VAL/M/1, paras. 66–67; see also G/VAL/W/1, Section A.2. The text of the decision can be found in G/VAL/5, Section A.2.

XI. ARTICLE 10**A. TEXT OF ARTICLE 10***Article 10*

All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

No jurisprudence or decision of a competent WTO body.

XII. ARTICLE 11**A. TEXT OF ARTICLE 11***Article 11*

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.

3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 11*Note to Article 11*

1. Article 11 provides the importer with the right to appeal against a valuation determination made by the customs administration for the goods being valued. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary.

2. "Without penalty" means that the importer shall not be subject to a fine or threat of fine merely because the importer chose to exercise the right of appeal. Payment of normal court costs and lawyers' fees shall not be considered to be a fine.

3. However, nothing in Article 11 shall prevent a Member from requiring full payment of assessed customs duties prior to an appeal.

C. INTERPRETATION AND APPLICATION OF ARTICLE 11

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE 12**A. TEXT OF ARTICLE 12***Article 12*

Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE 13**A. TEXT OF ARTICLE 13***Article 13*

If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

12. In *US – Certain EC Products*, the Panel examined whether the increased bonding requirements imposed by the United States on certain products imported from the European Communities were consistent with, among others, Article II of *GATT 1994* and certain provisions in the *DSU*. The United States put forward Article 13 of the *Customs Valuation Agreement* as a defence, arguing "that the non-compliance of the European Communities [with a certain DSB recommendation] created a risk, which allowed the United States to have concerns over its ability to collect the full amount of duties which might be due"⁸, and that the increased bonding requirements were consistent with that Article. The Panel stated as follows:

"In the present dispute the United States is not claiming that, as of 3 March, it required additional guarantees

⁸ Panel Report on *US – Certain EC Products*, para. 6.75.

because the customs value of the EC listed imports had increased or changed on 3 March 1999. In the present dispute, there is no disagreement between the parties on the customs value of the EC listed imports. Article 13 of the Customs Valuation Agreement allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such. Article 13 of the Customs Valuation Agreement does not authorise changes in the applicable tariff levels between the moment imports arrive at a US port of entry and a later date once imports have entered the US market. As we discuss further below, the applicable tariff (the applicable WTO obligation, the applicable law for that purpose), must be the one in force on the day of importation, the day the tariff is applied. In other words, Article 13 of the Customs Valuation Agreement is of no relevance to the present dispute. We reject, therefore, this US defense.”⁹

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14

The notes at Annex I to this Agreement form an integral part of this Agreement and the Articles of this Agreement are to be read and applied in conjunction with their respective notes. Annexes II and III also form an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

13. The text of Annex I is contained in Sections II.B, III.B, IV.B, VI.B, VII.B, VIII.B, IX.B, X.B, XII.B, and XXVI.A. With respect to the interpretation and application of Annex I, see the respective sections referring to paragraphs of Annex I.

14. With respect to Annex II, see Section XXVII.A below.

15. With respect to Annex III, Section XXVIII.A below.

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15

1. In this Agreement:

- (a) “customs value of imported goods” means the value of goods for the purposes of levying ad valorem duties of customs on imported goods;
- (b) “country of importation” means country or customs territory of importation; and

- (c) “produced” includes grown, manufactured and mined.

2. In this Agreement:

- (a) “identical goods” means goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical;
- (b) “similar goods” means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar;
- (c) the terms “identical goods” and “similar goods” do not include, as the case may be, goods which incorporate or reflect engineering, development, artwork, design work, and plans and sketches for which no adjustment has been made under paragraph 1(b)(iv) of Article 8 because such elements were undertaken in the country of importation;
- (d) goods shall not be regarded as “identical goods” or “similar goods” unless they were produced in the same country as the goods being valued;
- (e) goods produced by a different person shall be taken into account only when there are no identical goods or similar goods, as the case may be, produced by the same person as the goods being valued.

3. In this Agreement “goods of the same class or kind” means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.

4. For the purposes of this Agreement, persons shall be deemed to be related only if:

- (a) they are officers or directors of one another’s businesses;
- (b) they are legally recognized partners in business;
- (c) they are employer and employee;
- (d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;
- (e) one of them directly or indirectly controls the other;

⁹ Panel Report on *US – Certain EC Products*, para. 6.77.

- (f) both of them are directly or indirectly controlled by a third person;
- (g) together they directly or indirectly control a third person; or
- (h) they are members of the same family.

5. Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4.

B. TEXT OF INTERPRETATIVE NOTE TO ARTICLE 15

Note to Article 15
Paragraph 4

For the purposes of Article 15, the term "persons" includes a legal person, where appropriate.

Paragraph 4(e)

For the purposes of this Agreement, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

C. INTERPRETATION AND APPLICATION OF ARTICLE 15

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16

Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

No jurisprudence or decision of a competent WTO body.

XVIII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17

Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

16. Pursuant to the Ministerial mandate at Marrakesh, at its meeting of 12 May 1995, the Committee on Customs Valuation adopted the following decision:¹⁰

"Decision regarding cases where Customs Administrations have reasons to doubt the truth or accuracy of the declared value"

Ministers invite the Committee on Customs Valuation established under the Agreement on Implementation of Article VII of GATT 1994 to take the following decision:

The Committee on Customs Valuation,

Reaffirming that the transaction value is the primary basis of valuation under the Agreement on Implementation of Article VII of GATT 1994 (hereinafter referred to as the "Agreement");

Recognizing that the customs administration may have to address cases where it has reason to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value;

Emphasizing that in so doing the customs administration should not prejudice the legitimate commercial interests of traders;

Taking into account Article 17 of the Agreement, paragraph 6 of Annex III to the Agreement, and the relevant decisions of the Technical Committee on Customs Valuation;

Decides as follows:

1. When a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8. If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11, be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1. Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, its grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond. When a final decision is made, the customs

¹⁰ G/VAL/M/1, Section F. The text of the decision can be found in G/VAL/1.

administration shall communicate to the importer in writing its decision and the grounds therefor.

2. It is entirely appropriate in applying the Agreement for one Member to assist another Member on mutually agreed terms.”

17. Further to this Decision, at the Doha Ministerial Conference Members decided that the Agreement on the Implementation of Article VII of GATT 1994:

“[U]nderlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud. In this regard, it is agreed that, further to the 1994 Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt the truth or accuracy of the declared value, it may seek assistance from the customs administration of an exporting Member shall offer cooperation and assistance, consistent with its domestic laws and procedures, including furnishing information on the export value of the good concerned. Any information provided in this context shall be treated in accordance with Article 10 of the Customs Valuation Agreement. Furthermore, recognizing the legitimate concerns expressed by the customs administrations of several importing Members on the accuracy of the declared value, the Committee on Customs Valuation is directed to identify and assess practical means to address such concerns, including the exchange of information on export values and to report to the General Council by the end of 2002 at the latest.”¹¹

18. At its meeting on 10–12 and 20 December 2002, the General Council took note of the report of the Customs Valuation Committee¹², and authorized the Committee to continue its work under the existing mandate¹³ and to report to the General Council when it had completed this work.

PART II ADMINISTRATION, CONSULTATIONS AND DISPUTE SETTLEMENT

XIX. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18 *Institutions*

1. There is hereby established a Committee on Customs Valuation (referred to in this Agreement as “the Committee”) composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall normally meet once a year, or as is other-

wise envisaged by the relevant provisions of this Agreement, for the purpose of affording Members the opportunity to consult on matters relating to the administration of the customs valuation system by any Member as it might affect the operation of this Agreement or the furtherance of its objectives and carrying out such other responsibilities as may be assigned to it by the Members. The WTO Secretariat shall act as the secretariat to the Committee.

2. There shall be established a Technical Committee on Customs Valuation (referred to in this Agreement as “the Technical Committee”) under the auspices of the Customs Co-operation Council (referred to in this Agreement as “the CCC”), which shall carry out the responsibilities described in Annex II to this Agreement and shall operate in accordance with the rules of procedure contained therein.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. Article 18.1

(a) Observer status

19. With respect to observer status in meetings of the Committee on Customs Valuation, see Chapter on the *WTO Agreement*, Section V.B.6.¹⁴

20. At its meeting of 12 May 1995, the Committee on Customs Valuation agreed on observership in its meetings.¹⁵

(b) Rules of procedure

21. On 1 December 1995, the Council for Trade in Goods approved the Rules of Procedure for meetings of the Committee on Customs Valuation adopted by the Committee on Customs Valuation.¹⁶

22. The Committee on Customs Valuation reports to the Council for Trade in Goods on an annual basis.¹⁷

(c) Monitoring of the Agreement on Preshipment Inspection

23. At its meeting of 15 June 1999, the General Council adopted the recommendation of the Working Party on Preshipment Inspection¹⁸ that the future monitoring

¹¹ WT/MIN(01)/17, paragraph 8.3.

¹² G/VAL/50

¹³ WT/GC/70, paragraph 1.i).

¹⁴ In April 1997, the Committee on Customs Valuation granted regular observer status to those organizations which had observer status on an ad hoc basis, see G/VAL/M/5.

¹⁵ G/VAL/M/1, Sections D and E.

¹⁶ G/C/M/7. The text of the adopted rules of procedure can be found in G/L/146.

¹⁷ The reports are contained in documents G/L/55, 121, 205, 323, 414, 488, 590, 654 and 718.

¹⁸ WT/GC/M/40/Add.3, section 5. The text of the recommendation can be found in G/L/300, para. 23.

of the *Agreement on Preshipment Inspection* should be undertaken initially by the Committee on Customs Valuation, and that Preshipment Inspection should be a standing item on its agenda.

XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19

Consultations and Dispute Settlement

1. Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.
2. If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of this Agreement is being impeded, as a result of the actions of another Member or of other Members, it may, with a view to reaching a mutually satisfactory solution of this matter, request consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultations.
3. The Technical Committee shall provide, upon request, advice and assistance to Members engaged in consultations.
4. At the request of a party to the dispute, or on its own initiative, a panel established to examine a dispute relating to the provisions of this Agreement may request the Technical Committee to carry out an examination of any questions requiring technical consideration. The panel shall determine the terms of reference of the Technical Committee for the particular dispute and set a time period for receipt of the report of the Technical Committee. The panel shall take into consideration the report of the Technical Committee. In the event that the Technical Committee is unable to reach consensus on a matter referred to it pursuant to this paragraph, the panel should afford the parties to the dispute an opportunity to present their views on the matter to the panel.
5. Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of this information, authorized by the person, body or authority providing the information, shall be provided.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

24. The following table lists the dispute in which the panel and Appellate Body reports have been adopted

where the provisions of the *Customs Valuation Agreement* were invoked:

Case Name	Case Number	Invoked Articles
1 US – <i>Certain EC Products</i>	WT/DS165	Article 13

PART III

SPECIAL AND DIFFERENTIAL TREATMENT

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20

1. Developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of the provisions of this Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members. Developing country Members who choose to delay application of this Agreement shall notify the Director-General of the WTO accordingly.
2. In addition to paragraph 1, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this Agreement. Developing country Members that choose to delay application of the provisions specified in this paragraph shall notify the Director-General of the WTO accordingly.
3. Developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, *inter alia*, training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

1. General

25. At its meeting of 31 January 1995, the General Council took a decision on the Continued Application under the WTO Customs Valuation Agreement of Invocations of Provisions for Developing Countries for Delayed Application and Reservations under the Customs Valuation Agreement 1979.¹⁹

¹⁹ WT/GC/M/1, section 11. The text of the adopted decision can be found in WT/L/38.

26. At its meeting of 12 May 1995, the Committee on Customs Valuation agreed to continue the practice established by the Tokyo Round Committee on Information on Technical Assistance, in order to ensure transparency on technical assistance activities.²⁰

2. Article 20.1

27. Pursuant to paragraph 1 of Article 20, 58 developing country Members, which were not party to the 1979 Agreement on Implementation of Article VII of the GATT, requested a five-year delay of the application of the WTO Customs Valuation Agreement. This five-year delay was computed from the date of entry into force of the *WTO Agreement* for each of the Members concerned.²¹ However, 22 Members requested a further extension of this five-year period pursuant to paragraph 1 of Annex III. The length of this additional extension varied by Member.²²

28. At its meeting of 15 December 2000, the General Council adopted a decision concerning implementation-related issues and concerns in respect of several

WTO Agreements.²³ With respect to the *Customs Valuation Agreement*, the General Council decided:

“Noting that the process of examination and approval, in the Customs Valuation Committee, of individual requests from Members for extension of the five-year delay period in Article 20.1 is proceeding well, the General Council encourages the Committee to continue this work.”²⁴

3. Article 20.2

29. Pursuant to paragraph 2 of Article 20, 51 developing country Members delayed application of paragraph 2(b)(ii) of Article 1 and of Article 6 for three years from the date of entry into force of the WTO Agreement for each of them.²⁵

4. Article 20.3

30. At its meeting on 24 July 2001 the Committee agreed on resuming its work on technical assistance in response to a proposal from the European Communities and adopted its work programme on technical assistance²⁶. On 26 February 2002, the Committee decided

²⁰ G/VAL/M/1, para. 80–81; see also G/VAL/W/1, Section B.7. The text of the agreement can be found in G/VAL/5, Section B.4. Its revisions can be found in G/VAL/8.

²¹ These 58 developing Members which requested a five-year extension were: Bahrain, Bangladesh, Benin, Bolivia, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Central Africa Republic, Chad, Chile, Colombia, Costa Rica, Côte d'Ivoire, Cuba, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Ghana, Guatemala, Guyana, Haiti, Honduras, Indonesia, Israel, Jamaica, Kenya, Kuwait, Madagascar, Malaysia, Mali, Maldives, Malta, Mauritania, Mauritius, Morocco, Myanmar, Nicaragua, Nigeria, Pakistan, Paraguay, Peru, Philippines, Senegal, Singapore, Sri Lanka, Thailand, Togo, Tunisia, Uganda, United Arab Emirates, Uruguay, Venezuela, Zambia. On 25 April 2002 none of them maintained this special and differential treatment provision, G/L/590 pf 5. See G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, 124, 136 and G/VAL/2/Rev.19.

²² The following eight Members, for which the five-year delay period expired before or on 1 January 2000, requested an additional extension pursuant to paragraph 1 of Annex III: (i) Bahrain (requested three years (consultation pending) – G/VAL/W/57 and Add.1–4); (ii) Côte d'Ivoire (requested five years, extension granted for 18 months (expired 01.07.01) – G/VAL/32); (iii) Kuwait (requested two years, extension granted for one year (expired 01.01.01) – G/VAL/18); (iv) Myanmar (requested five years, extension granted for two years (expired on 01.01.02) – G/VAL/28); (v) Paraguay (requested two years, extension granted for one year (expired 01.01.01) – G/VAL/17/Rev.1); (vi) Senegal (requested five years, extension granted for six months (expired 30.06.01) – G/VAL/39); (vii) Sri Lanka (requested one year, extension granted for one year – G/VAL/23, requested second year extension, granted for 10 months – G/VAL/41, requested third extension, granted for 6 months to 30.04.02 – G/VAL/42, requested fourth extension, granted for six months to 31.10.02 – G/L/46, requested fifth extension, four months expired 28.02.03); and (viii) Tanzania (extension granted for one year (expired 01.01.01) – G/VAL/19). Also, the following 14 Members, for which this delay period expired during 2000 and 2001, requested extension: (i) Bolivia (requested two years, extension granted for 15 months (expired 31.12.01) – G/VAL/37); (ii) Burundi (requested two years, extension granted for two years to 01.08.02 – G/VAL/38); (iii) Cameroon (requested six months – G/VAL/W/80, G/C/W/245 and Add.1 – granted for six months (expired 01.07.01) – WT/L/396); (iv) Dominican Republic (requested two years, extension granted for 16 months (expired

01.07.01) – G/VAL/22); (v) El Salvador (requested two years, extension granted for 16 months (expired 07.09.01) – G/VAL/30); (vi) Egypt (requested three years, extension granted for one year (expired 30.06.01) – G/VAL/31); (vii) Guatemala (requested two years, extension granted for 16 months (expired 21.11.01) – G/VAL/33); (viii) Haiti (requested three years, extension granted for two years to 30.01.03 – G/C/W/256 and Rev.1, was granted by the General Council as Article IX waiver – WT/L/439); (ix) Jamaica (requested one year extension, extension granted for one year (expired 09.03.01) – G/VAL/24); (x) Mauritania (requested three years, extension granted for two years to 31.05.02 – G/VAL/29); (xi) Maldives (requested two years, extension granted for two years to 31.05.02 – G/VAL/35); (xii) Rwanda (requested three years – G/VAL/W/84); (xiii) Tunisia (requested three years, extension granted for 18 months (expired 28.09.01) – G/VAL/27); and (xiv) United Arab Emirates (expired 01.01.04, G/VAL/55). On 21 October 2004, no Member had either requested an extension or maintained an extension under Annex III, paragraph 1.

²³ WT/GC/M/62, para. 17. The text of the decision can be found in WT/L/384. See also Chapter on *WTO Agreement*, refer to the text on Articles IV:1, IV:2 and IX:1 of the *WTO* on the powers of the General Council more generally.

²⁴ WT/L/384, para. 4.

²⁵ Members requesting an extension were: Bahrain, Bangladesh, Bolivia, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Egypt, Ecuador, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, Indonesia, Israel, Jamaica, Kenya, Kuwait, Madagascar, Malaysia, Mali, Malta, Mauritania, Mexico, Morocco, Myanmar, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Senegal, Singapore, Sri Lanka, Tanzania, Thailand, Togo, Tunisia, Turkey, United Arab Emirates, Uruguay, Venezuela, Zambia. See G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, 124, and 136.

²⁶ G/VAL/M/21. The technical assistance programme, which started in May 1997, was created with a view to enhancing the capacity of developing countries to implement and to administer the Agreement on Customs Valuation. It was a demand-driven programme. The activities in the early years “focused on improving awareness and understanding of the activities already carried out or being carried out by international organizations and Members either bilaterally or regionally”; G/VAL/W/70. The new phase of the programme is oriented on promoting the coordination and cooperation between providers and donors; G/VAL/W/82/Rev.1.

to start its work programme with a seminar on technical assistance²⁷.

5. Annex III

31. The special and differential treatment for developing countries in respect of the application of Customs Valuation Agreement is also developed in Annex III. See Section XXVII below.

PART IV FINAL PROVISIONS

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21 *Reservations*

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

32. At its meeting on 12 May 1995, the Committee on Customs Valuation adopted the decisions of the Tokyo Round Committee on Customs Valuation on reservations.²⁸

XXIII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22 *National Legislation*

1. Each Member shall ensure, not later than the date of application of the provisions of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

2. Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. General

(a) Notification

33. At its meeting on 12 May 1995, the Committee on Customs Valuation agreed to adopt for all WTO Members the procedures regarding notification and circulation of national legislation that had been in use by the Tokyo Round Committee on Customs Valuation.²⁹

(b) Checklist of Issues

34. As the basis of an initial examination of national legislation, the Committee on Customs Valuation agreed to adopt the checklist of issues elaborated by the Tokyo Round Committee on Customs Valuation.³⁰ It also decided that in the cases of Members who were Tokyo Round signatories and whose legislation had already been examined, a communication from those Members could be sent to the Secretariat indicating that their responses to the Checklist of Issues remained valid under the WTO Customs Valuation Agreement.³¹

XXIV. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23 *Review*

The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the Council for Trade in Goods of developments during the period covered by such reviews³².

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24 *Secretariat*

This Agreement shall be serviced by the WTO Secretariat except in regard to those responsibilities specifically assigned to the Technical Committee, which will be serviced by the CCC Secretariat.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

No jurisprudence or decision of a competent WTO body.

²⁷ The seminar was held in Geneva on 6–7 November 2002; G/VAL/47/Rev.2.

²⁸ G/VAL/M/1, paras. 75–76; see also G/VAL/W/1, Section B.4. The text of the decisions can be found in G/VAL/5, Section B.1.

²⁹ G/VAL/M/1, Section I; see also G/VAL/W/1, Section B.5. The text of the decisions can be found in G/VAL/5, Section B.2.

³⁰ G/VAL/M/1, Section I; see also G/VAL/W/1, Section B.6. The text of the decisions can be found in G/VAL/5, Section B.3.

³¹ G/VAL/M/1, paras. 36–38.

³² See above footnote 17.

XXVI. ANNEX I**A. TEXT OF ANNEX I****ANNEX I**
INTERPRETATIVE NOTES*General Note**Sequential Application of Valuation Methods*

1. Articles 1 through 7 define how the customs value of imported goods is to be determined under the provisions of this Agreement. The methods of valuation are set out in a sequential order of application. The primary method for customs valuation is defined in Article 1 and imported goods are to be valued in accordance with the provisions of this Article whenever the conditions prescribed therein are fulfilled.

2. Where the customs value cannot be determined under the provisions of Article 1, it is to be determined by proceeding sequentially through the succeeding Articles to the first such Article under which the customs value can be determined. Except as provided in Article 4, it is only when the customs value cannot be determined under the provisions of a particular Article that the provisions of the next Article in the sequence can be used.

3. If the importer does not request that the order of Articles 5 and 6 be reversed, the normal order of the sequence is to be followed. If the importer does so request but it then proves impossible to determine the customs value under the provisions of Article 6, the customs value is to be determined under the provisions of Article 5, if it can be so determined.

4. Where the customs value cannot be determined under the provisions of Articles 1 through 6 it is to be determined under the provisions of Article 7.

*Use of Generally Accepted
Accounting Principles*

1. "Generally accepted accounting principles" refers to the recognized consensus or substantial authoritative support within a country at a particular time as to which economic resources and obligations should be recorded as assets and liabilities, which changes in assets and liabilities should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed and how it should be disclosed, and which financial statements should be prepared. These standards may be broad guidelines of general application as well as detailed practices and procedures.

2. For the purposes of this Agreement, the customs administration of each Member shall utilize information prepared in a manner consistent with generally accepted accounting principles in the country which is appropriate for the Article in question. For example, the determination of usual profit and general expenses under the pro-

visions of Article 5 would be carried out utilizing information prepared in a manner consistent with generally accepted accounting principles of the country of importation. On the other hand, the determination of usual profit and general expenses under the provisions of Article 6 would be carried out utilizing information prepared in a manner consistent with generally accepted accounting principles of the country of production. As a further example, the determination of an element provided for in paragraph 1(b)(ii) of Article 8 undertaken in the country of importation would be carried out utilizing information in a manner consistent with the generally accepted accounting principles of that country.

**B. INTERPRETATION AND APPLICATION OF
ANNEX I**

35. See Sections II.B, III.B, IV.B, VI.B, VII.B, VIII.B, IX.B, X.B, XII.B, and XVI.B which contain the respective parts of Annex I.

XXVII. ANNEX II**A. TEXT OF ANNEX II****ANNEX II**
**TECHNICAL COMMITTEE ON CUSTOMS
VALUATION**

1. In accordance with Article 18 of this Agreement, the Technical Committee shall be established under the auspices of the CCC with a view to ensuring, at the technical level, uniformity in interpretation and application of this Agreement.

2. The responsibilities of the Technical Committee shall include the following:

(a) to examine specific technical problems arising in the day-to-day administration of the customs valuation system of Members and to give advisory opinions on appropriate solutions based upon the facts presented;

(b) to study, as requested, valuation laws, procedures and practices as they relate to this Agreement and to prepare reports on the results of such studies;

(c) to prepare and circulate annual reports on the technical aspects of the operation and status of this Agreement;

(d) to furnish such information and advice on any matters concerning the valuation of imported goods for customs purposes as may be requested by any Member or the Committee. Such information and advice may take the form of advisory opinions, commentaries or explanatory notes;

(e) to facilitate, as requested, technical assistance to Members with a view to furthering the international acceptance of this Agreement;

(f) to carry out an examination of a matter referred to it by a panel under Article 19 of this Agreement; and

(g) to exercise such other responsibilities as the Committee may assign to it.

General

3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by Members, the Committee or a panel, in a reasonably short period of time. As provided in paragraph 4 of Article 19, a panel shall set a specific time period for receipt of a report of the Technical Committee and the Technical Committee shall provide its report within that period.

4. The Technical Committee shall be assisted as appropriate in its activities by the CCC Secretariat.

Representation

5. Each Member shall have the right to be represented on the Technical Committee. Each Member may nominate one delegate and one or more alternates to be its representatives on the Technical Committee. Such a Member so represented on the Technical Committee is referred to in this Annex as a "member of the Technical Committee". Representatives of members of the Technical Committee may be assisted by advisers. The WTO Secretariat may also attend such meetings with observer status.

6. Members of the CCC which are not Members of the WTO may be represented at meetings of the Technical Committee by one delegate and one or more alternates. Such representatives shall attend meetings of the Technical Committee as observers.

7. Subject to the approval of the Chairman of the Technical Committee, the Secretary-General of the CCC (referred to in this Annex as "the Secretary-General") may invite representatives of governments which are neither Members of the WTO nor members of the CCC and representatives of international governmental and trade organizations to attend meetings of the Technical Committee as observers.

8. Nominations of delegates, alternates and advisers to meetings of the Technical Committee shall be made to the Secretary-General.

Technical Committee Meetings

9. The Technical Committee shall meet as necessary but at least two times a year. The date of each meeting shall be fixed by the Technical Committee at its preceding session. The date of the meeting may be varied either at the request of any member of the Technical Committee concurred in by a simple majority of the members of the Technical Committee or, in cases requiring urgent attention, at the request of the Chairman. Notwith-

standing the provisions in sentence 1 of this paragraph, the Technical Committee shall meet as necessary to consider matters referred to it by a panel under the provisions of Article 19 of this Agreement.

10. The meetings of the Technical Committee shall be held at the headquarters of the CCC unless otherwise decided.

11. The Secretary-General shall inform all members of the Technical Committee and those included under paragraphs 6 and 7 at least 30 days in advance, except in urgent cases, of the opening date of each session of the Technical Committee.

Agenda

12. A provisional agenda for each session shall be drawn up by the Secretary-General and circulated to the members of the Technical Committee and to those included under paragraphs 6 and 7 at least 30 days in advance of the session, except in urgent cases. This agenda shall comprise all items whose inclusion has been approved by the Technical Committee during its preceding session, all items included by the Chairman on the Chairman's own initiative, and all items whose inclusion has been requested by the Secretary-General, by the Committee or by any member of the Technical Committee.

13. The Technical Committee shall determine its agenda at the opening of each session. During the session the agenda may be altered at any time by the Technical Committee.

Officers and Conduct of Business

14. The Technical Committee shall elect from among the delegates of its members a Chairman and one or more Vice-Chairmen. The Chairman and Vice-Chairmen shall each hold office for a period of one year. The retiring Chairman and Vice-Chairmen are eligible for re-election. The mandate of a Chairman or Vice-Chairman who no longer represents a member of the Technical Committee shall terminate automatically.

15. If the Chairman is absent from any meeting or part thereof, a Vice-Chairman shall preside. In that event, the latter shall have the same powers and duties as the Chairman.

16. The Chairman of the meeting shall participate in the proceedings of the Technical Committee as such and not as the representative of a member of the Technical Committee.

17. In addition to exercising the other powers conferred upon the Chairman by these rules, the Chairman shall declare the opening and closing of each meeting, direct the discussion, accord the right to speak, and, pursuant to these rules, have control of the proceedings. The Chairman may also call a speaker to order if the speaker's remarks are not relevant.

18. During discussion of any matter a delegation may raise a point of order. In this event, the Chairman shall immediately state a ruling. If this ruling is challenged, the Chairman shall submit it to the meeting for decision and it shall stand unless overruled.

19. The Secretary-General, or officers of the CCC Secretariat designated by the Secretary-General, shall perform the secretarial work of meetings of the Technical Committee.

Quorum and Voting

20. Representatives of a simple majority of the members of the Technical Committee shall constitute a quorum.

21. Each member of the Technical Committee shall have one vote. A decision of the Technical Committee shall be taken by a majority comprising at least two thirds of the members present. Regardless of the outcome of the vote on a particular matter, the Technical Committee shall be free to make a full report to the Committee and to the CCC on that matter indicating the different views expressed in the relevant discussions. Notwithstanding the above provisions of this paragraph, on matters referred to it by a panel, the Technical Committee shall take decisions by consensus. Where no agreement is reached in the Technical Committee on the question referred to it by a panel, the Technical Committee shall provide a report detailing the facts of the matter and indicating the views of the members.

Languages and Records

22. The official languages of the Technical Committee shall be English, French and Spanish. Speeches or statements made in any of these three languages shall be immediately translated into the other official languages unless all delegations agree to dispense with translation. Speeches or statements made in any other language shall be translated into English, French and Spanish, subject to the same conditions, but in that event the delegation concerned shall provide the translation into English, French or Spanish. Only English, French and Spanish shall be used for the official documents of the Technical Committee. Memoranda and correspondence for the consideration of the Technical Committee must be presented in one of the official languages.

23. The Technical Committee shall draw up a report of all its sessions and, if the Chairman considers it necessary, minutes or summary records of its meetings. The Chairman or a designee of the Chairman shall report on the work of the Technical Committee at each meeting of the Committee and at each meeting of the CCC.

B. INTERPRETATION AND APPLICATION OF ANNEX II

No jurisprudence or decision of a competent WTO body.

1. Reference to GATT practice

36. With respect to the practice developed under the *GATT 1947*, see GATT Analytical Index, page 265.

XXVIII. ANNEX III

A. TEXT OF ANNEX III

ANNEX III

1. The five-year delay in the application of the provisions of the Agreement by developing country Members provided for in paragraph 1 of Article 20 may, in practice, be insufficient for certain developing country Members. In such cases a developing country Member may request before the end of the period referred to in paragraph 1 of Article 20 an extension of such period, it being understood that the Members will give sympathetic consideration to such a request in cases where the developing country Member in question can show good cause.

2. Developing countries which currently value goods on the basis of officially established minimum values may wish to make a reservation to enable them to retain such values on a limited and transitional basis under such terms and conditions as may be agreed to by the Members.

3. Developing countries which consider that the reversal of the sequential order at the request of the importer provided for in Article 4 of the Agreement may give rise to real difficulties for them may wish to make a reservation to Article 4 in the following terms:

"The Government of reserves the right to provide that the relevant provision of Article 4 of the Agreement shall apply only when the customs authorities agree to the request to reverse the order of Articles 5 and 6."

If developing countries make such a reservation, the Members shall consent to it under Article 21 of the Agreement.

4. Developing countries may wish to make a reservation with respect to paragraph 2 of Article 5 of the Agreement in the following terms:

"The Government of reserves the right to provide that paragraph 2 of Article 5 of the Agreement shall be applied in accordance with the provisions of the relevant note thereto whether or not the importer so requests."

If developing countries make such a reservation, the Members shall consent to it under Article 21 of the Agreement.

5. Certain developing countries may have problems in the implementation of Article 1 of the Agreement insofar as it relates to importations into their countries by

sole agents, sole distributors and sole concessionaires. If such problems arise in practice in developing country Members applying the Agreement, a study of this question shall be made, at the request of such Members, with a view to finding appropriate solutions.

6. Article 17 recognizes that in applying the Agreement, customs administrations may need to make enquiries concerning the truth or accuracy of any statement, document or declaration presented to them for customs valuation purposes. The Article thus acknowledges that enquiries may be made which are, for example, aimed at verifying that the elements of value declared or presented to customs in connection with a determination of customs value are complete and correct. Members, subject to their national laws and procedures, have the right to expect the full cooperation of importers in these enquiries.

7. The price actually paid or payable includes all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.

B. INTERPRETATION AND APPLICATION OF ANNEX III

1. Paragraph 1

37. With respect to the extension of the five-year delay in the application of the Customs Valuation Agreement under paragraph 1 of Annex III, see paragraph 27 above.

2. Paragraph 2

38. Pursuant to the Ministerial Decision at Marrakesh, at its meeting of 12 May 1995, the Committee on Customs Valuation adopted the following decision:³³

“Decision on Texts relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires

Ministers decide to refer the following texts to the Committee on Customs Valuation established under the Agreement on Implementation of Article VII of GATT 1994, for adoption.

I

Where a developing country makes a reservation to retain officially established minimum values within the terms of paragraph 2 of Annex III and shows good cause, the Committee shall give the request for the reservation sympathetic consideration.

Where a reservation is consented to, the terms and conditions referred to in paragraph 2 of Annex III shall take full account of the development, financial and trade needs of the developing country concerned.

II

1. A number of developing countries have a concern that problems may exist in the valuation of imports by sole agents, sole distributors and sole concessionaires. Under paragraph 1 of Article 20, developing country Members have a period of delay of up to five years prior to the application of the Agreement. In this context, developing country Members availing themselves of this provision could use the period to conduct appropriate studies and to take such other actions as are necessary to facilitate application.

2. In consideration of this, the Committee recommends that the Customs Co-operation Council assist developing country Members, in accordance with the provisions of Annex II, to formulate and conduct studies in areas identified as being of potential concern, including those relating to importations by sole agents, sole distributors and sole concessionaires.”

39. Pursuant to paragraph 2 of Annex III, 38 Members made reservations regarding officially established minimum values³⁴. The establishment of minimum values allows developing countries to apply the same minimum values to all identical products, without the need to look for the value that the products would have in the event of the application of the mandates contained in the present Agreement. On 21 October 2004, only five Members maintained exceptions in accordance with the terms of this paragraph³⁵.

3. Paragraph 3

40. Pursuant to paragraph 3 of Annex III, at the time of the 2004 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 53 Members maintained reservations concerning reversal of sequential order of Articles 5 and 6.³⁶

³³ G/VAL/M/1, Section F. The text of the decision can be found also in G/VAL/1.

³⁴ Members requesting a reservation were: Bahrain, Bangladesh, Burkina Faso, Chile, Colombia, Côte d'Ivoire, Djibouti, Dominican Republic, Gabon, Guatemala, Guyana, Haiti, Indonesia, Jamaica, Kenya, Madagascar, Maldives, Mali, Malaysia, Malta, Mauritania, Morocco, Myanmar, Niger, Pakistan, Paraguay, Peru, Philippines, Senegal, Singapore, Sri Lanka, Thailand, Togo, Tunisia, Uganda, Uruguay, Venezuela, Zambia. See G/VAL/W/3, 13, 22, 29, 43, 77, 89 and 108.

³⁵ The five Members at issue were: El Salvador (reservation granted as Article IX waiver in WT/L/476), Guatemala (reservation granted in G/VAL/43), Pakistan (reservation requested under Article IX waiver in G/C/W/246), Senegal (reservation granted under Article IX waiver in WT/L/571), and Sri Lanka (reservation granted in G/VAL/53). See also G/VAL/2/Rev.19.

³⁶ These Members were: Argentina, Bahrain, Bangladesh, Benin, Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Israel, Jamaica, Kenya, Madagascar, Maldives, Malawi, Malaysia, Mali, Mexico, Morocco, Myanmar, Nicaragua, Niger, Pakistan, Panama, Peru, Philippines, Senegal, Sri Lanka, Thailand, Togo, Tunisia, Turkey, Uganda, United Arab Emirates, Uruguay, Venezuela, Zambia, Zimbabwe. See G/VAL/W/136; and for previous years see G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, and 124.

4. Paragraph 4

41. Pursuant to paragraph 4 of Annex III, at the time of the 2004 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 50 Members maintained reservations concerning application of Article 5.2 whether or not the importer so requests.³⁷

5. Paragraph 6

42. See Interpretation and Application of Article 17, paragraphs 16–17 above.

³⁷ These Members were: Argentina, Bahrain, Bangladesh, Benin, Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Gabon, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Israel, Jamaica, Kenya, Madagascar, Maldives, Malaysia, Mali, Mexico, Morocco, Myanmar, Nicaragua, Niger, Nigeria, Pakistan, Peru, Philippines, Senegal, Sri Lanka, Thailand, Togo, Tunisia, Turkey, Uruguay, Venezuela, Zambia, Zimbabwe. See G/VAL/W/136; and for previous years see G/VAL/W/3, 13, 22, 29, 43, 77, 89, 108, and 124.

Agreement on Preshipment Inspection

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Noting that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade

Negotiations shall aim to “bring about further liberalization and expansion of world trade”, “strengthen the role of GATT” and “increase the responsiveness of the GATT system to the evolving international economic environment”;

Noting that a number of developing country Members have recourse to preshipment inspection;

Recognizing the need of developing countries to do so for as long and in so far as it is necessary to verify the quality, quantity or price of imported goods;

Mindful that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment;

Noting that this inspection is by definition carried out on the territory of exporter Members;

Recognizing the need to establish an agreed international framework of rights and obligations of both user Members and exporter Members;

Recognizing that the principles and obligations of GATT 1994 apply to those activities of preshipment inspection entities that are mandated by governments that are Members of the WTO;

Recognizing that it is desirable to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection;

Desiring to provide for the speedy, effective and equitable resolution of disputes between exporters and preshipment inspection entities arising under this Agreement;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

Coverage – Definitions

1. This Agreement shall apply to all preshipment inspection activities carried out on the territory of Mem-

bers, whether such activities are contracted or mandated by the government, or any government body, of a Member.

2. The term “user Member” means a Member of which the government or any government body contracts for or mandates the use of preshipment inspection activities.

3. Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member.

4. The term “preshipment inspection entity” is any entity contracted or mandated by a Member to carry out preshipment inspection activities.¹

*(footnote original)*¹ It is understood that this provision does not obligate Members to allow government entities of other Members to conduct preshipment inspection activities on their territory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

No jurisprudence or decision of a competent WTO body.

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Obligations of User Members

Non-discrimination

1. User Members shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities. They shall ensure uniform performance of inspection by all the inspectors of the preshipment inspection entities contracted or mandated by them.

Governmental Requirements

2. User Members shall ensure that in the course of preshipment inspection activities relating to their laws, regulations and requirements, the provisions of paragraph 4 of Article III of GATT 1994 are respected to the extent that these are relevant.

Site of Inspection

3. User Members shall ensure that all preshipment inspection activities, including the issuance of a Clean Report of Findings or a note of non-issuance, are performed in the customs territory from which the goods are exported or, if the inspection cannot be carried out in that customs territory given the complex nature of the

products involved, or if both parties agree, in the customs territory in which the goods are manufactured.

Standards

4. User Members shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards, relevant international standards² apply.

*(footnote original)*² An international standard is a standard adopted by a governmental or non-governmental body whose membership is open to all Members, one of whose recognized activities is in the field of standardization.

Transparency

5. User Members shall ensure that preshipment inspection activities are conducted in a transparent manner.

6. User Members shall ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The preshipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of user Members relating to preshipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under paragraph 21. Additional procedural requirements or changes in existing procedures shall not be applied to a shipment unless the exporter concerned is informed of these changes at the time the inspection date is arranged. However, in emergency situations of the types addressed by Articles XX and XXI of GATT 1994, such additional requirements or changes may be applied to a shipment before the exporter has been informed. This assistance shall not, however, relieve exporters from their obligations in respect of compliance with the import regulations of the user Members.

7. User Members shall ensure that the information referred to in paragraph 6 is made available to exporters in a convenient manner, and that the preshipment inspection offices maintained by preshipment inspection entities serve as information points where this information is available.

8. User Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Protection of Confidential Business Information

9. User Members shall ensure that preshipment inspection entities treat all information received in the

course of the preshipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User Members shall ensure that preshipment inspection entities maintain procedures to this end.

10. User Members shall provide information to Members on request on the measures they are taking to give effect to paragraph 9. The provisions of this paragraph shall not require any Member to disclose confidential information the disclosure of which would jeopardize the effectiveness of the preshipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.

11. User Members shall ensure that preshipment inspection entities do not divulge confidential business information to any third party, except that preshipment inspection entities may share this information with the government entities that have contracted or mandated them. User Members shall ensure that confidential business information which they receive from preshipment inspection entities contracted or mandated by them is adequately safeguarded. Preshipment inspection entities shall share confidential business information with the governments contracting or mandating them only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

12. User Members shall ensure that preshipment inspection entities do not request exporters to provide information regarding:

- (a) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;
- (b) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
- (c) internal pricing, including manufacturing costs;
- (d) profit levels;
- (e) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. In such cases, the entity shall only request the information necessary for this purpose.

13. The information referred to in paragraph 12, which preshipment inspection entities shall not otherwise request, may be released voluntarily by the exporter to illustrate a specific case.

Conflicts of Interest

14. User Members shall ensure that preshipment inspection entities, bearing in mind also the provisions

on protection of confidential business information in paragraphs 9 through 13, maintain procedures to avoid conflicts of interest:

- (a) between preshipment inspection entities and any related entities of the preshipment inspection entities in question, including any entities in which the latter have a financial or commercial interest or any entities which have a financial interest in the preshipment inspection entities in question, and whose shipments the preshipment inspection entities are to inspect;
- (b) between preshipment inspection entities and any other entities, including other entities subject to preshipment inspection, with the exception of the government entities contracting or mandating the inspections;
- (c) with divisions of preshipment inspection entities engaged in activities other than those required to carry out the inspection process.

Delays

15. User Members shall ensure that preshipment inspection entities avoid unreasonable delays in inspection of shipments. User Members shall ensure that, once a preshipment inspection entity and an exporter agree on an inspection date, the preshipment inspection entity conducts the inspection on that date unless it is rescheduled on a mutually agreed basis between the exporter and the preshipment inspection entity, or the preshipment inspection entity is prevented from doing so by the exporter or by *force majeure*.³

(footnote original) ³ It is understood that, for the purposes of this Agreement, "*force majeure*" shall mean "irresistible compulsion or coercion, unforeseeable course of events excusing from fulfilment of contract".

16. User Members shall ensure that, following receipt of the final documents and completion of the inspection, preshipment inspection entities, within five working days, either issue a Clean Report of Findings or provide a detailed written explanation specifying the reasons for non-issuance. User Members shall ensure that, in the latter case, preshipment inspection entities give exporters the opportunity to present their views in writing and, if exporters so request, arrange for re-inspection at the earliest mutually convenient date.

17. User Members shall ensure that, whenever so requested by the exporters, preshipment inspection entities undertake, prior to the date of physical inspection, a preliminary verification of price and, where applicable, of currency exchange rate, on the basis of the contract between exporter and importer, the *pro forma* invoice and, where applicable, the application for import authorization. User Members shall ensure that a price or currency exchange rate that has been accepted by a preshipment inspection entity on the basis of such preliminary verification is not withdrawn, providing the

goods conform to the import documentation and/or import licence. They shall ensure that, after a preliminary verification has taken place, preshipment inspection entities immediately inform exporters in writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate.

18. User Members shall ensure that, in order to avoid delays in payment, preshipment inspection entities send to exporters or to designated representatives of the exporters a Clean Report of Findings as expeditiously as possible.

19. User Members shall ensure that, in the event of a clerical error in the Clean Report of Findings, preshipment inspection entities correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

Price Verification

20. User Members shall ensure that, in order to prevent over- and under-invoicing and fraud, preshipment inspection entities conduct price verification⁴ according to the following guidelines:

(footnote original) ⁴ The obligations of user Members with respect to the services of preshipment inspection entities in connection with customs valuation shall be the obligations which they have accepted in GATT 1994 and the other Multilateral Trade Agreements included in Annex 1A of the WTO Agreement.

- (a) preshipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in subparagraphs (b) through (e);
- (b) the preshipment inspection entity shall base its price comparison for the verification of the export price on the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts. Such comparison shall be based on the following:
 - (i) only prices providing a valid basis of comparison shall be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison;
 - (ii) the preshipment inspection entity shall not rely upon the price of goods offered for export to different countries of importation to arbitrarily impose the lowest price upon the shipment;

(iii) the preshipment inspection entity shall take into account the specific elements listed in subparagraph (c);

(iv) at any stage in the process described above, the preshipment inspection entity shall provide the exporter with an opportunity to explain the price;

- (c) when conducting price verification, preshipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price, such as the contractual relationship between the exporter and importer;
- (d) the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;
- (e) the following shall not be used for price verification purposes:
 - (i) the selling price in the country of importation of goods produced in such country;
 - (ii) the price of goods for export from a country other than the country of exportation;
 - (iii) the cost of production;
 - (iv) arbitrary or fictitious prices or values.

Appeals Procedures

21. User Members shall ensure that preshipment inspection entities establish procedures to receive, consider and render decisions concerning grievances raised by exporters, and that information concerning such procedures is made available to exporters in accordance with the provisions of paragraphs 6 and 7. User Members shall ensure that the procedures are developed and maintained in accordance with the following guidelines:

- (a) preshipment inspection entities shall designate one or more officials who shall be available during normal business hours in each city or port in which they maintain a preshipment inspection administrative office to receive, consider and render decisions on exporters' appeals or grievances;

- (b) exporters shall provide in writing to the designated official(s) the facts concerning the specific transaction in question, the nature of the grievance and a suggested solution;
- (c) the designated official(s) shall afford sympathetic consideration to exporters' grievances and shall render a decision as soon as possible after receipt of the documentation referred to in subparagraph (b).

Derogation

22. By derogation to the provisions of Article 2, user Members shall provide that, with the exception of part shipments, shipments whose value is less than a minimum value applicable to such shipments as defined by the user Member shall not be inspected, except in exceptional circumstances. This minimum value shall form part of the information furnished to exporters under the provisions of paragraph 6.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. In its first report (2 December 1997), the PSI Working Party¹ made a set of recommendations to user Members to ensure that they comply with their obligations under Article 2 of the *PSI Agreement*.²

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

Obligations of Exporter Members

Non-discrimination

1. Exporter Members shall ensure that their laws and regulations relating to preshipment inspection activities are applied in a non-discriminatory manner.

Transparency

2. Exporter Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Technical Assistance

3. Exporter Members shall offer to provide to user Members, if requested, technical assistance directed towards the achievement of the objectives of this Agreement on mutually agreed terms.⁵

(*footnote original*)⁵ It is understood that such technical assistance may be given on a bilateral, plurilateral or multilateral basis.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.3

2. In its first report (2 December 1997), the PSI Working Party considered that “[t]echnical assistance activities, which should be administered on a request basis, could include areas such as tariff and customs administration reforms; simplification and modernization of systems and procedures; and the development of an adequate legal, administrative, and physical infrastructure.”³

V. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

Independent Review Procedures

Members shall encourage preshipment inspection entities and exporters mutually to resolve their disputes. However, two working days after submission of the grievance in accordance with the provisions of paragraph 21 of Article 2, either party may refer the dispute to independent review. Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

- (a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;
- (b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:
 - (i) a section of members nominated by an organization representing preshipment inspection entities;
 - (ii) a section of members nominated by an organization representing exporters;
 - (iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on this list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The

¹ With respect to the PSI Working Party more generally, see paragraph 8 below.

² G/L/214, section B.

³ G/L/214, page 4.

list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

- (c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the above list by the preshipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No objections shall be made to any independent trade expert drawn from section (iii) of the above list;
- (d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;
- (e) if the parties to the dispute so agree, one independent trade expert could be selected from section (iii) of the above list by the independent entity referred to in subparagraph (a) to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;
- (f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;
- (g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agree-

ment by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;

- (h) the decision of the panel shall be binding upon the preshipment inspection entity and the exporter which are parties to the dispute.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

3. At its meeting of 13 and 15 December 1995, the General Council established an "Independent Entity" as a subsidiary body of the Council for Trade in Goods.⁴ The International Chamber of Commerce (representing exporters) and the International Federation of Inspections Agencies (representing PSI entities) accepted, in an Agreement concluded with the WTO⁵, to constitute jointly the Independent Entity. In consultations with those organizations, the WTO defined the structure and functioning of the Independent Entity⁶ and determined the rules of procedure applicable to the conduct of independent reviews by the Independent Entity.⁷
4. The Rules of Procedure for the Independent Entity are included in Annex III to the decision by the General Council establishing the Independent Entity.⁸
5. The Independent Entity reports to the Council for Trade in Goods on an annual basis.⁹
6. As envisaged in Article 4(b), the Independent Entity drew up its list in March 1996¹⁰ and updated it in April 1997.¹¹

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5
Notification

Members shall submit to the Secretariat copies of the laws and regulations by which they put this Agreement into force, as well as copies of any other laws and regulations relating to preshipment inspection, when the WTO Agreement enters into force with respect to the Member concerned. No changes in the laws and regulations relating to preshipment inspection shall be enforced before such changes have been officially published. They shall be notified to the Secretariat immediately after their

⁴ WT/GC/M/9, section 1.(f).

⁵ WT/L/125/Rev.1, Annex I.

⁶ WT/L/125/Rev.1, Annex II.

⁷ WT/L/125/Rev.1, Annex III.

⁸ WT/L/125/Rev.1, Annex III.

⁹ The reports of the Independent Entity are numbered G/L/120, 208, 269, 330 and 410.

¹⁰ G/PSI/IE/1.

¹¹ G/PSI/IE/1/Rev.1.

publication. The Secretariat shall inform the Members of the availability of this information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

7. In its first report (2 December 1997), the PSI Working Party stated that when Members notify their laws and regulations, they “should endeavour to provide additional descriptive information on how they are implementing the Agreement”.^{12 13}

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

*Article 6
Review*

At the end of the second year from the date of entry into force of the WTO Agreement and every three years thereafter, the Ministerial Conference shall review the provisions, implementation and operation of this Agreement, taking into account the objectives thereof and experience gained in its operation. As a result of such review, the Ministerial Conference may amend the provisions of the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

8. At its meeting of 7, 8 and 13 November 1996, the General Council established a working party under the Council for Trade in Goods to conduct the review provided for under Article 6 of the *PSI Agreement*.¹⁴ The terms of reference of the PSI Working Party were as follows:

“[T]o conduct the review provided for under Article 6 of the Agreement on Preshipment Inspection and to report to the General Council through the Council for Trade in Goods in December 1997”.¹⁵

9. The PSI Working Party issued three reports¹⁶, all of which were approved by the General Council.¹⁷

10. At its December 1997 meeting the General Council agreed that the life of the Working Party on Preshipment Inspection be extended for one year for the purposes described in paragraph 8 of Section B of the report in G/L/214.¹⁸

11. In December 1998, the General Council agreed to a further extension of the life of the Working Party until 31 March 1999.¹⁹

12. The Working Party concluded its final Article 6 review of the Agreement on Preshipment Inspection at its meeting held on 12 March 1999.²⁰

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

*Article 7
Consultation*

Members shall consult with other Members upon request with respect to any matter affecting the operation of this Agreement. In such cases, the provisions of Article XXII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

*Article 8
Dispute Settlement*

Any disputes among Members regarding the operation of this Agreement shall be subject to the provisions of Article XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

No jurisprudence or decision of a competent WTO body.

X. ARTICLE 9

A. TEXT OF ARTICLE 9

*Article 9
Final Provisions*

1. Members shall take the necessary measures for the implementation of the present Agreement.

2. Members shall ensure that their laws and regulations shall not be contrary to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

¹² G/L/214, page 3.

¹³ Notice of changes in laws and regulations received are listed in documents G/PSI/N/1, G/PSI/N/1/Add.1–Add.10.

¹⁴ WT/GC/M/16, section 3.

¹⁵ WT/GC/M/16, section 3. The terms of reference can be also found in WT/L/196.

¹⁶ The reports can be found in G/L/214, G/L/273 and G/L/300.

¹⁷ See WT/GC/M/25, item 8; WT/GC/M/32, item 13; WT/GC/M/40/Add.3, item 5.

¹⁸ WT/GC/M/25.

¹⁹ WT/GC/M/32.

²⁰ The final report was circulated in document G/L/300.

Agreement on Rules of Origin

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A. TEXT OF THE PREAMBLE	
<i>Members,</i>	
<i>Noting</i> that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to "bring about further liberalization and expansion of world trade", "strengthen the role of GATT" and "increase the responsiveness of the GATT system to the evolving international economic environment";	
<i>Desiring</i> to further the objectives of GATT 1994;	
<i>Recognizing</i> that clear and predictable rules of origin and their application facilitate the flow of international trade;	
<i>Desiring</i> to ensure that rules of origin themselves do not create unnecessary obstacles to trade;	
<i>Desiring</i> to ensure that rules of origin do not nullify or impair the rights of Members under GATT 1994;	

Recognizing that it is desirable to provide transparency of laws, regulations, and practices regarding rules of origin;

Desiring to ensure that rules of origin are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner;

Recognizing the availability of a consultation mechanism and procedures for the speedy, effective and equitable resolution of disputes arising under this Agreement;

Desiring to harmonize and clarify rules of origin;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

PART I DEFINITIONS AND COVERAGE

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1 *Rules of Origin*

1. For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences¹ going beyond the application of paragraph 1 of Article I of GATT 1994.

2. Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.¹

(footnote original) ¹ It is understood that this provision is without prejudice to those determinations made for purposes of defining "domestic industry" or "like products of domestic industry" or similar terms wherever they apply.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

No jurisprudence or decision of a competent WTO body.

PART II DISCIPLINES TO GOVERN THE APPLICATION OF RULES OF ORIGIN

III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2 *Disciplines During the Transition Period*

Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that:

- (a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:
 - (i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;
 - (ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin;
 - (iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the good concerned shall be precisely specified;
- (b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;
- (c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a);
- (d) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not dis-

¹ With respect to preferential rules of origin, see Annex II (Section XII).

criminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned²;

(*footnote original*)² It is understood that this provision is without prejudice to those determinations made for purposes of defining “domestic industry” or “like products of domestic industry” or similar terms wherever they apply.

- (e) their rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
- (f) their rules of origin are based on a positive standard. Rules of origin that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of origin is not necessary;
- (g) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
- (h) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days³ after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (j). Such assessments shall be made publicly available subject to the provisions of subparagraph (k);

(*footnote original*)³ In respect of requests made during the first year from the date of entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.

- (i) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (j) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or

administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;

- (k) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Article 2

- (a) Negative list of disciplines prescribed by Article 2(b) through (d) of the Agreement on Rules of Origin

1. With respect to the provisions prescribed by Article 2 of the *Agreement on Rules of Origin*, the Panel on *US – Textiles Rules of Origin* explained that subparagraphs (b) through (d) lay down a negative set of disciplines that apply during the transition period. According to the Panel, during the transition period members enjoy “considerable discretion in designing and applying their rules of origin”:

“With regard to the provisions of Article 2 at issue in this case – subparagraphs (b) through (d) – we note that they set out what rules of origin should not do: rules of origin should not pursue trade objectives directly or indirectly; they should not themselves create restrictive, distorting or disruptive effects on international trade; they should not pose unduly strict requirements or require the fulfilment of a condition unrelated to manufacturing or processing; and they should not discriminate between other Members. These provisions do not prescribe what a Member must do.

By setting out what Members cannot do, these provisions leave for Members themselves discretion to decide what, within those bounds, they can do. In this regard, it is common ground between the parties that Article 2 does not prevent Members from determining the criteria which confer origin, changing those criteria over time, or applying different criteria to different goods.

Accordingly, in assessing whether the relevant United States rules of origin are inconsistent with the provisions of Article 2, we will bear in mind that, while during the post-harmonization period Members will be constrained by the result of the harmonization work programme, during the transition period, Members retain consider-

able discretion in designing and applying their rules of origin.”²

2. Article 2(b)

(a) Purpose of Article 2(b)

2. The Panel on *US – Textiles Rules of Origin* explained that Article 2(b) is intended to preclude Members from using rules of origin “to substitute for, or to supplement, the intended effect of trade policy instruments”:

“In our view, Article 2(b) is intended to ensure that rules of origin are used to implement and support trade policy instruments, rather than to substitute for, or to supplement, the intended effect of trade policy instruments. Allowing Members to use rules of origin to pursue the objectives of ‘protecting the domestic industry against import competition’ or ‘favouring imports from one Member over imports from another’ would be to substitute for, or supplement, the intended effect of a trade policy instrument and, hence, be contrary to the objective of Article 2(b).”³

(b) Pursuit of trade objectives

(i) General

3. In *US – Textiles Rules of Origin* India claimed that both Section 334 of the United States Uruguay Agreement Act and Section 405 of the United States Trade and Development Act of 2000 are inconsistent with Article 2(b) of the *Agreement on Rules of Origin*. The Panel agreed with both India and the United States that the operative clause of Article 2(b) is the obligation that rules of origin must not be used as instruments to pursue trade objectives:

“The Panel agrees with the parties that the operative part of Article 2(b) is the phrase ‘rules of origin are not [to be] used as instruments to pursue trade objectives directly or indirectly’. It is clear from this phrase that in order to establish a violation of Article 2(b), a Member needs to demonstrate that another Member is using rules of origin for a specified purpose, viz., to pursue trade objectives.”⁴

(ii) Panel’s duty to conduct an inquiry into the objectives of the measure

4. The Panel on *US – Textiles Rules of Origin* noted the statements of the Appellate Body on *Chile – Alcoholic Beverages* on how Panels should carry on an inquiry into the objectives of a measure. While the *Chile – Alcoholic Beverages* interpretation was related to the second sentence of Article III:2 of the *GATT 1994*, the Panel said that this reasoning also applies in the context of Article 2(b) of the *Agreement on Rules of Origin*:

“[W]e agree with India that the Appellate Body has already taken a position on how panels should conduct

an inquiry into the objectives of a measure. The Appellate Body did so in the context of an analysis under Article III:2, second sentence, of the *GATT 1994*. In examining whether a tax measure was applied ‘so as to afford protection to domestic production’, the Appellate Body stated that:

‘[. . .] it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.’ The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member’s legislature and government as a whole – to the extent that they are given *objective* expression in the statute itself, are not pertinent. To the contrary, as we also stated in *Japan – Alcoholic Beverages*:

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the *design*, the *architecture*, and the revealing *structure* of a measure. (emphasis added)⁵

The reasons cited by the Appellate Body in support of its view do not appear to be specific to the provisions of Article III:2, second sentence, of the *GATT 1994*. Hence, these reasons apply with equal force in the context of Article 2(b) of the *RO Agreement*. Accordingly, in applying Article 2(b), we will follow the above-quoted statement by the Appellate Body.”⁶

(iii) An incidental trade effect should not be inferred as a trade objective

5. In addressing India’s claim that that Section 405 of the United States Trade and Development Act of 2000 is being used to pursue the trade objective of favouring imports from the European Communities over imports from other countries, and particularly imports from developing countries such as India, the Panel on *US – Textiles Rules of Origin* ruled that an incidental effect should not be inferred as a trade objective:

“[W]e note, finally, that even if section 405 had the practical effect of favouring goods imported from the European Communities over competitive goods imported from other Members, that effect might be incidental

² Panel Report on *US – Textiles Rules of Origin*, paras. 6.23–6.25.

³ Panel Report on *US – Textiles Rules of Origin*, paras. 6.43. See also para. 6.84.

⁴ Panel Report on *US – Textiles Rules of Origin*, para. 6.36.

⁵ (footnote original) Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* (“*Chile – Alcoholic Beverages*”), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281, para. 62 (footnotes omitted).

⁶ Panel Report on *US – Textiles Rules of Origin*, paras. 6.37–6.38.

rather than intentional. In other words, we do not think that the mere effect of favouring European Communities imports over imports from other Members would in itself justify the inference that creating such an effect is an objective pursued by the United States.”⁷

3. Article 2(c), first sentence

(a) “themselves”

6. The Panel on *US – Textiles Rules of Origin* interpreted several terms used in the first sentence of Article 2(c), and considered that the term “themselves” specifically relates to a Member’s rules of origin as opposed to something like a commercial policy. The Panel discussed the term “themselves” as follows:

“[W]e consider that, in the first sentence of Article 2(c), the pronoun ‘themselves’ is used mainly to emphasise the preceding term ‘rules of origin’. By emphasising the term “rules of origin”, the pronoun ‘themselves’ brings out very clearly that the first sentence of Article 2(c) is concerned with a Member’s rules of origin, as distinct from something other than rules of origin, and that it is rules of origin, as opposed to something other than rules of origin, that must not ‘create restrictive, distorting, or disruptive effects on international trade’.

...

[t]he term ‘themselves’ is meant to highlight that, although there may be commercial policy measures which create restrictive, distorting, or disruptive effects on international trade, the rules of origin used to implement and support these commercial policy measures must not create restrictive, distorting, or disruptive effects on international trade additional to those which may be caused by the underlying commercial policy measures.⁸ Similarly, in cases where an underlying commercial policy measure does not cause any restrictive, distorting, or disruptive effects on international trade, the word ‘themselves’ would serve to underscore that rules of origin must not create any new restrictive, distorting, or disruptive effects on international trade.”⁹

(b) “create”

7. The Panel on *US – Textiles Rules of Origin* continued exploring the interpretation of terms used in Article 2(c) first sentence, and explained that the term “create” ensures that there should be a “causal link” between a certain rule of origin and a prohibited trade effect for that rule of origin to be considered inconsistent with the first sentence of Article 2(c):

“The next element of the text of the first sentence of Article 2(c) to be considered is the term ‘create’. The ordinary meaning of the term ‘create’ is to ‘cause, occasion, produce, give rise to’.¹⁰ Thus, it is implicit in the term ‘create’ that a Member’s rules of origin only contravene the first sentence of Article 2(c) if there is a

causal link between those rules and the prohibited effects specified in the first sentence.”¹¹¹²

(c) “restrictive, distorting or disruptive effects”

8. The Panel on *US – Textiles Rules of Origin* explained that the prohibited trade effects “restrictive, distorting or disruptive effects” listed in the first sentence of Article 2(c) form “alternative bases” for a claim:

“Turning to the prohibited effects – *i.e.*, ‘restrictive, distorting, or disruptive effects’ – the Panel notes that these effects constitute alternative bases for a claim under the first sentence of Article 2(c), as is confirmed by the use of the disjunctive ‘or’. Accordingly, independent meaning and effect should be given to the concepts of ‘restriction’, ‘distortion’ and ‘disruption’. In this regard, we note that the ordinary meaning of the term ‘restrict’ is to ‘limit, bound, confine’; that of the term ‘distort’ is to ‘alter to an unnatural shape by twisting’; and that of the term to ‘disrupt’ is to ‘interrupt the normal continuity of’.¹³ Thus, the first sentence of Article 2(c) prohibits rules of origin which create the effect of limiting the level of international trade (‘restrictive’ effects); of interfering with the natural pattern of international trade (‘distorting’ effects); or of interrupting the normal continuity of international trade (‘disruptive’ effects).”¹⁴

(d) “effects on international trade”

9. The Panel on *US – Textiles Rules of Origin* determined that the term “effects on international trade” could not be interpreted as covering adverse effects on trade in different goods:

“[W]e cannot assume that Members intended to bring adverse effects on different types of goods within the ambit of the prohibition set out in the first sentence of Article 2(c). Indeed, as the Appellate Body has said in a different context, ‘[t]o sustain such an assumption and to warrant such a far-reaching interpretation, treaty

⁷ Panel Report on *US – Textiles Rules of Origin*, para. 6.117.

⁸ (footnote original) It is worth noting in this context that Article 3.2 of the *Agreement on Import Licensing Procedures* on non-automatic licensing contains provisions along these lines. Specifically, it states that “[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports *additional* to those caused by the imposition of the restriction” (emphasis added).

⁹ Panel Report on *US – Textiles Rules of Origin*, paras. 6.136–6.137.

¹⁰ (footnote original) *The New Shorter Oxford English Dictionary*, L. Brown, ed., Clarendon Press, 1993, Vol. I, p. 198.

¹¹ (footnote original) It is relevant to point out here that the Appellate Body has given a similar interpretation to the previously mentioned Article 3.2 of the *Agreement on Import Licensing Procedures*. Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* (“*EC – Poultry*”), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras. 126–127.

¹² Panel Report on *US – Textiles Rules of Origin*, para. 6.140.

¹³ (footnote original) *The New Shorter Oxford English Dictionary*, L. Brown, ed., Clarendon Press, 1993, Vol. II, p. 2569; Vol. I, pp. 707 and 702, respectively.

¹⁴ Panel Report on *US – Textiles Rules of Origin*, para. 6.141.

language far more specific [. . .] would be necessary'.¹⁵ We consider that the same could be said of Article 2(c), first sentence.¹⁶

Therefore, we consider that it would not be appropriate to interpret the phrase 'effects on international trade' as covering adverse effects on trade in different (but closely similar) types of finished goods. We construe the phrase 'effects on international trade' to cover trade in the goods to which the relevant rule of origin is applied (e.g., cotton bed linen)"¹⁷

4. Article 2(c), second sentence

(a) "unduly strict requirements"

10. In *US – Textiles Rules of Origin*, the Panel explained the meaning of the phrase "unduly strict requirement" in the context of India's claim that the United States' measures at issue imposed strict requirements that did not assist the United States in determining the country with which the product had the most significant economic link. The Panel explored the meaning of the sentence examining each term:

"First, we need to examine what kind of 'requirements' are covered by the obligation that Members must ensure that their rules of origin not 'pose unduly strict requirements'. In this regard, we note the view of the United States that the clause 'as a prerequisite for the determination of the country of origin' qualifies also the phrase '[rules of origin] shall not pose unduly strict requirements'. While the English version of Article 2(c) may be susceptible of such an interpretation, the equally authentic French version is not.¹⁸ Nevertheless, the

clause 'as a prerequisite for the determination of the country of origin' is part of the immediate context of the term 'requirements'. Considered as relevant context, the clause at issue lends force to the argument that the 'requirements' which must not be unduly strict include the kind of requirements which must be fulfilled as a prerequisite for the determination of the country of origin. Article 2(a) of the *RO Agreement* provides further contextual support for such an interpretation. The first sentence of that provision states that the 'requirements to be fulfilled' must be clearly defined. It is clear to us that these requirements include the substantive requirements which must be met for a good to be determined to originate in a particular country. For these reasons, we read the term 'requirements' in the second sentence of Article 2(c) as encompassing the substantive origin requirements¹⁹ that must be met for a good to obtain origin status.²⁰

Another issue presented by the phrase 'unduly strict requirements' is the interpretation to be given to the adjective 'strict'. The most pertinent dictionary definitions of the term 'strict' are 'exacting'²¹ and 'rigorous'²². Thus, a 'strict' requirement is an exacting or rigorous requirement. In the specific context of Article 2 of the *RO Agreement*, and also bearing in mind our interpretation of the term 'requirements', 'strict' requirements are, therefore, those requirements which make the conferral of origin conditional on conformity with an exacting or rigorous (technical) standard.²³

The second sentence of Article 2(c) only precludes Members from imposing requirements which are 'unduly strict'. The dictionary meaning of the adverb 'unduly' is 'more than is warranted or natural; excessively, dispro-

¹⁵ (footnote original) Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("EC – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 165.

¹⁶ (footnote original) In response to a question from the Panel, India argues that the plural in Article 2(c) means that that provision applies both to an individual rule of origin as well as to a Member's system of rules of origin. India's reply to Panel question No. 48. Since India, in developing its claim, does not rely on this interpretation of the text of Article 2(c), it is sufficient to note that we understand the plural in Article 2(c), first sentence, to refer to a Member's "rules of origin" taken individually, i.e., to individual rules of origin as they apply to individual goods. Indeed, provisions like the second sentence of Article 2(c), the first clause of Article 2(d), Article 2(f) and Article 3(a) of the *RO Agreement* cannot reasonably be read to lay down disciplines for anything other than individual rules of origin.

¹⁷ Panel Report on *US – Textiles Rules of Origin*, paras. 6.1466-147. See also para. 6.172.

¹⁸ (footnote original) The French version of Article 2(c), second sentence, reads as follows:

"[Les règles d'origine] n'imposent pas de prescriptions indûment rigoureuses ni n'exigeront, comme condition préalable à la détermination du pays d'origine, le respect d'une certaine condition non liée à la fabrication ou à l'ouvroison."

The Spanish text of Article 2(c), second sentence, seems to track the French version rather than the English version. It reads:

"[Las normas de origen] [n]o impondrán condiciones indebidamente estrictas ni exigirán el cumplimiento de una determinada condición no relacionada con la fabricación o

elaboración como requisito previo para la determinación del país de origen."

¹⁹ (footnote original) For the purposes of this dispute, we need not decide whether the "requirements" mentioned in the second sentence of Article 2(c) would also encompass the formal, or administrative, requirements which may be imposed in order to assess compliance with rules of origin (e.g., documentation requirements).

²⁰ (footnote original) The negotiating history of the *RO Agreement* tends to confirm that the term "requirements" refers to the substantive origin requirements that must be met for a good to obtain origin status. The first clause of Article 2(c), second sentence, appears to originate in two provisions proposed by Japan. The first of these proposed provisions states that "the requirements to be fulfilled in the determination of origin shall be clearly defined. [. . .] Rules of origin which state only what does not confer origin [. . .] or state only abstract conditions or unduly strict conditions shall be prohibited". MTN.GNG/NG2/W/52, p. 5 (emphasis added). The other provision proposed by Japan states that "[t]echnically excessive requirements as a prerequisite for the determination of country of origin shall be prohibited". *Ibid.*

²¹ (footnote original) *Black's Law Dictionary*, B. A. Garner (ed.), West Group, 1999, p. 1434.

²² (footnote original) *Merriam-Webster OnLine Thesaurus*, <http://www.m-w.com> (March 2003). We note that the French version of the second sentence of Article 2(c) also uses the adjective "rigoureux".

²³ (footnote original) In other words, we think that the "strictness" of requirements is to be assessed from the perspective of countries wanting to obtain origin status, rather than from the perspective of countries wanting to lose origin status.

portionately'.²⁴ Accordingly, an origin requirement can be considered to be 'unduly' strict if it is excessively strict."²⁵

(i) "fulfilment of a certain condition not related to manufacturing or processing"

11. In *US – Textiles Rules of Origin*, the Panel noted that the sentence "fulfilment of a certain condition not related to manufacturing or processing" requires Members to ensure that the conditions that their rules of origin impose as a prerequisite for the conferral of origin do not include a condition unrelated to the manufacturing or processing:

"[W]e consider that the ordinary meaning of the second clause is clear. It requires Members to ensure that the conditions their rules of origin impose as a prerequisite for the conferral of origin not include a condition which is unrelated to manufacturing or processing.²⁶ We note the example offered by the United States that a rule of origin would not conform to this requirement if it stated that a good can only be ascribed the origin of a country if the good has been certified by several authorities through a time-consuming process in the exporting country."²⁷

5. Article 2(d)

(a) Scope of application of non-discrimination rule

12. In *US – Textiles Rules of Origin*, India argued that rules of origin violate Article 2(d) if they result in unjustifiably differential treatment of "closely related (Indian and European Communities) products". The Panel rejected India's claim and explained that India's argument was partly based on the erroneous assumption that Members should apply "the same rule of origin, or at least equally advantageous rules, to 'closely related' products imported from different Members". The Panel then determined that Article 2(d) does not intend to preclude discrimination across different (but closely related) goods imported from different Members:

"[W]e recall that the second clause of Article 2(d) states that rules of origin 'shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned'. It does not state that rules of origin 'shall not discriminate between closely related goods of other Members [. . .]'. Thus, the plain terms of the second clause do not support India's reading.

Moreover, the expression 'the good concerned' in the singular indicates that the second clause of Article 2(d) is not concerned with discrimination across different (but closely related) goods. Were it otherwise, the second clause would arguably have referred to 'the goods concerned' in the plural. In our view, the use of the singular suggests that, for the purposes of assessing whether

there is discrimination 'between Members', a comparison should be made between the rule of origin applicable to a particular good when imported from one or more Members and the rule(s) of origin applicable to the same good – 'the good concerned' – when imported from one or more other Members.

If the second clause of Article 2(c) were intended to preclude discrimination across different (but closely related) goods, we consider it likely that the drafters would have provided some textual guidance as to the product scope of the prohibition set forth in the second clause. Indeed, we note that other WTO non-discrimination provisions, such as Articles I, III and IX of the GATT 1994, do specify the product scope of the prohibitions they contain.²⁸

Finally, our reading of the second clause of Article 2(d) is consistent with the objective of that clause. In our view, the principal objective of the second clause of Article 2(d) is to ensure that, for a given good, the strictness of the requirements that must be satisfied for that good to be accorded the origin of a particular Member is the same, regardless of the provenance of the good in question (*i.e.*, Member from which the good is imported, affiliation of the manufacturers of the good, etc.).²⁹³⁰

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

Disciplines after the Transition Period

Taking into account the aim of all Members to achieve, as a result of the harmonization work programme set out in Part IV, the establishment of harmonized rules of origin, Members shall ensure, upon the implementation of the results of the harmonization work programme, that:

- (a) they apply rules of origin equally for all purposes as set out in Article 1;
- (b) under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the

²⁴ (footnote original) *The New Shorter Oxford English Dictionary*, L. Brown (ed.), Clarendon Press, 1993, Vol. 2, p. 3480.

²⁵ Panel Report on *US – Textiles Rules of Origin*, paras. 6.204–6.206.

²⁶ (footnote original) We are aware that the third sentence of Article 2(c) states that "costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a)". But the third sentence opens with the word "however", which implies a contrast between the second and third sentences.

²⁷ Panel Report on *US – Textiles Rules of Origin*, para. 6.208.

²⁸ (footnote original) For instance, Article I of the GATT 1994 prohibits discrimination as between "like" products only.

²⁹ (footnote original) The Panel notes that this is consistent with its view that Article 2 is intended to leave Members a considerable measure of discretion in designing and applying their rules of origin. *Supra*, para. 6.25.

³⁰ Panel Report on *US – Textiles Rules of Origin*, paras. 6.245–6.248.

- production of the good, the country where the last substantial transformation has been carried out;
- (c) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned;
 - (d) the rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
 - (e) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
 - (f) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (h). Such assessments shall be made publicly available subject to the provisions of subparagraph (i);
 - (g) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
 - (h) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
 - (i) all information which is by nature confidential or which is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

**PART III
PROCEDURAL ARRANGEMENTS ON
NOTIFICATION, REVIEW, CONSULTATION
AND DISPUTE SETTLEMENT**

V. ARTICLE 4

A. TEXT OF ARTICLE 4

*Article 4
Institutions*

1. There is hereby established a Committee on Rules of Origin (referred to in this Agreement as "the Committee") composed of the representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Members the opportunity to consult on matters relating to the operation of Parts I, II, III and IV or the furtherance of the objectives set out in these Parts and to carry out such other responsibilities assigned to it under this Agreement or by the Council for Trade in Goods. Where appropriate, the Committee shall request information and advice from the Technical Committee referred to in paragraph 2 on matters related to this Agreement. The Committee may also request such other work from the Technical Committee as it considers appropriate for the furtherance of the above-mentioned objectives of this Agreement. The WTO Secretariat shall act as the secretariat to the Committee.

2. There shall be established a Technical Committee on Rules of Origin (referred to in this Agreement as "the Technical Committee") under the auspices of the Customs Co-operation Council (CCC) as set out in Annex I.³¹ The Technical Committee shall carry out the technical work called for in Part IV and prescribed in Annex I. Where appropriate, the Technical Committee shall request information and advice from the Committee on matters related to this Agreement. The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement. The CCC Secretariat shall act as the secretariat to the Technical Committee.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. Observers

13. At its meeting on 4 April 1995, the Committee on Rules of Origin agreed that governments granted

³¹ See Section XI.

observer status by the WTO General Council would be allowed to attend meetings of the Committee as observers, without prejudice to the possibility of holding closed sessions without observers.³²

2. Rules of procedure

14. At its meeting of 16 November 1995, the Committee on Rules of Origin adopted its Rules of Procedure³³, which were subsequently approved by the Council for Trade in Goods at its meeting of 1 December 1995.³⁴

15. The Committee on Rules of Origin reports to the Council for Trade in Goods on an annual basis.³⁵

3. Drafting Group on Rules of Origin

16. At its meeting on 27 June 1995, the Committee on Rules of Origin set up a Drafting Group to elaborate a definition of the term "country" for the purposes of the *Agreement on Rules of Origin*.³⁶ At its meeting on 16 November 1995, the Committee on Rules of Origin agreed to adopt the following recommendation from the Drafting Group:

"[T]he Committee requests the Technical Committee to fully proceed with its Harmonization Work Programme in the absence of an abstractly constructed definition of the term 'country'; and to forward to it unresolved issues relating to the definition of the term 'country', for a final determination; and

the Committee may request the Drafting Group to address particular issues relating to the definition of the term 'country' and, in that connection, to offer clarification that may enhance the work of the Technical Committee;"³⁷

4. Working Group

17. At its meeting on 16 November 1995, the Committee on Rules of Origin agreed, as concerned the process of reviewing the reports submitted to the Committee by the Technical Committee on Rules of Origin in Brussels, to establish an open-ended Working Group to deal with bracketed interpretations and opinions of the Technical Committee, and consequently forward appropriate recommendations to the Committee on Rules of Origin for final consideration and decision.³⁸

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Information and Procedures for Modification and Introduction of New Rules of Origin

1. Each Member shall provide to the Secretariat, within 90 days after the date of entry into force of the

WTO Agreement for it, its rules of origin, judicial decisions, and administrative rulings of general application relating to rules of origin in effect on that date. If by inadvertence a rule of origin has not been provided, the Member concerned shall provide it immediately after this fact becomes known. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.

2. During the period referred to in Article 2, Members introducing modifications, other than *de minimis* modifications, to their rules of origin or introducing new rules of origin, which, for the purpose of this Article, shall include any rule of origin referred to in paragraph 1 and not provided to the Secretariat, shall publish a notice to that effect at least 60 days before the entry into force of the modified or new rule in such a manner as to enable interested parties to become acquainted with the intention to modify a rule of origin or to introduce a new rule of origin, unless exceptional circumstances arise or threaten to arise for a Member. In these exceptional cases, the Member shall publish the modified or new rule as soon as possible.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Notification procedures

18. At its meeting of 4 April 1995, the Committee on Rules of Origin agreed that, if a notification under Article 5.1 and paragraph 4 of Annex II were to be made in a language other than one of the WTO working languages, such notification should be accompanied by a summary in one of the WTO working languages.³⁹

19. As of 31 December 2004, 84 Members have made notifications of non-preferential rules of origin and 89 Members have made notifications of preferential rules of origin pursuant to Article 5 and paragraph 4 of Annex II.⁴⁰

20. At its meeting of 1 February 1996, the Committee on Rules of Origin adopted a procedure to deal with queries by Members in respect of national legislation;

³² G/RO/M/1, para. 11. In addition, Representatives of the ACP, EFTA, IADB, IMF, ITCB, OECD, UNCTAD, WCO and the World Bank were invited to attend meetings of the Committee on Rules of Origin in 2000 in an observer capacity. See G/L/413, para. 1.

³³ G/RO/M/3. The adopted rules of procedure can be found in G/L/149.

³⁴ G/C/M/7.

³⁵ The reports are contained in documents G/L/36, 36/Corr.1, 119, 210, 271, 326, 413, 656 and 704.

³⁶ G/RO/M/2, para. 10–16.

³⁷ G/RO/M/3, paras. 3.1–3.2.

³⁸ The terms of reference of the Working Group can be found in G/RO/M/3, para. 4.3.

³⁹ G/RO/M/1, para. 44. For details on Members' notifications relating to preferential and non-preferential rules of origin, see G/RO/47, para. 5 and Annex.

⁴⁰ G/L/656.

such queries should be communicated to the Secretariat ten working days in advance of the meeting at which they are to be raised.⁴¹

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6 *Review*

1. The Committee shall review annually the implementation and operation of Parts II and III of this Agreement having regard to its objectives. The Committee shall annually inform the Council for Trade in Goods of developments during the period covered by such reviews.
2. The Committee shall review the provisions of Parts I, II and III and propose amendments as necessary to reflect the results of the harmonization work programme.
3. The Committee, in cooperation with the Technical Committee, shall set up a mechanism to consider and propose amendments to the results of the harmonization work programme, taking into account the objectives and principles set out in Article 9. This may include instances where the rules need to be made more operational or need to be updated to take into account new production processes as affected by any technological change.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.1

21. As of 31 December 2004, the Committee on Rules of Origin has conducted ten reviews of the implementation and operation of the Agreement.⁴²

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7 *Consultation*

The provisions of Article XXII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8 *Dispute Settlement*

The provisions of Article XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, are applicable to this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

22. The following table lists the dispute in which the panel report has been adopted where the provisions of the *Agreement on Rules of Origin* were invoked:

Case Name	Case Number	Invoked Articles
1 US – <i>Textiles Rules of Origin</i>	WT/DS165	Article 2

PART IV HARMONIZATION OF RULES OF ORIGIN

X. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9 *Objectives and Principles*

1. With the objectives of harmonizing rules of origin and, *inter alia*, providing more certainty in the conduct of world trade, the Ministerial Conference shall undertake the work programme set out below in conjunction with the CCC, on the basis of the following principles:

- (a) rules of origin should be applied equally for all purposes as set out in Article 1;
- (b) rules of origin should provide for the country to be determined as the origin of a particular good to be either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;
- (c) rules of origin should be objective, understandable and predictable;
- (d) notwithstanding the measure or instrument to which they may be linked, rules of origin should not be used as instruments to pursue trade objectives directly or indirectly. They should not themselves create restrictive, distorting or dis-

⁴¹ G/RO/M/5, para. 1.3.

⁴² See G/RO/3, G/RO/12, G/RO/21, G/RO/28, G/RO/43, G/RO/47, G/RO/50 and G/RO/55.

ruptive effects on international trade. They should not pose unduly strict requirements or require the fulfilment of a certain condition not relating to manufacturing or processing as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for purposes of the application of an ad valorem percentage criterion;

- (e) rules of origin should be administrable in a consistent, uniform, impartial and reasonable manner;
- (f) rules of origin should be coherent;
- (g) rules of origin should be based on a positive standard. Negative standards may be used to clarify a positive standard.

Work Programme

- 2. (a) The work programme shall be initiated as soon after the entry into force of the WTO Agreement as possible and will be completed within three years of initiation.
- (b) The Committee and the Technical Committee provided for in Article 4 shall be the appropriate bodies to conduct this work.
- (c) To provide for detailed input by the CCC, the Committee shall request the Technical Committee to provide its interpretations and opinions resulting from the work described below on the basis of the principles listed in paragraph 1. To ensure timely completion of the work programme for harmonization, such work shall be conducted on a product sector basis, as represented by various chapters or sections of the Harmonized System (HS) nomenclature.

- (i) *Wholly Obtained and Minimal Operations or Processes*

The Technical Committee shall develop harmonized definitions of:

- the goods that are to be considered as being wholly obtained in one country. This work shall be as detailed as possible;
- minimal operations or processes that do not by themselves confer origin to a good.

The results of this work shall be submitted to the Committee within three months of receipt of the request from the Committee.

- (ii) *Substantial Transformation – Change in Tariff Classification*

- The Technical Committee shall consider and elaborate upon, on the basis of the criterion

of substantial transformation, the use of change in tariff subheading or heading when developing rules of origin for particular products or a product sector and, if appropriate, the minimum change within the nomenclature that meets this criterion.

- The Technical Committee shall divide the above work on a product basis taking into account the chapters or sections of the HS nomenclature, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within one year and three months from receipt of the request of the Committee.

- (iii) *Substantial Transformation – Supplementary Criteria*

Upon completion of the work under subparagraph (ii) for each product sector or individual product category where the exclusive use of the HS nomenclature does not allow for the expression of substantial transformation, the Technical Committee:

- shall consider and elaborate upon, on the basis of the criterion of substantial transformation, the use, in a supplementary or exclusive manner, of other requirements, including ad valorem percentages⁴ and/or manufacturing or processing operations⁵, when developing rules of origin for particular products or a product sector;

(footnote original) ⁴ If the ad valorem criterion is prescribed, the method for calculating this percentage shall also be indicated in the rules of origin.

(footnote original) ⁵ If the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the product concerned shall be precisely specified.

- may provide explanations for its proposals;
- shall divide the above work on a product basis taking into account the chapters or sections of the HS nomenclature, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within two years and three months of receipt of the request from the Committee.

Role of the Committee

- 3. On the basis of the principles listed in paragraph 1:
 - (a) the Committee shall consider the interpretations and opinions of the Technical Committee periodically in accordance with the time-frames provided in subparagraphs (i), (ii) and (iii) of paragraph 2(c) with a view to endorsing such interpretations and opinions. The Committee

may request the Technical Committee to refine or elaborate its work and/or to develop new approaches. To assist the Technical Committee, the Committee should provide its reasons for requests for additional work and, as appropriate, suggest alternative approaches;

- (b) upon completion of all the work identified in subparagraphs (i), (ii) and (iii) of paragraph 2(c), the Committee shall consider the results in terms of their overall coherence.

Results of the Harmonization Work Programme and Subsequent Work

4. The Ministerial Conference shall establish the results of the harmonization work programme in an annex as an integral part of this Agreement.⁶ The Ministerial Conference shall establish a time-frame for the entry into force of this annex.

(footnote original)⁶ At the same time, consideration shall be given to arrangements concerning the settlement of disputes relating to customs classification.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

23. The Committee on Rules of Origin has pursued work on the harmonization of non-preferential rules of origin.⁴³ At its meeting of 10 May 1996, the Committee on Rules of Origin decided to establish an Integrated Negotiating Text for the Harmonization Work Programme.⁴⁴

24. At its meeting of 15 December 2000, with respect to implementation-related issues and concerns, the General Council made a decision relating to several WTO Agreements.⁴⁵ Specifically, with respect to the *Agreement on Rules of Origin*, the General Council decided:

"Members undertake to expedite the remaining work on the harmonization of non-preferential rules of origin, so as to complete it by the time of the Fourth Ministerial Conference, or by the end of 2001 at the latest. The Chairman of the Committee on Rules of Origin shall report regularly, on his own responsibility, to the General Council on the progress being made. The first such report would be submitted to the Council at its first regular meeting in 2001, and subsequently at each regular meeting until the completion of the work programme."⁴⁶

25. The Chairman of the Committee on Rules of Origin submitted a progress report on the harmonization work programme to the General Council in December 2001.⁴⁷ Following the discussion on the report, the General Council agreed that the Committee on Rules of Origin would hold two additional sessions in the first half of 2002 to resolve remaining

issues, so that it might identify a limited number of core policy-level issues that in its view needed to be reported to the General Council for discussion and decision at that level. It also agreed that the outcome of the Committee on Rules of Origin's further work would be reported by the Chairman of the Committee, on his own responsibility, to the General Council at its first regular meeting after the end of June 2002, at which point the matter would be in the hands of the General Council, and that the deadline for completion of the harmonization work programme would be extended to the end of 2002.⁴⁸

26. At its meeting in July 2002, the General Council took note of a report by the Chairman of the Committee on Rules of Origin and of the recommendations contained therein⁴⁹, and agreed to hold a first meeting on the 12 core policy-level issues identified in paragraph 5.1 of that report.⁵⁰

27. At its meeting in December 2002, the General Council considered a report from its Chairman and the Chairman of the Committee on Rules of Origin on the progress to date. Following the discussion, and taking into account the importance of the issues to be resolved and the implications to be considered, and in the full knowledge of the consequences of a failure to meet another new deadline, the General Council agreed to extend, to July 2003, the deadline for completion of negotiations on the core policy issues identified in the Committee on Rules of Origin Chair's report to the General Council of 15 July 2002. The General Council also agreed that following resolution of these core policy issues, the Committee on Rules of Origin complete its remaining technical work, including the work referred to in Article 9.3(b) of the Agreement on Rules of Origin, by 31 December 2003.⁵¹

⁴³ The General Council adopted to date recommendations by the Committee on Rules of Origin to continue its work on this matter, in July 1998 (WT/GC/M/29, Section 4(a)) and October 2000 (WT/GC/M/59, Section 1(e)).

⁴⁴ G/RO/M/6, para.1 The Integrated Negotiating Text can be found in G/RO/W/13. The text with the latest update can be found in G/RO/45.

⁴⁵ WT/GC/M/62, para. 17. The text of the decision can be found in WT/L/384. See also Chapter on *WTO Agreement*, Section X.B on the powers of the General Council more generally.

⁴⁶ WT/L/384, para. 5.

⁴⁷ G/RO/49.

⁴⁸ WT/GC/M/72.

⁴⁹ G/RO/52.

⁵⁰ WT/GC/M/75.

⁵¹ WT/GC/M/77.

XI. ANNEX I**A. TEXT OF ANNEX I*****ANNEX I******TECHNICAL COMMITTEE ON RULES OF ORIGIN******Responsibilities***

1. The ongoing responsibilities of the Technical Committee shall include the following:

- (a) at the request of any member of the Technical Committee, to examine specific technical problems arising in the day-to-day administration of the rules of origin of Members and to give advisory opinions on appropriate solutions based upon the facts presented;
- (b) to furnish information and advice on any matters concerning the origin determination of goods as may be requested by any Member or the Committee;
- (c) to prepare and circulate periodic reports on the technical aspects of the operation and status of this Agreement; and
- (d) to review annually the technical aspects of the implementation and operation of Parts II and III.

2. The Technical Committee shall exercise such other responsibilities as the Committee may request of it.

3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by Members or the Committee, in a reasonably short period of time.

Representation

4. Each Member shall have the right to be represented on the Technical Committee. Each Member may nominate one delegate and one or more alternates to be its representatives on the Technical Committee. Such a Member so represented on the Technical Committee is hereinafter referred to as a "member" of the Technical Committee. Representatives of members of the Technical Committee may be assisted by advisers at meetings of the Technical Committee. The WTO Secretariat may also attend such meetings with observer status.

5. Members of the CCC which are not Members of the WTO may be represented at meetings of the Technical Committee by one delegate and one or more alternates. Such representatives shall attend meetings of the Technical Committee as observers.

6. Subject to the approval of the Chairman of the Technical Committee, the Secretary-General of the CCC (referred to in this Annex as "the Secretary-General") may invite representatives of governments which are neither Members of the WTO nor members of the CCC and representatives of international governmental and

trade organizations to attend meetings of the Technical Committee as observers.

7. Nominations of delegates, alternates and advisers to meetings of the Technical Committee shall be made to the Secretary-General.

Meetings

8. The Technical Committee shall meet as necessary, but not less than once a year.

Procedures

9. The Technical Committee shall elect its own Chairman and shall establish its own procedures.

B. INTERPRETATION AND APPLICATION OF ANNEX I

No jurisprudence or decision of a competent WTO body.

XII. ANNEX II**A. TEXT OF ANNEX II*****ANNEX II******COMMON DECLARATION WITH REGARD TO PREFERENTIAL RULES OF ORIGIN***

1. Recognizing that some Members apply preferential rules of origin, distinct from non-preferential rules of origin, the Members hereby agree as follows.

2. For the purposes of this Common Declaration, preferential rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.

3. The Members agree to ensure that:

- (a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:
 - (i) in cases where the criterion of change of tariff classification is applied, such a preferential rule of origin, and any exceptions to the rule, must clearly specify the sub-headings or headings within the tariff nomenclature that are addressed by the rule;
 - (ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the preferential rules of origin;
 - (iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers

- preferential origin shall be precisely specified;
- (b) their preferential rules of origin are based on a positive standard. Preferential rules of origin that state what does not confer preferential origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of preferential origin is not necessary;
 - (c) their laws, regulations, judicial decisions and administrative rulings of general application relating to preferential rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
 - (d) upon request of an exporter, importer or any person with a justifiable cause, assessments of the preferential origin they would accord to a good are issued as soon as possible but no later than 150 days⁷ after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the preferential rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (f). Such assessments shall be made publicly available subject to the provisions of subparagraph (g);
 - (e) when introducing changes to their preferential rules of origin or new preferential rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
 - (f) any administrative action which they take in relation to the determination of preferential origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
 - (g) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of preferential rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.
4. Members agree to provide to the Secretariat promptly their preferential rules of origin, including a listing of the preferential arrangements to which they apply, judicial decisions, and administrative rulings of general application relating to their preferential rules of origin in effect on the date of entry into force of the WTO Agreement for the Member concerned. Furthermore, Members agree to provide any modifications to their preferential rules of origin or new preferential rules of origin as soon as possible to the Secretariat. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.

B. INTERPRETATION AND APPLICATION OF ANNEX II

28. With respect to implementation of paragraph 4 of Annex II, see paragraph 19 above.

(footnote original)⁷ In respect of requests made during the first year from entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.