WTO Analytical Index

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I. GENERAL INTRODUCTORY COMMENTARY

A. TEXT OF GENERAL INTRODUCTORY COMMENTARY

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, inter alia, 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.

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.

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

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¹ WT/GC/M/59, paras. 22-26.
² G/VAL/M/1, Section J. Those decisions are referred to in paragraphs 3, 4, 6, 7, 8, 15, 21, 30 and 31 of this Chapter.
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. 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;
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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 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

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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.
AGREEMENT ON IMPLEMENTATION OF ARTICLE VII
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(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.

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

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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.
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 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 quantities. 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**

No jurisprudence or decision of a competent WTO body so far.

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.

<table>
<thead>
<tr>
<th>Sale quantity</th>
<th>Unit price</th>
<th>Number of sales</th>
<th>Total quantity sold at each price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10 units</td>
<td>100</td>
<td>10 sales of 5 units</td>
<td>65</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5 sales of 3 units</td>
<td></td>
</tr>
<tr>
<td>11-25 units</td>
<td>95</td>
<td>5 sales of 11 units</td>
<td>55</td>
</tr>
<tr>
<td>over 25 units</td>
<td>90</td>
<td>1 sale of 30 units</td>
<td>80</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 sale of 50 units</td>
<td></td>
</tr>
</tbody>
</table>

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.

\[(a)\] Sales

<table>
<thead>
<tr>
<th>Sale quantity</th>
<th>Unit price</th>
</tr>
</thead>
<tbody>
<tr>
<td>40 units</td>
<td>100</td>
</tr>
<tr>
<td>30 units</td>
<td>90</td>
</tr>
<tr>
<td>15 units</td>
<td>100</td>
</tr>
<tr>
<td>50 units</td>
<td>95</td>
</tr>
<tr>
<td>25 units</td>
<td>105</td>
</tr>
<tr>
<td>35 units</td>
<td>90</td>
</tr>
<tr>
<td>5 units</td>
<td>100</td>
</tr>
</tbody>
</table>

\[(b)\] Totals

<table>
<thead>
<tr>
<th>Total quantity sold</th>
<th>Unit price</th>
</tr>
</thead>
<tbody>
<tr>
<td>65</td>
<td>90</td>
</tr>
<tr>
<td>50</td>
<td>95</td>
</tr>
<tr>
<td>60</td>
<td>100</td>
</tr>
<tr>
<td>25</td>
<td>105</td>
</tr>
</tbody>
</table>

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

No jurisprudence or decision of a competent WTO body.
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

*No jurisprudence or decision of a competent WTO body.*
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. Paragraph 1

(a) Treatment of interest charges in the customs value of imported goods

6. 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) Paragraph 1(b)(iv)

7. 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

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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.
8. 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).  

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.*

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.

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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.
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

9. 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 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


11. With respect to Annex II, see Section XXVII.B below.

12. With respect to Annex III, Section XXVIII.B below.

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\(^8\) Panel Report on US – Certain EC Products, para. 6.75.
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;

(f) both of them are directly or indirectly controlled by a third person;
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

13. Pursuant to the Ministerial Decision at Marrakesh, at its meeting of 12 May 1995, the Committee on Customs Valuation adopted a decision regarding cases where customs administrations have reasons to doubt the truth or accuracy of the declared value.\(^\text{10}\)

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 otherwise 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. **Paragraph 1**

(a) Observer status

14. With respect to observer status in meetings of the Committee on Customs Valuation, see Chapter on *WTO Agreement*, paragraphs 151 and Section XXVI.\(^\text{11}\)

15. At its meeting of 12 May 1995, the Committee on Customs Valuation agreed on observership in its meetings.\(^\text{12}\)

(b) Rules of procedure

16. 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.\(^\text{13}\)

17. The Committee on Customs Valuation reports to the Council for Trade in Goods on an annual basis.\(^\text{14}\)

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\(^\text{10}\) G/VAL/M/1, Section F. The text of the decision can be found in G/VAL/1.

\(^\text{11}\) 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.

\(^\text{12}\) G/VAL/M/1, Sections D and E.

\(^\text{13}\) G/C/M/7. The text of the adopted rules of procedure can be found in G/L/146.
Monitoring of the Agreement on Preshipment Inspection

18. At its meeting of 15 June 1999, the General Council adopted the recommendation of the Working Party on Preshipment Inspection\textsuperscript{15} that the future monitoring 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

\textit{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

19. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the Customs Valuation Agreement were invoked:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Case Number</th>
<th>Invoked Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>US – Certain EC Products</td>
<td>WT/DS165</td>
<td>Article 13</td>
</tr>
</tbody>
</table>

\textsuperscript{14} The reports are contained in documents G/L/55, 121, 205, 323, 414.

\textsuperscript{15} WT/GC/M/40/Add.3, section 5. The text of the recommendation can be found in G/L/300, para. 23.
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

20. 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.\(^\text{16}\)

21. 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.\(^\text{17}\)

2. Paragraph 1

22. Pursuant to paragraph 1 of Article 20, 58 developing country Members, as of 31 December 2000, have requested the five-year delay period.\(^\text{18}\) Further, pursuant to paragraph 1 of Annex III, as of 31 December 2000, 22 Members requested extension of this delay period.\(^\text{19}\)

\(^{16}\) WT/GC/M/1, section 11. The text of the adopted decision can be found in WT/L/38.
\(^{17}\) 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.
\(^{18}\) The names of the Members which requested extension can be found in G/VAL/W/3, 13, 22, 29, 43, 77, and 89, Section I.(b)(i).
\(^{19}\) The following eight Members, for which this delay period expired before or on 1 January 2000, requested extension: (i) Bahrain (requested three years (consultation pending) – G/VAL/W/57 and Adds.1-4); (ii) Côte d'Ivoire (requested five years, extension granted for 18 months (expired 01.07.01) – G/VAL/32); (iii)
23. Further, at its meeting of 15 December 2000, with respect to implementation-related issues and concerns, the General Council took a decision concerning several WTO Agreements. With respect to the *Agreement on Agriculture*, 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."21

3. **Paragraph 2**

24. Pursuant to paragraph 2 of Article 20, 46 developing country Members delayed application of paragraph 2(b)(ii) of Article 1 and Article 6 as of 30 June 2001.22

4. **Annex III**

25. 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 22 above.

26. Pursuant to paragraph 2 of Annex III, 13 Members made reservations regarding officially established minimum values.23

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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); 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 three years, extension granted for one year (expired 30.06.01) – G/VAL/31); (vi) Egypt (requested three years, extension granted for one year (expired 30.06.01) – G/VAL/33); (vii) 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 (requested three years - G/VAL/W/83).

20 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 Agreement* and paras. 26, 39 and 177 on the powers of the General Council more generally.

21 WT/L/384, para. 4.

22 The names of the Members which requested extension can be found in G/VAL/W/3, 13, 22, 29, 43, 77, and 89, Section I(b)(ii).

23 The 13 Members are: (i) Colombia (request granted for one, two, and three years for certain products to 31.04.01, 30.04.02, and 30.04.03 – G/VAL/26); (ii) Côte d'Ivoire (request pending in the Council for Trade in Goods as Article IX waiver – G/C/W/300); (iii) Dominican Republic (request granted for two years to 01.07.03 – G/VAL/W/85; G/C/W/286; G/C/W/310); (iv) El Salvador (request pending in the Council for Trade in Goods as Article IX waiver – G/C/W/301); (v) Gabon (request granted for two years to 01.01.03 – G/VAL/14); (vi) Guatemala (request granted for 1, 2, and 3 years to 21.11.02, 21.05.03, and 21.11.04 – G/VAL/W/91 and
27. Pursuant to paragraph 3 of Annex III, at the time of the 2001 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 52 Members made reservations concerning reversal of sequential order of Articles 5 and 6.\(^{24}\)

28. Pursuant to paragraph 4 of Annex III, at the time of the 2001 annual review meeting of the implementation and operation of the Agreement on Customs Valuation, 50 Members made reservations concerning application of Article 5.2 whether or not the importer so requests.\(^{25}\)

**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**

29. 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.\(^{26}\)

**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.

\(^{24}\) See G/VAL/W/3, 13, 22, 29, 43, 77, and 89, Section I.(b)(i).\(^{25}\) See G/VAL/W/3, 13, 22, 29, 43, 77, and 89, Section I.(b)(iv).\(^{26}\) See G/VAL/W/3, 13, 22, 29, 43, 77, and 89, Section I.(b)(v).
B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. General

(a) Notification

30. 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.  

(b) Checklist of Issues

31. 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. 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.

XXIV. ARTICLE 23

A. TEXT OF ARTICLE 23

\textit{Article 23}

\textit{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 reviews.

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

\textit{No jurisprudence or decision of a competent WTO body.}

XXV. ARTICLE 24

A. TEXT OF ARTICLE 24

\textit{Article 24}

\textit{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

\textit{No jurisprudence or decision of a competent WTO body.}

\footnotesize{\textsuperscript{27} 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. 
\textsuperscript{28} 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. 
\textsuperscript{29} G/VAL/M/1, paras. 36-38.}
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 provisions 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**


**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. Notwithstanding 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 2

No jurisprudence or decision of a competent WTO body.

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

33. With respect to paragraph 2 of Annex III, in Marrakesh, the Ministerial Conference decided
as follows:

"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."

XXIX. DECISION REGARDING CASES WHERE CUSTOMS ADMINISTRATIONS HAVE REASONS TO DOUBT THE TRUTH OR ACCURACY OF THE DECLARED VALUE

A. TEXT OF THE DECISION

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 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.

B. INTERPRETATION AND APPLICATION OF THE DECISION

*No jurisprudence or decision of a competent WTO body.*
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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 Members, 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

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 standards apply.

(footnote original) 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
inspections 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.

¹ With respect to the PSI Working Party more generally, see paragraph 8 below.
² G/L/214, section B.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 3**

1. **Paragraph 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."  

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 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;

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3 G/L/214, page 4.
(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 agreement 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 WTO\(^5\), to constitute jointly the Independent Entity. In consultations with those organizations, the WTO defined the structure and functioning of the Independent Entity\(^6\) 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 1996\(^10\) and updated it in April 1997.\(^11\)

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\(^4\) WT/GC/M/9, section I.(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.
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 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

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. 13 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". 14

9. The PSI Working Party issued three reports 15, all of which were approved by the General Council. 16

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12 G/L/214, page 3.
13 WT/GC/M/16, section 3.
14 WT/GC/M/16, section 3. The terms of reference can be also found in WT/L/196.
15 The reports can be found in G/L/214, G/L/273 and G/L/300.
16 See WT/GC/M/25, item 8; WT/GC/M/32, item 13; WT/GC/M/40/Add.3, item 5.
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.*
AGREEMENT ON RULES OF ORIGIN

Agreement on Rules of Origin

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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";

Desiring to further the objectives of GATT 1994;

Recognizing that clear and predictable rules of origin and their application facilitate the flow of international trade;

Desiring to ensure that rules of origin themselves do not create unnecessary obstacles to trade;

Desiring 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 preferences \(^1\) going beyond the application of paragraph 1 of Article I of GATT 1994.

\(^1\) With respect to preferential rules of origin, see Annex II (Section XII).
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.\footnotemark[1]

(footnote original) 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 discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned;

(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**

*No jurisprudence or decision of a competent WTO body.*

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 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.² 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**

1. At its meeting on 4 April 1995, the Committee on Rules of Origin agreed that governments granted observer status by the WTO General Council would be allowed to attend meetings of the

² See Section XI.
AGREEMENT ON RULES OF ORIGIN

Committee as observers, without prejudice to the possibility of holding closed sessions without observers.\(^3\)

2. **Rules of procedure**

2. At its meeting of 16 November 1995, the Committee on Rules of Origin adopted its Rules of Procedure\(^4\), which were subsequently approved by the Council for Trade in Goods at its meeting of 1 December 1995.\(^5\)

3. The Committee on Rules of Origin reports to the Council for Trade in Goods on an annual basis.\(^6\)

3. **Drafting Group on Rules of Origin**

4. 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*.\(^7\) 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;"\(^8\)

4. **Working Group**

5. 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.\(^9\)

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\(^3\) 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.

\(^4\) G/RO/M/3. The adopted rules of procedure can be found in G/L/149.

\(^5\) G/C/M/7.

\(^6\) The reports are contained in documents G/L/36, 36/Corr.1, 119, 210, 271, 326, 413.

\(^7\) G/RO/M/2, para. 10-16.

\(^8\) G/RO/M/3, para. 3.1-3.2.

\(^9\) The terms of reference of the Working Group can be found in G/RO/M/3, para. 4.3.
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**

6. 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.10

7. 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; such queries should be communicated to the Secretariat ten working days in advance of the meeting at which they are to be raised.11

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.

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10 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.

11 G/RO/M/5, para. 1.3.
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. Paragraph 1

8. As of 31 December 2000, the Committee on Rules of Origin has conducted six reviews of the implementation and operation of the Agreement.12

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

No jurisprudence or decision of a competent WTO body.

12 See G/RO/3, G/RO/12, G/RO/21, G/RO/28, G/RO/43, and G/RO/47.
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 disruptive 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
AGREEMENT ON RULES OF ORIGIN

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 percentages\(^4\) and/or manufacturing or processing operations\(^5\), when developing rules of origin for particular products or a product sector;

\(^4\) If the ad valorem criterion is prescribed, the method for calculating this percentage shall also be indicated in the rules of origin.

\(^5\) 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.

\(^6\) 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

9. The Committee on Rules of Origin has pursued work on the harmonization of non-preferential rules of origin.\(^13\) 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.\(^14\)

10. 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.\(^15\) 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."\(^16\)

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\(^13\) 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(c)).

\(^14\) 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.

\(^15\) WT/GC/M/62, para. 17. The text of the decision can be found in WT/L/384. See also Chapter on WTO Agreement, paras. 26, 39 and 177, on the powers of the General Council more generally.

\(^16\) WT/L/384, para. 5.
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 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 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 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 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);

\textit{(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.

\begin{enumerate}
\item[(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;
\item[(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;
\item[(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.
\end{enumerate}

4. Members \textit{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. \textbf{INTERPRETATION AND APPLICATION OF ANNEX II}

\textit{No jurisprudence or decision of a competent WTO body.}
AGREEMENT ON IMPORT LICENSING PROCEDURES

Agreement on Import Licensing Procedures

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having regard to the Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Taking into account the particular trade, development and financial needs of developing country Members;

Recognizing the usefulness of automatic import licensing for certain purposes and that such licensing should not be used to restrict trade;

Recognizing that import licensing may be employed to administer measures such as those adopted pursuant to the relevant provisions of GATT 1994;

Recognizing the provisions of GATT 1994 as they apply to import licensing procedures;

Desiring to ensure that import licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994;

Recognizing that the flow of international trade could be impeded by the inappropriate use of import licensing procedures;

Convinced that import licensing, particularly non-automatic import licensing, should be implemented in a transparent and predictable manner;

Recognizing that non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary to administer the relevant measure;

Desiring to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices;

Desiring to provide for a consultative mechanism and the speedy, effective and equitable resolution of disputes arising under this Agreement;

Hereby agree as follows:
B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In EC – Poultry, Brazil argued before the Appellate Body that Articles 1.2 and 3.2 of the Licensing Agreement were not applicable to over-quota trade. In addressing these issues, the Appellate Body referred to the Preamble of the Licensing Agreement:

"The preamble to the Licensing Agreement stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'." ¹

II. ARTICLE 1

A. TEXT OF ARTICLE 1

Article 1

General Provisions

1. For the purpose of this Agreement, import licensing is defined as administrative procedures¹ used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member. (footnote original)¹ Those procedures referred to as "licensing" as well as other similar administrative procedures.

2. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members.² (footnote original)² Nothing in this Agreement shall be taken as implying that the basis, scope or duration of a measure being implemented by a licensing procedure is subject to question under this Agreement.

3. The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

4. (a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments² and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat. (footnote original)³ For the purpose of this Agreement, the term "governments" is deemed to include the competent authorities of the European Communities.

(b) Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion.

¹ Appellate Body Report on EC – Poultry, para. 121.
5. Application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application.

6. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of licence applications. Where there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies.

7. No application shall be refused for minor documentation errors which do not alter basic data contained therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.

8. Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice.

9. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders on the same basis as to importers of goods not requiring import licences.

10. With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply.

11. The provisions of this Agreement shall not require any Member 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.

B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Paragraph 1

(a) Scope of the Licensing Agreement

(i) Tariff quotas procedures

2. In EC – Bananas III, the Appellate Body considered that the European Communities licensing procedures for tariff quotas were within the scope of the Licensing Agreement. After quoting the definition of "import licensing" set out in Article 1.1, the Appellate Body concluded that licensing procedures for tariff quotas fell under the provisions of the Licensing Agreement:

"Although the precise terms of Article 1.1 do not say explicitly that licensing procedures for tariff quotas are within the scope of the Licensing Agreement, a careful reading of that provision leads inescapably to that conclusion. The EC import licensing procedures require 'the submission of an application' for import licences as 'a prior condition for importation' of a product at the lower, in-quota tariff rate. The fact that the importation of that product is possible at a high out-of-quota tariff rate without a licence does not alter the fact that a licence is required for importation at the lower in-quota tariff rate.

We note that Article 3.2 of the Licensing Agreement provides that:

'Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction.' (emphasis added)
We note also that Article 3.3 of the Licensing Agreement reads:

'>In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.' (emphasis added)

We see no reason to exclude import licensing procedures for the administration of tariff quotas from the scope of the Licensing Agreement on the basis of the use of the term 'restriction' in Article 3.2. We agree with the Panel that, in the light of the language of Article 3.3 of the Licensing Agreement and the introductory words of Article XI of the GATT 1994, the term 'restriction' as used in Article 3.2 should not be interpreted to encompass only quantitative restrictions, but should be read also to include tariff quotas.

For these reasons, we agree with the Panel that import licensing procedures for tariff quotas are within the scope of the Licensing Agreement.\(^2\)

(ii) Licensing procedures for over-quota trade

3. In EC – Poultry, the European Communities regulation at issue applied, by its terms, only to in-quota trade in frozen poultry meat. The Panel had found that "the Licensing Agreement, as applied to this particular case, only relates to in-quota trade."\(^3\) Brazil claimed that nothing in the text or context of Articles 1.2 and 3.2 of the Licensing Agreement limits to in-quota trade the requirement in Article 1.2 that licensing systems be implemented "with a view to preventing trade distortions" or the prohibition in Article 3.2 of additional trade-restrictive or trade-distortive effects. The Appellate Body stated as follows:

"The preamble to the Licensing Agreement stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'. Moreover, Articles 1.2 and 3.2 make it clear that the Licensing Agreement is also concerned, with, among other things, preventing trade distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the Licensing Agreement refers to any trade distortion that may be caused by the introduction or operation of licensing procedures, and is not necessarily limited to that part of trade to which the licensing procedures themselves apply. There may be situations where the operation of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to those procedures.

In the case before us, the licensing procedure established in Article 1 of Regulation 1431/94 applies, by its terms, only to in-quota trade in frozen poultry meat. No licensing is required by Regulation 1431/94 for out-of-quota trade in frozen poultry meat. To the extent that the Panel intended merely to reflect the fairly obvious fact that this licensing procedure applies only to in-quota trade, we uphold the finding of the Panel that '[t]he Licensing Agreement, as applied to this particular case, only relates to in-quota trade'.\(^4\)

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\(^3\) Panel Report on EC – Poultry, para. 249.

(iii) Licensing "rules"

4. In EC – Bananas III, the Appellate Body reversed the Panel's finding that Article 1.3 of the Licensing Agreement "preclude[s] the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members." In doing so, the Appellate Body drew a distinction between licensing rules per se, on the one hand, and their application and administration, on the other:

"By its very terms, Article 1.3 of the Licensing Agreement clearly applies to the application and administration of import licensing procedures, and requires that this application and administration be 'neutral ... fair and equitable'. Article 1.3 of the Licensing Agreement does not require the import licensing rules, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 – including the preamble, Article 1.1 and, in particular, Article 1.2 of the Licensing Agreement – supports the conclusion that Article 1.3 does not apply to import licensing rules. Article 1.2 provides, in relevant part, as follows:

'Members shall ensure that the administrative procedures used to implement import licensing régimes are in conformity with the relevant provisions of GATT 1994 ... as interpreted by this Agreement, ...'

As a matter of fact, none of the provisions of the Licensing Agreement concerns import licensing rules, per se. As is made clear by the title of the Licensing Agreement, it concerns import licensing procedures. The preamble of the Licensing Agreement indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the Licensing Agreement defines its scope as the administrative procedures used for the operation of import licensing regimes.

We conclude, therefore, that the Panel erred in finding that Article 1.3 of the Licensing Agreement precludes the imposition of different import licensing systems on like products when imported from different Members."

5. In Korea – Various Measures on Beef, the Panel followed the distinction between licensing rules per se and their administration, set out in the finding of the Appellate Body referenced in paragraph 4 above. The Panel examined the United States' claim that Korea's regulatory regime was inconsistent with Article 3.2 of the Licensing Agreement by granting exclusive authority to the LPMO and the SBS system to import beef, holding:

"[T]he Panel notes that many of the US claims regarding alleged violations of the Licensing Agreement are concerned with the substantive provisions of Korea's import (and distribution) regime (by the LPMO or SBS super-groups). It has been said repeatedly that such substantive matters are of no relevance to the Licensing Agreement which is concerned with the administrative rules of import licensing systems."

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For these reasons, the Panel does not reach any general conclusion on the compatibility of Korea's import licensing system with the WTO Agreement.

6. With respect to the distinction between licensing rules per se and their administration, see also paragraph 13 below.

2. Paragraph 2

(a) Interpretation

7. The Panel on EC – Bananas III addressed the issue of whether Article 1.2 in itself creates obligations additional to those arising from GATT. The Panel considered the historical developments of the GATT/WTO rules on licensing and concluded that, except for a reference to developing Members, "Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT" and "Article 1.2 … has lost most of its legal significance:

"[Article 1.2] derives from the 1979 Tokyo Round Agreement on Import Licensing Procedures which was negotiated as a self-standing agreement without a formal legal link to GATT 1947. Accordingly, membership was open not only to GATT contracting parties and the European Communities, but also to any other government. Therefore, provisions of GATT 1947 applied between the signatories of the 1979 Licensing Agreement, by virtue of that agreement, only to the extent that they had been explicitly referred to and incorporated into the 1979 Licensing Agreement. In this context, Articles 1.10 and 4.2 of the 1979 Licensing Agreement mention, inter alia, Articles XXI, XXII and XXIII of GATT 1947. Accordingly, the general rule that administrative procedures used to implement import licensing regimes had to conform with the relevant GATT provisions in fact added only to the obligations which any non-GATT contracting parties among the signatories of the 1979 Licensing Agreement would have been subject to.

The wording of Article 1.2 remained unchanged in the Uruguay Round. Given that the Agreement Establishing the WTO and all the agreements listed in Annexes 1 through 3 thereto constitute a single undertaking, however, Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT, except for the reference to developing country Members. Given this context, Article 1.2 of the WTO Licensing Agreement has lost most of its legal significance."

8. Despite its finding that Article 1.2 of the Licensing Agreement merely duplicates already existing obligations, the Panel recalled the principle of effective treaty interpretation:

"However, the Appellate Body has endorsed the principle of effective treaty interpretation by stating that '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'. In light of this, we have to give effect and meaning to Article 1.2 of the Licensing Agreement.

For this reason, to the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily

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8 Panel Report on Korea – Various Measures on Beef, paras. 784-785.
9 (original footnote) 1979 Licensing Agreement, Article 5.
also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement.\textsuperscript{12}

9. The Panel on EC – Bananas III also addressed the legal significance of the reference in Article 1.2 to developing country Members:

"With respect to Article 1.2's requirement that account should be taken of 'economic development purposes and financial and trade needs of developing country Members', the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members. In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2.

Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement."\textsuperscript{13}

10. In EC – Poultry, Brazil argued that the European Communities had violated the prohibition of trade distortion contained in Articles 1.2 and 3.2 of the Licensing Agreement. The Panel had rejected Brazil's claim. On appeal, Brazil argued that the Panel had failed to address or examine properly certain evidence, including evidence concerning Brazil's falling share of the poultry market in the European Communities, and had examined whether this falling market share was caused by the introduction of the European Communities licensing procedures for the tariff-rate quota for frozen poultry meat. The Appellate Body found that Brazil had failed to establish a causal link between the decline in market share and other indicators, on the one hand, and the licensing requirements at issue, on the other:

"Under Regulation 1431/94, Brazil's share in the EC tariff-rate quota for frozen poultry meat is 7,100 tonnes out of the total tariff-rate quota of 15,500 tonnes. This share is equal to approximately 45 per cent of the tariff-rate quota. This is the same as Brazil's percentage share of the total exports of frozen poultry meat to the European Communities during the reference period of the preceding three years. In addition, the Panel noted, licences issued by the European Communities for imports of frozen poultry meat from Brazil have been fully utilized. This means that Brazil's percentage share in the tariff-rate quota has remained at the same level as Brazil's share in the total trade over the relevant period. Moreover, the absolute volume of exports of frozen poultry meat by Brazil in the total exports of this product to the European Communities has been rising since the imposition of the tariff-rate quota for frozen poultry meat.

Brazil has not, in our view, clearly explained, either before the Panel or before us, how the licensing procedure caused the decline in market share. Brazil has not offered any persuasive evidence that its falling market share could, in this particular case – with a constant percentage share of the tariff-rate quota, full utilization of the tariff-rate quota and a growing total volume of exports – be viewed as constituting

\textsuperscript{12} Panel Report on EC – Bananas III, paras. 7.270-7.271.
trade distortion attributable to the licensing procedure. In other words, Brazil has not proven a violation of the prohibition of trade distortion in Articles 1.2 and 3.2 of the Licensing Agreement by the European Communities.

Brazil argues that the Panel did not consider a number of other arguments in its examination of the existence of trade distortion: that licences have been apportioned in non-economic quantities; that there have been frequent changes to the licensing rules; that licence entitlement has been based on export performance; and that there has been speculation in licences. These arguments, however, do not address the problem of establishing a causal relationship between imposition of the EC licensing procedure and the claimed trade distortion. Even if conceded arguendo, these arguments do not provide proof of the essential element of causation.

For these reasons, we uphold the finding of the Panel that Brazil has not established that the European Communities has acted inconsistently with either Article 1.2 or Article 3.2 of the Licensing Agreement.\(^{14}\)

11. With respect to the legal implication of Article 1.2 for interpreting the scope of the Licensing Agreement, see also the excerpt referenced in paragraph 3 above.

(b) Relationship with GATT provisions

12. With respect to the relationship between Article 1.2 and provisions of the GATT 1994, see paragraph 7 above.

3. Paragraph 3

(a) Import licensing on the basis of export performance

13. In EC – Poultry, the Panel, in a finding not reviewed by the Appellate Body, examined Brazil’s claim that the European Communities allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the Licensing Agreement:

"The requirement of export performance for the issuance of import licences on its face does seem unusual. However, Brazil has not elaborated on how the export performance requirement was administered and how it has affected the in-quota exports of poultry products from Brazil.

We also note that the Appellate Body in the Banana III case made the following observation:

'By its very terms, Article 1.3 of the Licensing Agreement clearly applies to the application and administration of import licensing procedures, and requires that this application and administration be 'neutral ... fair and equitable'. Article 1.3 of the Licensing Agreement does not require the import licensing rules, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 – including the preamble, Article 1.1 and, in particular, Article 1.2 of the Licensing Agreement - supports the conclusion that Article 1.3 does not apply to import licensing rules.'\(^ {15}\)

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\(^{15}\) (original footnote) Appellate Body Report on EC – Bananas III, para. 197.
In our view, the issue of licence entitlement based on export performance is clearly that of rules, not that of application or administration of import licensing procedures. Thus, Article 1.3 is not applicable on this specific issue.\textsuperscript{16}

14. With respect to the distinction between licensing rules \textit{per se} and their application, see also paragraph 4 above.

4. \textbf{Paragraph 4(a)}

(a) General

15. In \textit{EC – Poultry}, the Panel examined the claim that the European Communities had failed to notify the necessary information regarding the poultry tariff quotas to the Committee on Import Licensing under Article 1.4(a) of the \textit{Licensing Agreement}. The European Communities responded that it had not made a notification because it was unclear, prior to the Appellate Body report in the \textit{Banana III} case, whether the \textit{Licensing Agreement} applied to tariff rate quotas ("TRQs"). The Panel rejected the European Communities defence:

"While we note the EC's explanation for non-notification, we find this omission to be inconsistent with Article 1.4(a) of the Licensing Agreement. The fact that all the relevant information is published and that the administration of all agricultural TRQs in the EC has been notified to the WTO Committee on Agriculture does not in our view excuse the EC from notifying the sources of publication pursuant to this subparagraph."\textsuperscript{17}

16. Further, the Panel on \textit{EC – Poultry}, in a finding not addressed by the Appellate Body, rejected the claim by Brazil that frequent changes to the licensing rules and procedures regarding the poultry TRQ had made it difficult for governments and traders to become familiar with the rules, contrary to the provisions of Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d):

"We note that the transparency requirement under the cited provisions is limited to publication of rules and other relevant information. While we have sympathy for Brazil regarding the difficulties caused by frequent changes to the rules, we find that changes in rules \textit{per se} do not constitute a violation of Article 1.4, 3.3, 3.5(b), 3.5(c) or 3.5(d)."\textsuperscript{18}

(b) Procedures for notification and review

17. At its meeting of 12 October 1995, the Committee on Import Licensing agreed on procedures for notification and review under the \textit{Licensing Agreement}.\textsuperscript{19}

\textsuperscript{17} Panel Report on \textit{EC – Poultry}, para. 244.
\textsuperscript{18} Panel Report on \textit{EC – Poultry}, para. 246.
\textsuperscript{19} G/LIC/M/2, paras. 8-9, and 21-23. The text of the agreed procedures for notifications and review can be found in G/LIC/3, para. (1). Also, notifications filed under Article 1.4(a) and (Article 8.2(b)) are numbered G/LIC/N/1/-.
III. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Automatic Import Licensing

Those import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of paragraphs 1 and 2.

1. Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a).

2. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1 and paragraph 1 of this Article, shall apply to automatic import licensing procedures:

(a) automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing procedures shall be deemed to have trade-restricting effects unless, inter alia:

(i) any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences;

(ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods;

(iii) applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days;

(b) Members recognize that automatic import licensing may be necessary whenever other appropriate procedures are not available. Automatic import licensing may be maintained as long as the circumstances which gave rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. General

(a) Application of Article 2 to developing country Members

In its annual report for 1998, with reference to the delay in application, the Committee on Import Licensing stated the following:

"It was noted that the two-year period of delay allowed under the Agreement had expired for all these Members, and accordingly the obligations of Article 2.2(a)(ii) and (a)(iii) apply to all current WTO Members. It was recalled that the invocation of the above provisions did not exempt the Members concerned from the obligation to notify under the Agreement. The mandatory notifications included publications and legislation relevant to import licensing, and replies to the Questionnaire on Import Licensing Procedures by 30 September each year. Those Members that had not yet made the necessary notifications under the Agreement were urged to do so at the earliest opportunity."

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

Non-Automatic Import Licensing

1. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2.

2. Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

3. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.

4. Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published under paragraph 4 of Article 1 as well as information on how to make such a request and, to the extent possible, an indication of the circumstances under which requests would be considered.

5. (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning:

   (i) the administration of the restrictions;

   (ii) the import licences granted over a recent period;

   (iii) the distribution of such licences among supplying countries;

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20 G/LIC/1, and its addenda 1-3. The date in brackets indicates the date of entry into force of the WTO Agreement for the Member concerned. In this regard, with respect to the "date of entry into force of the WTO Agreement", see Chapter on WTO Agreement, paras. 219-221.

21 G/L/264, para. 8.
(iv) where practicable, import statistics (i.e. value and/or volume) with respect to
the products subject to import licensing. Developing country Members would
not be expected to take additional administrative or financial burdens on this
account;

(b) Members administering quotas by means of licensing shall publish the overall amount
of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change
thereof, within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable
governments and traders to become acquainted with them;

(c) in the case of quotas allocated among supplying countries, the Member applying the
restrictions shall promptly inform all other Members 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 publish this information within the time periods specified in paragraph 4 of Article 1
and in such a manner as to enable governments and traders to become acquainted with them;

(d) where situations arise which make it necessary to provide for an early opening date of
quotas, the information referred to in paragraph 4 of Article 1 should be published within the time-periods
specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to
become acquainted with them;

(e) any person, firm or institution which fulfils the legal and administrative requirements of
the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence
application is not approved, the applicant shall, on request, be given the reason therefor and shall have a
right of appeal or review in accordance with the domestic legislation or procedures of the importing
Member;

(f) the period for processing applications shall, except when not possible for reasons
outside the control of the Member, not be longer than 30 days if applications are considered as and when
received, i.e. on a first-come first-served basis, and no longer than 60 days if all applications are
considered simultaneously. In the latter case, the period for processing applications shall be considered to
begin on the day following the closing date of the announced application period;

(g) the period of licence validity shall be of reasonable duration and not be so short as to
preclude imports. The period of licence validity shall not preclude imports from distant sources, except in
special cases where imports are necessary to meet unforeseen short-term requirements;

(h) when administering quotas, Members shall not prevent importation from being effected
in accordance with the issued licences, and shall not discourage the full utilization of quotas;

(i) when issuing licences, Members shall take into account the desirability of issuing
licences for products in economic quantities;

(j) in allocating licences, the Member should consider the import performance of the
applicant. In this regard, consideration should be given as to whether licences issued to applicants in the
past have been fully utilized during a recent representative period. In cases where licences have not been
fully utilized, the Member shall examine the reasons for this and take these reasons into consideration
when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of
licences to new importers, taking into account the desirability of issuing licences for products in economic
quantities. In this regard, special consideration should be given to those importers importing products
originating in developing country Members and, in particular, the least-developed country Members;

(k) in the case of quotas administered through licences which are not allocated among
supplying countries, licence holders’ shall be free to choose the sources of imports. In the case of quotas
allocated among supplying countries, the licence shall clearly stipulate the country or countries;

(footnote original) Sometimes referred to as “quota holders”.
in applying paragraph 8 of Article 1, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

B. INTERPRETATION ANDAPPLICATION OFARTICLE 3

1. Paragraph 1

(a) Scope of Article 3

20. With respect to the scope of Article 3, see paragraphs 2, 3 and 5 above.

2. Paragraph 2

21. Regarding the application of Article 3.2, see paragraph 10 above.

22. With respect to the legal implication of Article 3.2 for the scope of the Licensing Agreement, see paragraph 3 above.

3. Paragraph 3

23. Concerning the issue of whether frequent changes in licensing procedures are inconsistent with Article 3.3, see paragraph 16 above.

4. Paragraph 5(a)

24. In _EC – Poultry_, Brazil argued on appeal that the Panel had erred in restricting Brazil's "comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement" to an analysis of Article 3.5(a) of the Licensing Agreement. The contention of Brazil was that "the administration of import licenses in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement." The Appellate Body, however, upheld the Panel's approach and the Panel's finding that the European Communities measure was not inconsistent with Article 3.5(a) of the Licensing Agreement:

"Brazil's notice of appeal contained no reference to a general issue of transparency in relation to the Licensing Agreement. However, Brazil argued in its appellant's submission that the Panel erred in restricting Brazil's 'comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement' to an analysis of Article 3.5(a) of the Licensing Agreement. The contention of Brazil is that 'the administration of import licenses in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement'.

Brazil argued before the Panel that 'underlying the Licensing Agreement was the principle of transparency.' Brazil submitted, in particular, that the European Communities was obliged under either Article 3.5(a)(iii) or (iv) of the Licensing Agreement to provide complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. According to Brazil, the European Communities failed to fulfil this obligation. The Panel found that Brazil had not demonstrated that the European Communities had violated either Article 3.5(a)(iii) or (iv) of the Licensing Agreement. In the light of the existence of express provisions in Article 3.5(a) of the Licensing Agreement relating to transparency on which the Panel did in fact make findings, we do not believe that the

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Panel erred by refraining from examining Brazil's 'comprehensive' claim relating to a general principle of transparency purportedly underlying the Licensing Agreement.\textsuperscript{23}

5. \textbf{Paragraph 5(b)}

With respect to the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(b), see paragraph 16 above.

6. \textbf{Paragraph 5(c)}

Regarding the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(c), see paragraph 16 above.

7. \textbf{Paragraph 5(d)}

Concerning the issue of whether frequent changes in licensing procedures are consistent with Article 3.5(d), see paragraph 16 above.

8. \textbf{Paragraph 5(h)}

In EC – Poultry, Brazil claimed that speculation in licences discouraged full utilization of the poultry TRQ in violation of Articles 3.5(h) and 3.5(j). The European Communities responded that licences awarded under the regulation at issue were non-transferable, so as to avoid such speculation. The Panel, in a finding not reviewed by the Appellate Body, rejected Brazil's claim:

"While it may be true that Brazilian exporters have had additional difficulties in exporting to the EC market due to the speculation in licences, we note that the licences allocated to imports from Brazil have been fully utilized. In other words, the speculation in licences has not discouraged the full utilization of the TRQ. Thus, we do not find that the EC has acted inconsistently with Articles 3.5(h) or 3.5(j) of the Licensing Agreement in this regard."\textsuperscript{24}

9. \textbf{Paragraph 5(i)}

In EC – Poultry, Brazil claimed that the allocation of licences where each applicant received a licence allowing imports of about 5 tonnes was inconsistent with Article 3.5(i) regarding issuance of licences in economic quantities. As a related matter, Brazil claimed that the absence of a newcomer provision in the regulation regarding the operation of the poultry TRQ was inconsistent with Article 3.5(j) of the Licensing Agreement. The European Communities responded that licences for the quantity of about 5 tonnes were indeed being issued to newcomers and that the allocation of licences in small quantities was made in response to an ever increasing number of importers. The Panel, in a finding not reviewed by the Appellate Body, responded:

"We note Brazil's argument that its exporters are facing difficulties in dealing with licences for small quantities, which is echoed in Thailand's third-party submission also. While the decline in the average quantity per licence may cause problems for traders, we note at the same time that the total TRQ has been fully utilized. The very fact that the licences have been fully utilized suggests to us that the quantities

\textsuperscript{23} Appellate Body Report on EC – Poultry, paras. 129-130.

\textsuperscript{24} Panel Report on EC – Poultry, para. 259.
involved are still 'economic', particularly in combination with the significant amount of the over-quota trade.\textsuperscript{25}

10. **Paragraph 5(j)**

30. The Panel on *EC – Poultry*, examined Brazil's claim that the European Communities allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the *Licensing Agreement*. While the Panel opined that "the requirement of export performance for the issuance of import licences on its face does seem unusual", it nevertheless held:

"[T]he provision of Article 3.5(j) in this regard is hortatory and does not necessarily prohibit the consideration of other factors than import performance.\textsuperscript{26}"

31. Also, the Panel addressed Brazil's claim that the absence of a newcomer provision in the regulation was inconsistent with Article 3.5(j) of the *Licensing Agreement*. See the excerpt referenced in paragraph 29 above.

32. With respect to the issue of speculation in licences, see paragraph 28 above.

C. **RELATIONSHIP WITH OTHER AGREEMENTS**

1. **GATT 1994**

33. In *Canada – Dairy*, the Panel addressed the United States' claim that Canada was in violation of Article II of *GATT 1994* and Article 3 of the *Licensing Agreement* because it restricted access to tariff quotas to certain cross-border imports by Canadians. Having found that the restriction was inconsistent with Article II:1(b) of *GATT 1994*, the Panel did not find it necessary to examine whether in so doing, Canada also violated Article 3 of the *Licensing Agreement*.\textsuperscript{27}

V. **ARTICLE 4**

A. **TEXT OF ARTICLE 4**

*Article 4*

*Institutions*

There is hereby established a Committee on Import Licensing composed of representatives from each of the Members. The Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary 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.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 4**

1. **Rules of procedure**

34. At its meeting of 1 December 1995, the Council for Trade in Goods approved the rules of procedure for meetings of the Committee on Import Licensing, where the Committee follows,

\textsuperscript{25} Panel Report on *EC – Poultry*, para. 262.

\textsuperscript{26} Panel Report on *EC – Poultry*, para. 255.

\textsuperscript{27} Panel Report on *Canada – Dairy*, para. 7.157.
mutatis mutandis, the rules of procedure for meetings of the General Council with certain exceptions.\textsuperscript{28} 

35. The Committee on Import Licensing held 13 meetings from 1 January 1995 to 30 June 2001.\textsuperscript{29} The Committee reported to the Council for Trade in Goods on an annual basis.\textsuperscript{30}

2. **Procedures for the review of notifications**

36. At its meeting on 23 October 1996, the Committee on Import Licensing adopted the Understanding on Procedures for the Review of Notifications Submitted under the Agreement on Import Licensing Procedures.\textsuperscript{31}

VI. **ARTICLE 5**

A. **TEXT OF ARTICLE 5**

**Article 5**

*Notification*

1. Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication.

2. Notifications of the institution of import licensing procedures shall include the following information:

   (a) list of products subject to licensing procedures;

   (b) contact point for information on eligibility;

   (c) administrative body(ies) for submission of applications;

   (d) date and name of publication where licensing procedures are published;

   (e) indication of whether the licensing procedure is automatic or non-automatic according to definitions contained in Articles 2 and 3;

   (f) in the case of automatic import licensing procedures, their administrative purpose;

   (g) in the case of non-automatic import licensing procedures, indication of the measure being implemented through the licensing procedure; and

   (h) expected duration of the licensing procedure if this can be estimated with some probability, and if not, reason why this information cannot be provided.

3. Notifications of changes in import licensing procedures shall indicate the elements mentioned above, if changes in such occur.

4. Members shall notify the Committee of the publication(s) in which the information required in paragraph 4 of Article 1 will be published.

5. Any interested Member which considers that another Member has not notified the institution of a licensing procedure or changes therein in accordance with the provisions of paragraphs 1 through 3 may

\textsuperscript{28} G/C/M/7, para. 2.2. The text of the adopted rules of procedure can be found in G/L/147.

\textsuperscript{29} The text of the adopted Understanding can be found in G/LIC/4.

\textsuperscript{30} The minutes are contained in documents G/LIC/M/1-13.

\textsuperscript{31} The reports are contained in documents G/L/29, 127, 203, 264, 336, 403.
bring the matter to the attention of such other Member. If notification is not made promptly thereafter, such Member may itself notify the licensing procedure or changes therein, including all relevant and available information.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. General

37. Since the entry into force of the WTO Agreement, the Committee on Import Licensing received, pursuant to Article 5 of the Agreement, 44 notifications. 32

2. Duplication or overlapping of notifications

38. On the question of possible duplication or overlapping of notifications, i.e. whether import licensing aspects associated with the administration of tariff quotas resulting from 'tariffication' in agriculture should be notified to the Committee on Import Licensing or to the Committee on Agriculture, at its meeting of 12 October 1995, the Committee on Import Licensing agreed as follows:

"[A]ll import licensing procedures, including those dealing with the administration of tariff quotas in agriculture, should be notified to the Committee on Import Licensing. Any problem that might arise relating to duplication or overlapping of notifications, as well as related questions of simplification, could be taken up as necessary, at the appropriate body, i.e. the Working Group on Notification Obligations and Procedures." 33

39. In its report to the Council for Trade in Goods, dated 21 August 1996, the Working Group on Notification Obligations and Procedures concluded that efforts to remove the possible duplication were not warranted. 34

40. At its meeting of 19 February 1998, the General Council adopted the following decision pursuant to the recommendation of the Council for Trade in Goods:

"The notification obligations resulting from the Decision of the CONTRACTING PARTIES to the GATT 1947 taken at their twenty-eighth Session in November 1972 (SR.28/6, item 3) to adopt the report of the Committee on Trade in Industrial Products, including the Committee's proposal regarding notification obligations on licensing systems (L/3756, paragraph 76), are hereby eliminated." 35

41. With regards to Procedures for the Review of Notifications, see the excerpt referenced in paragraph 36 above.

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32 These notifications may be found in document series G/LIC/N/2/.
33 G/LIC/M/2, paras. 21-23. With respect to the Working Group on Notification Obligations and Procedures, see the Chapter on the WTO Agreement, paras. 80-82.
34 G/NOP/W/16/Rev.1, paras. 25-28.
35 (original footnote) The paragraph reads as follows: "In addition, it [the Committee on Trade in Industrial Products] proposes to the Council that contracting parties should notify changes of licensing systems at the same time as notifications are made on import restrictions, i.e. 30 September of each year."
36 WT/L/261.
3. Counter-Notifications

42. With reference to Paragraph 5 of Article 5 of the Licensing Agreement addressing the issue of so-called counter-notifications, in its third biennial review, the Committee on Import Licensing noted that "[s]o far, the Committee has not received any notifications under this provision."37

VII. ARTICLE 6

A. Text of Article 6

Article 6

Consultation and Dispute Settlement

Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall be subject to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

B. Interpretation and Application of Article 6

43. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the Licensing Agreement were invoked:

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VIII. ARTICLE 7

A. Text of Article 7

Article 7

Review

1. The Committee shall review as necessary, but at least once every two years, the implementation and operation of this Agreement, taking into account the objectives thereof, and the rights and obligations contained therein.

37 G/LIC/7, fn. 8.

38 The Panel stated:

"A claim of violation of Article 3 of the Import Licensing Agreement is contained in the United States' request for establishment of a panel and thus, in our terms of reference. The United States, however, did not develop any legal arguments relating to such claim at any point of the proceedings, nor did it request a finding on the basis of that provision. We therefore do not address that claim."

Panel Report on India – Quantitative Restrictions, para. 5.16.
2. As a basis for the Committee review, the Secretariat shall prepare a factual report based on information provided under Article 5, responses to the annual questionnaire on import licensing procedures\(^3^9\) and other relevant reliable information which is available to it. This report shall provide a synopsis of the aforementioned information, in particular indicating any changes or developments during the period under review, and including any other information as agreed by the Committee.

3. Members undertake to complete the annual questionnaire on import licensing procedures promptly and in full.

4. The Committee shall inform the Council for Trade in Goods of developments during the period covered by such reviews.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 7**

1. **Paragraph 1**

44. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for review under Article 7.1 of the *Licensing Agreement*.\(^4^0\) At its meeting on 23 October 1996, the Committee concluded its first biennial review under Article 7.1 of the *Licensing Agreement*.\(^4^1\) At its meetings on 20 October 1998, the Committee concluded its second biennial review.\(^4^2\) At its meeting on 11 October 2000, the Committee concluded its third biennial review.\(^4^3\)

2. **Paragraph 3**

45. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for notification under Article 7.3 of the *Licensing Agreement*.\(^4^4\)

46. At the same meeting, the Committee agreed on the standard form of the annual questionnaire which Members are required to complete under Article 7.3.\(^4^5\)

IX. **ARTICLE 8**

A. **TEXT OF ARTICLE 8**

**Article 8**

*Final Provisions*

**Reservations**

1. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

**Domestic Legislation**

2. (a) Each Member shall 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.

\(^{3^9}\) (original footnote) Originally circulated as GATT 1947 document L/3515 of 23 March 1971.

\(^{4^0}\) G/LIC/M/2, paras. 34. The agreed rules are codified in G/LIC/3, para. 2.

\(^{4^1}\) G/LIC/M/4, paras. 46-49; see also G/LIC/5.

\(^{4^2}\) G/LIC/M/8, para. 4; see also G/LIC/6.

\(^{4^3}\) G/LIC/M/12, para. 5; see also G/LIC/7.

\(^{4^4}\) G/LIC/M/2, paras. 18-19. The agreed rules are codified in G/LIC/3, para. 3.

\(^{4^5}\) G/LIC/M/2, paras. 17-18. The form of the annual questionnaire can be found in G/LIC/2.
(b) 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 8

1. Procedures for Notification and Review

47. At its meeting on 12 October 1995, the Committee on Import Licensing agreed on procedures for notification under Article 8.2(b) of the Licensing Agreement.\(^{46}\)

48. With regard to Procedures for the Review of Notifications, see paragraph 36 above.

\(^{46}\) G/LIC/M/2, paras. 6-16. The agreed rules are set out in G/LIC/3, para. 4. Also, notifications filed under Article 8.2(b) (and Article 1.4(a)) are numbered G/LIC/N/1-.
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PART I: GENERAL PROVISIONS

I. ARTICLE 1

A. TEXT OF ARTICLE 1

Members hereby agree as follows:

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);\(^1\)

\(^1\) In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, 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.
(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Article 1.1(a)(1)

(a) "financial contribution"

1. With respect to the relationship with the term "benefit" under Article 1.1(b), see paragraphs 3, 18 and 25 below.

2. Article 1.1(a)(1)(i)

(a) Existence of a subsidy

2. On the issue of the existence of a subsidy, the Panel on Brazil – Aircraft, in a finding subsequently not addressed by the Appellate Body, rejected the argument that a subsidy exists only when a transfer of funds has actually been effectuated:

"[A]ccording to Article 1:1(i) a subsidy exists if a government practice involves a direct transfer of funds or a potential direct transfer of funds and not only when a government actually effectuates such a transfer or potential transfer (otherwise the text of (i) would read: 'a government directly transfers funds … or engages in potential direct transfers of funds or liabilities') … As soon as there is such a practice, a subsidy exists, and the question whether the practice involves a direct transfer of funds or a potential direct transfer of funds is not relevant to the existence of a subsidy. One or the other is sufficient. If subsidies were deemed to exist only once a direct or potential direct transfer of funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible."1

3. In its analysis of the form of "financial contribution" made by export subsidies, the Panel on Brazil – Aircraft stated that "a 'potential direct transfer of funds' exists only where the action in question gives rise to a benefit and thus confers a subsidy irrespective of whether any payment

occurs”, and that "the existence of a 'potential direct transfer of funds' does not depend upon the probability that a payment will subsequently occur." The Appellate Body criticized the Panel for not distinguishing clearly the concepts of "financial contribution" and "benefit":

"[T]he Panel compounded its error in finding that the 'financial contribution' … is not a 'potential direct transfer of funds' by reasoning that a letter of commitment does not confer a 'benefit'. In this way, in its interpretation of Article 1.1(a)(i), the Panel imported the notion of a 'benefit' into the definition of a 'financial contribution'. This was a mistake. We see the issues – and the respective definitions – of a 'financial contribution' and a 'benefit' as two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists, and not whether it is granted for the purpose of calculating the level of a developing country Member's export subsidies under Article 27.4 of that Agreement." (emphasis in original)

4. See also paragraphs 160-161 below.

3. Article 1.1(a)(i)(ii)

(a) "otherwise due is foregone"

5. In US – FSC, in interpreting the phrase "'foregoing' of revenue 'otherwise due'", the Appellate Body held that the term "otherwise" referred to a "normative benchmark" as established by the tax rules applied by the Member in question. The Appellate Body rejected the use of a benchmark other than the tax rules of the Member in question, holding that to do otherwise would be contrary to a Member's sovereignty of taxation:

"In our view, the 'foregoing' of revenue 'otherwise due' implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, 'otherwise'. Moreover, the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax all revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'. We, therefore, agree with the Panel that the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question. To accept the argument of the United States that the comparator in determining what is 'otherwise due' should be something other than the prevailing domestic standard of the Member in question would be to imply that WTO obligations somehow compel Members to choose a particular kind of tax system; this is not so. A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free not to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations. What is 'otherwise due', therefore,
depends on the rules of taxation that each Member, by its own choice, establishes for itself.\textsuperscript{6}

6. While largely upholding the Panel's findings on Article 1.1(a)(1)(ii) with respect to the interpretation of "government revenue foregone" which was "otherwise due", the Appellate Body expressed some reservations about the Panel's "but for" test. The Panel had interpreted the term "otherwise due" as referring to the situation that would prevail "but for" the United States' tax measures under consideration. The Panel held that it would determine whether, absent these measures, there would be a higher tax liability, meaning that it would examine the situation "that would exist but for the measure in question".\textsuperscript{7} The Appellate Body noted that this "but for" test established by the Panel was not actual treaty language and cautioned that the test may "not work in other cases":

"The Panel found that the term 'otherwise due' establishes a 'but for' test, in terms of which the appropriate basis of comparison for determining whether revenues are 'otherwise due' is 'the situation that would prevail but for the measures in question'.\textsuperscript{8}

In the present case, this legal standard provides a sound basis for comparison because it is not difficult to establish in what way the foreign-source income of an FSC would be taxed 'but for' the contested measure. However, we have certain abiding reservations about applying any legal standard, such as this 'but for' test, in the place of the actual treaty language. Moreover, we would have particular misgivings about using a 'but for' test if its application were limited to situations where there actually existed an alternative measure, under which the revenues in question would be taxed, absent the contested measure. It would, we believe, not be difficult to circumvent such a test by designing a tax regime under which there would be no general rule that applied formally to the revenues in question, absent the contested measures. We observe, therefore, that, although the Panel's 'but for' test works in this case, it may not work in other cases. We note, however, that, in this dispute, the European Communities does not contest either the Panel's interpretation of the term 'otherwise due' or the Panel's application of that term to the facts of this case. The United States also accepts the Panel's interpretation of that term as a general proposition."\textsuperscript{9}

7. In \textit{US – FSC}, the United States argued that footnote 59 to the \textit{SCM Agreement}, rather than Article 1.1, was the "controlling legal provision" for the definition of the term "subsidy".\textsuperscript{6} The Appellate Body rejected this argument, distinguishing between the general definition of the term "subsidy" under Article 1.1 and the specific regime which footnote 59 establishes with respect to a certain type of export subsidies:

"Article 1.1 sets forth the general definition of the term 'subsidy' which applies 'for the purpose of this Agreement'. This definition, therefore, applies wherever the word 'subsidy' occurs throughout the \textit{SCM Agreement} and conditions the application of the provisions of that Agreement regarding prohibited subsidies in Part II, actionable subsidies in Part III, non-actionable subsidies in Part IV and countervailing measures in Part V. By contrast, footnote 59 relates to one item in the Illustrative List of Export Subsidies. Even if footnote 59 means – as the United States also argues – that a measure, such as the FSC measure, is not a prohibited export subsidy, footnote 59 does not purport to establish an exception to the general definition of a 'subsidy'\textsuperscript{6}

\textsuperscript{6} Appellate Body Report on \textit{US – FSC}, para. 90. In \textit{Canada – Autos}, the Appellate Body applied these same principles to decide "whether government revenue that is otherwise due is foregone". Appellate Body Report on \textit{Canada – Autos}, para. 91.

\textsuperscript{7} Panel Report on \textit{US – FSC}, para. 7.45.

\textsuperscript{8} (footnote original) Panel Report on \textit{US – FSC}, para. 7.45.

otherwise applicable throughout the entire SCM Agreement. Under footnote 5 of the SCM Agreement, where the Illustrative List indicates that a measure is not a prohibited export subsidy, that measure is not deemed, for that reason alone, not to be a 'subsidy'. Rather, the measure is simply not prohibited under the Agreement. Other provisions of the SCM Agreement may, however, still apply to such a 'subsidy'.

8. After distinguishing between the general definition of a subsidy under Article 1.1 and the special regime applicable to a particular type of export subsidy pursuant to footnote 59, the Appellate Body opined that footnote 1 of the SCM Agreement was equally not relevant in the case at hand, given that the United States' measure at issue provided for exemptions from corporate income taxes:

"We note, moreover, that, under footnote 1 of the SCM Agreement, 'the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption … shall not be deemed to be a subsidy'. (emphasis added) The tax measures identified in footnote 1 as not constituting a 'subsidy' involve the exemption of exported products from product-based consumption taxes. The tax exemptions under the FSC measure relate to the taxation of corporations and not products. Footnote 1, therefore, does not cover measures such as the FSC measure.

9. In the Panel proceedings in US – FSC, the United States had argued that the term "otherwise due" must be interpreted in accordance with the 1981 Understanding adopted by the GATT Council in conjunction with four panel reports on tax legislation. The essence of the United States' argument was that the Understanding made clear that the exemption of foreign source income from taxation did not constitute the foregoing of revenue that is "otherwise due" and that the Understanding had been incorporated into GATT 1994 or, in the alternative, constituted "subsequent practice" in the application of GATT 1947 within the meaning of the Vienna Convention. The Panel had rejected this argument, stating that although the 1981 Understanding was a "decision" within the meaning of Article XVI:1 of the WTO Agreement, it could not "provide guidance in understanding detailed provisions of the SCM Agreement which did not exist at the time the understanding was adopted." The Appellate Body upheld the Panel's finding, but modified the reasoning. First, the Appellate Body examined and confirmed the Panel's finding that the 1981 Council action is not part of GATT 1994; in so doing, the Appellate Body considered whether the Council action is "another decision" within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the WTO Agreement. The Appellate Body rejected this claim, recalling its holding in Japan – Alcohol that GATT Panel reports are only binding as between the parties to the dispute; nevertheless, in the specific case at hand, it noted a certain ambiguity in this regard:

"The opening clause of the 1981 Council action states: 'The Council adopts these reports on the understanding that with respect to these cases, and in general …'. The 1981 Council action is, therefore, somewhat equivocal in tenor. On the one hand, it is clear from the text that the 1981 Council action relates specifically to the Tax Legislation Cases and is an integral part of the resolution of those disputes. This would suggest that, consistently with our Report in Japan – Alcoholic Beverages, the Council action is binding only on the parties to those disputes, and only for the purposes of those disputes.

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12 L/5271, BISD 28S/114.
On the other hand, we note that the opening clause of the 1981 Council action also prefaces the substance of the statement with the words 'in general'. The United States argues that these words indicate that the 1981 Council action was an 'authoritative interpretation' of Article XVI:4 of the GATT 1947 that has 'general' application and that, therefore, bound all the contracting parties…

[However], when the 1981 Council action was adopted, the Chairman of the GATT 1947 Council stated, inter alia, that 'the adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement.' In our view, if the contracting parties had intended to make an authoritative interpretation of Article XVI:4 of the GATT 1947, binding on all contracting parties, they would have said so in reasonably recognizable terms … Thus, we are of the view that the statement of the GATT 1947 Council Chairman is consistent with a reading of the 1981 Council action which views that action as an integral part of the resolution of the Tax Legislation Cases, binding only the parties to those disputes.

10. After upholding the Panel's finding that the 1981 Council action did not represent another decision within the meaning of Article 1(b)(iv) of the language incorporating GATT 1994 into the WTO Agreement, the Appellate Body proceeded to examine the status of the 1981 Council action as a "decision" within the meaning of Article XVI:1 of the WTO Agreement. In doing so, the Appellate Body had to address the relationship between Article XVI:4 of GATT 1994 and the SCM Agreement

"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. …

…

[T]he provisions of the SCM Agreement do not provide explicit assistance as to the relationship between the export subsidy provisions of the SCM Agreement and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the SCM Agreement and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the SCM Agreement, and, in particular, from the export subsidy provisions of both the SCM Agreement and the Agreement on Agriculture. First of all, the SCM Agreement contains an express definition of the term 'subsidy' which is not contained in Article XVI:4. In fact, as we have observed previously, the SCM Agreement contains a broad package of new export subsidy disciplines that 'go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the

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16 (footnote original) We note, however, that under Article 1.1(a)(2) of the SCM Agreement, a "subsidy" may exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994". This is a reference to Article XVI:1 and not Article XVI:4 of the GATT 1994. Footnote 1 of the SCM Agreement, which is attached to Article 1.1(a)(1)(ii) of that Agreement, also makes reference to Article XVI of the GATT 1994 in connection with "the exemption of an exported product from duties or taxes borne by like products destined for domestic consumption …". This is a reference to the Interpretative Note Ad Article XVI of the GATT and is not a specific reference to Article XVI:4 of the GATT 1994. This reference to the Interpretative Note also has no relevance to this dispute. These references do not, therefore, provide us with guidance in determining the relationship between the export subsidy provisions of the SCM Agreement and Article XVI:4 of the GATT 1994.
Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the 'comparable price charged for the like product to buyers in the domestic market.' In contrast, the SCM Agreement establishes a much broader prohibition against any subsidy which is 'contingent upon export performance'. To say the least, the rule contained in Article 3.1(a) of the SCM Agreement that all subsidies which are 'contingent upon export performance' are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to 'primary products', which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the Agreement on Agriculture must clearly take precedence over the exemption of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994.

Furthermore, as the Panel observed, the text of the 1981 Council action itself contains reference only to Article XVI:4, and the Chairman of the GATT 1947 Council stated expressly that the 1981 Council action did not affect the Tokyo Round Subsidies Code. We share the Panel's view that, in these circumstances, it would be incongruous to extend the scope of the action, beyond that intended, to the SCM Agreement. If the 1981 Council action did not affect the Tokyo Round Subsidies Code, which existed in 1981, it is difficult to see how that action could be seen to affect the SCM Agreement, which did not.\footnote{Appellate Body Report on \textit{US – FSC}, paras. 115 and 117-118.}

\begin{itemize}
  \item[(b)] \textbf{Footnote 1}

11. The measure at issue in the \textit{Canada – Autos} case consisted of the exemption of import duties for motor vehicles imported into Canada by Canadian car manufacturers who fulfilled certain conditions. The Appellate Body rejected the argument that the Canadian measure was "analogous" to the situation described in footnote 1."\footnote{Appellate Body Report on \textit{Brazil – Desiccated Coconut}, fn. 50.} The Appellate Body stated: "Footnote 1 … deals with duty and tax exemptions or remissions for exported products. The measure at issue applies, in contrast, to \textit{imports} … . For this reason we do not consider that footnote 1 bears upon the import duty exemption at issue in this case."\footnote{Appellate Body Report on \textit{Canada – Autos}, para. 92.}

12. With respect to the relationship with Article 1.1(b), see paragraph 3 above ("potential direct transfer of funds") and paragraphs 16 and 25 below ("ordinary meaning of 'benefit'").
\end{itemize}
4. **Article 1.1(b)**

(a) "benefit"

13. In *Canada – Aircraft*, the Appellate Body quoted approvingly the Panel's focus on the recipient of the subsidy in its interpretation of the term "benefit" under Article 1.1(b):[21]

"[T]he ordinary meaning of 'benefit' clearly encompasses some form of advantage. … In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a 'benefit', *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market. Accordingly, a financial contribution will only confer a "benefit", *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market."

14. The Panel further explained its reasons for rejecting an interpretation of benefit based on whether there was a "net cost" to the government[24] and focused rather on the recipient of the subsidy:

"[L]eaving aside situations of alleged 'income or price supports' within the meaning of Article 1.1(a)(2), we consider that a 'financial contribution' by a government or public body confers a 'benefit', and therefore constitutes a 'subsidy' within the meaning of Article 1 of the SCM Agreement, when it confers an advantage on the recipient relative to applicable commercial benchmarks, *i.e.*, when it is provided on terms that are more advantageous than those that would be available to the recipient on the market."[25]

15. The Panel added that interpreting the term "benefit" with a view to the granting government – rather than with a view to the recipient – was not consistent with the object and purpose of the SCM Agreement:

"[W]e note that the SCM Agreement does not contain any express statement of its object and purpose. We therefore consider it unwise to attach undue importance to arguments concerning the object and purpose of the SCM Agreement. In our view, however, the avoidance of net cost to government is not the object and purpose of the multilateral disciplines contained in the SCM Agreement. Rather, … we consider that the object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]'"[26]

16. The Appellate Body in *Canada – Aircraft* agreed with the Panel's findings. In so doing, it first considered the dictionary meaning of the term "benefit":

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[22] *(footnote original)* Panel Report, para. 9.112. The Panel confirmed its interpretation in similar terms in its conclusion at para. 9.120 of the Panel Report.
[24] Panel Report on *Canada – Aircraft*, para. 9.120.
[25] Panel Report on *Canada – Aircraft*, para. 9.120.
[26] Panel Report on *Canada – Aircraft*, para. 9.119, quoting from the Canada's submission.
"The dictionary meaning of 'benefit' is 'advantage', 'good', 'gift', 'profit', or, more generally, 'a favourable or helpful factor or circumstance'. Each of these alternative words or phrases gives flavour to the term 'benefit' and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that 'the ordinary meaning of 'benefit' clearly encompasses some form of advantage.' Clearly, however, dictionary meanings leave many interpretive questions open."\(^{27}\)

17. The Appellate Body then confirmed the Panel's focus on the recipient of a subsidy in determining the existence of a benefit:

"A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the SCM Agreement should be on the recipient and not on the granting authority. The ordinary meaning of the word 'confer', as used in Article 1.1(b), bears this out. 'Confer' means, \textit{inter alia}, 'give', 'grant' or 'bestow'. The use of the past participle 'conferred' in the passive form, in conjunction with the word 'thereby', naturally calls for an inquiry into what was conferred on the recipient. Accordingly, we believe that Canada's argument that 'cost to government' is one way of conceiving of 'benefit' is at odds with the ordinary meaning of Article 1.1(b), which focuses on the recipient and not on the government providing the 'financial contribution'.\(^{28}\)

18. The Appellate Body in \textit{Canada – Aircraft} finally held that a determination whether a benefit exists for the recipient of a subsidy implies a comparison with market conditions:

"We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."\(^{29}\)

19. The Panel on \textit{US – Lead and Bismuth II}, in its interpretation of the term "benefit" subsequently upheld by the Appellate Body, considered in addition Articles VI:3 of \textit{GATT 1994} and footnote 36 to Article 10 of the SCM Agreement:

"[T]he existence or non-existence of 'benefit' rests on whether the potential recipient or beneficiary, which 'logically' must be a legal or natural person, or group of persons, has received a 'financial contribution' on terms more favourable than those available to the potential recipient or beneficiary in the market. Moreover, in the particular context of countervailing duties, we believe that consideration should also be given to Article VI:3 of the GATT 1994, and footnote 36 to Article 10 of the SCM Agreement.

Article VI:3 of the GATT 1994 provides in relevant part:

'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.'

Footnote 36 to Article 10 of the SCM Agreement provides that:

'The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.'

These provisions state that countervailing duties levied on imported products are intended to offset (countervailable) subsidies found to have been bestowed on inter alia the production of such imported products. The notion of 'subsidy' comprises two elements: (1) 'financial contribution', and (2) 'benefit'. As noted above, 'benefit' is determined by reference to the terms on which a 'financial contribution' would have been made available to a particular legal or natural person, or group of persons, in the market. Full consideration of Article VI:3 of the GATT 1994 and footnote 36 to Article 10 of the SCM Agreement leads us to conclude that, in the context of countervailing duty investigations, the existence of a 'benefit' should be determined by reference to the market terms on which a 'financial contribution' bestowed directly or indirectly upon the production of any merchandise would have been made available to the producer of that merchandise.\(^{30}\)

20. In \textit{US – Lead and Bismuth II}, the European Communities challenged the administrative review of the imposition of countervailing duties by United States' authorities. The United States' investigating authorities had imposed countervailing duties on products of a company which had received subsidized equity infusions from the United Kingdom Government while still under state control, but for which a fair market value price had been paid in a subsequent privatization by the buyers. Both the equity infusion and the privatization had occurred prior to the initiation of the investigation of the United States' authorities. The applicable United States' statutory provisions contained an "irrebuttable presumption that nonrecurring subsidies benefit merchandise produced by the recipient over time", without requiring any re-evaluation of those subsidies based on the use or effect of those subsidies or subsequent events in the marketplace.\(^{31}\) As a consequence, the competent United States' authority examined whether "potentially allocable subsidies … could have travelled with the productive unit" following a change in ownership\(^{32}\) and concluded that a benefit indeed still existed, accruing to the new owners of the privatized corporation. In its report, the Panel first found that, in general, there could not be an irrebuttable presumption that a benefit "continues to flow from untied, non-recurring 'financial contributions', even after changes in ownership."\(^{33}\) The Panel then stated that it also failed to see how, in the specific case at hand, the new owners of the producing facility could be deemed to have obtained a benefit by previous subsidies bestowed upon the enterprise, if a fair market value had been paid for all productive assets in the course of the

\(^{30}\) Panel Report on \textit{US – Lead and Bismuth II}, paras. 6.66-6.69.

\(^{31}\) Panel Report on \textit{US – Lead and Bismuth II}, para. 6.59, quoting from the United States' submission.

\(^{32}\) Remand Determination of US Department of Commerce on General Issues of Privatization, Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, 12 October 1993 (unpublished), page 5. We note that at page 6240 of its 27 January 1993 determination, the USDOC stated that "as [a subsidized] company disposes of its productive entities, these entities take a portion of the [subsidy] benefits with them when they 'travel to their new home'."

\(^{33}\) Panel Report on \textit{US – Lead and Bismuth II}, para. 6.71.
privatization.\textsuperscript{34} Upon appeal, the Appellate Body held that it saw "no error in the Panel's conclusion".\textsuperscript{35}

21. Discussing the payment of value by owners of companies, rather than the companies themselves, the Panel on \textit{US – Lead and Bismuth II}, in a statement not addressed by the Appellate Body, held that "\[i\]n the context of privatizations negotiated at arm's length, for fair market value, and consistent with commercial principles, the distinction between a company and its owners is redundant for the purpose of establishing 'benefit'".\textsuperscript{36}

22. In \textit{Brazil – Aircraft}, the Appellate Body rejected the Panel's interpretation of the "material advantage" clause in item (k) of the Illustrative List of Export Subsidies as effectively the same interpretation of the term "benefit" in Article 1.1(b) adopted by the Panel on \textit{Canada – Aircraft}.\textsuperscript{37} See paragraph 219 below.

(b) "is … conferred"

23. In \textit{US – Lead and Bismuth II}, the United States argued that the present tense of the verb "is conferred" in Article 1.1 of the \textit{SCM Agreement} shows that an investigating authority must demonstrate the existence of "benefit" only at the time the "financial contribution" was made.\textsuperscript{38} The consequence of this argument was that an investigating authority would not be required to make a finding of benefit in a (subsequent) review of the countervailing measure. The Appellate Body in \textit{US – Lead and Bismuth II} rejected this holding that "Article 1.1 does not address the time at which the 'financial contribution' and/or the 'benefit' must be shown to exist."\textsuperscript{39}

(c) Rebuttal of a prima facie case of subsidization

24. Considering whether a party has rebutted a prima facie case of subsidization established against it, the Panel on \textit{Canada – Aircraft} stated:

"In order to rebut the \textit{prima facie} case of 'benefit', we consider that Canada must do more than simply demonstrate that the amount of specific 'benefit' estimated by Brazil may be incorrect, or that TPC's rate of return covers Canada's cost of funds. Rather, Canada must demonstrate that no 'benefit' is conferred, in the sense that the terms of the contribution provide for a commercial rate of return."\textsuperscript{40}

(d) Relationship with other Articles in the SCM Agreement

(i) \textit{Article 1.1(a)(1)}

25. The Appellate Body in \textit{Canada – Aircraft} found Article 1.1(a)(1) a relevant context for interpreting the term "benefit" in Article 1.1(b):

"The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the 'benefit' to the recipient, and not with the 'cost to government'. The definition of 'subsidy' in Article 1.1 has two discrete elements: 'a financial contribution by a government or any public body' and 'a benefit is thereby conferred'. The first element of this definition is concerned with whether the \textit{government} made a

\textsuperscript{34} Panel Report on \textit{US – Lead and Bismuth II}, para. 6.81.
\textsuperscript{35} Appellate Body on \textit{US – Lead and Bismuth II}, para. 68.
\textsuperscript{36} Panel Report on \textit{US – Lead and Bismuth II}, para. 6.82.
\textsuperscript{37} Appellate Body Report on \textit{Brazil – Aircraft}, para. 179.
\textsuperscript{38} Appellate Body Report on \textit{US – Lead and Bismuth II}, para. 12.
\textsuperscript{39} Appellate Body Report on \textit{US – Lead and Bismuth II}, para. 60.
\textsuperscript{40} Panel Report on \textit{Canada – Aircraft}, para. 9.312.
'financial contribution', as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the 'financial contribution'. That being so, it seems to us logical that the second element in Article 1.1 is concerned with the 'benefit... conferred' on the recipient by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a 'subsidy' by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that 'cost to government' is relevant to the question of whether there is a 'benefit' to the recipient under Article 1.1(b) disregards the overall structure of Article 1.1.\(^41\)

(ii) Article 14

26. Both the Panel and the Appellate Body in Canada – Aircraft held that Article 14 was relevant context for interpretation of the term "benefit". The Appellate Body noted the explicit reference to Article 1.1 contained in Article 14:

"Although the opening words of Article 14 state that the guidelines it establishes apply '[f]or the purposes of Part V' of the SCM Agreement, which relates to 'countervailing measures', our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the 'benefit to the recipient' conferred pursuant to paragraph 1 of Article 1. (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that 'benefit' is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to 'benefit to the recipient' in Article 14 also implies that the word 'benefit', as used in Article 1.1, is concerned with the 'benefit to the recipient' and not with the 'cost to government' … .

…

Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."\(^42\)

(iii) Annex I, Item (k)

27. The Panel on Canada – Aircraft rejected the use of item (k) in the interpretation of the term "benefit". The Panel noted:

"[W]e are unable to accept … [the] argument that item (k) of the Illustrative List of Annex I of the SCM Agreement constitutes contextual guidance for determining the existence of 'benefit' in the specific context of government credit under Article 1. In our view, item (k) of the Illustrative List applies in determining whether or not a prohibited export subsidy exists. We do not consider … that item (k) determines whether or not a 'subsidy' exists within the meaning of Article 1 of the SCM Agreement."\(^43\)

\(^{41}\) Appellate Body Report on Canada – Aircraft, para. 156.
\(^{42}\) Appellate Body Report on Canada – Aircraft, paras. 155 and 158.
\(^{43}\) Panel Report on Canada – Aircraft, para. 9.117.
28. See paragraph 218 below.

(iv) Annex IV.1

29. The Appellate Body on Canada – Aircraft agreed with the Panel "that Annex IV is not useful context for interpreting Article 1.1(b),"\(^{44}\) stating:

"We fail to see the relevance of this provision to the interpretation of 'benefit' in Article 1.1(b) of the SCM Agreement. Annex IV provides a method for calculating the total ad valorem subsidization of a product under the 'serious prejudice' provisions of Article 6 of the SCM Agreement, with a view to determining whether a subsidy is used in such a manner as to have 'adverse effects'. Annex IV, therefore, has nothing to do with whether a 'benefit' has been conferred, nor with whether a measure constitutes a subsidy within the meaning of Article 1.1."\(^{45}\)

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(footnote original)\(^2\) Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.\(^3\) In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

(footnote original)\(^3\) In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

\(^{44}\) Appellate Body Report on Canada – Aircraft, para. 159.

\(^{45}\) Appellate Body Report on Canada – Aircraft, para. 159.
2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. Relationship with other Articles

(a) Article 3

30. The SCM Agreement prohibits, under Article 3, export contingent subsidies or subsidies contingent upon the use of domestic products over imported products. Article 2.3 establishes an irrefutable presumption that such subsidies are specific. For the most part, however, panels and the Appellate Body do not refer to Article 2.3 to emphasize the specificity when making a finding of a prohibited subsidy under Article 3. Rather, such findings simply build on the fact that Article 3 prohibits export contingent subsidies and subsidies upon the use of domestic over imported goods. However, pursuant to Articles 27.2 and 27.3, developing country Members are entitled to special and differential treatment in that the prohibitions of Article 3 do not apply to them within certain time-periods from the date of entry into force of the WTO Agreement. As a consequence, subsidies contingent upon export performance and upon the use of domestic over imported goods are, when granted by qualifying developing country Members, merely actionable rather than prohibited subsidies. As a result, these subsidies will be inconsistent with the SCM Agreement only if, among other things, they are specific within the meaning of Article 2. The Panel in Indonesia – Autos, therefore, was called upon to decide whether the Indonesian subsidies contingent upon the use of domestic over imported goods were specific:

"As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2 … In this case, the European Communities, the United States and Indonesia agree that these measures are specific subsidies within the meaning of those articles … Further, the European Communities, the United States and Indonesia agree that these subsidies are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b), and that they are therefore deemed to be specific pursuant to Article 2.3 of the Agreement. In light of the views of the parties, and given that nothing in the record would compel a different conclusion, we find that the measures in question are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement"46

PART II: PROHIBITED SUBSIDIES

III. ARTICLE 3

A. TEXT OF ARTICLE 3

*Article 3*

Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact⁴, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I⁵;

(footnote original) ⁴ This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

(footnote original) ⁵ Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

B. INTERPRETATION AND APPLICATION 3

1. Article 3.1(a)

(a) "contingent in law … upon export performance"

31. In *Canada – Autos*, the Appellate Body addressed the precise distinction between a *de jure* and a *de facto* subsidy with reference to the wording of a particular measure:

"In our view, a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure."⁴⁷

⁴⁷ Appellate Body Report on *Canada – Autos*, para. 100.
32. The Appellate Body in *Canada – Autos* concluded that "as the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles, the import duty exemption is clearly conditional, or dependent upon, exportation and, therefore, is contrary to Article 3.1(a)."48

33. Before the Panel on *Canada – Aircraft*, Canada stated that the mandate of one of its agencies was "to offer a full range of risk management services and financing products 'for the purpose of supporting and developing, directly or indirectly, Canada’s export trade'"49. Basing itself on this statement by Canada, the Panel held that "export credits granted 'for the purpose of supporting and developing, directly or indirectly, Canada's export trade' are expressly contingent in law on export performance."50

34. In examining whether a subsidy is contingent "in law" upon export performance, the Appellate Body in *Canada – Autos* noted that "footnote 4 ... uses the words 'tied to' as a synonym for 'contingent' or 'conditional'. As the legal standard is the same for *de facto* and *de jure* export contingency, we believe that a 'tie', amounting to the relationship of contingency, between the granting of the subsidy and actual or anticipated exportation meets the legal standard of'contingent' in Article 3.1(a) ... ."51

(b) "contingent … in fact… upon export performance"

(i) contingency

35. Regarding the interpretation of the term "contingent … in fact", the Panel in *Australia – Automotive Leather II* established a standard of "close connection" between the grant or maintenance of a subsidy and export performance. It added that a subsidy, in order to be export contingent in fact, must be "conditioned" upon export:

"An inquiry into the meaning of the term 'contingent … in fact' in Article 3.1(a) of the SCM Agreement must, therefore, begin with an examination of the ordinary meaning of the word 'contingent'. The ordinary meaning of 'contingent' is 'dependent for its existence on something else', 'conditional; dependent on, upon'. The text of Article 3.1(a) also includes footnote 4, which states that the standard of 'in fact' contingency is met if the facts demonstrate that the subsidy is 'in fact tied to actual or anticipated exportation or export earnings'. The ordinary meaning of 'tied to' is 'restrain or constrain to or from an action; limit or restrict as to behaviour, location, conditions, etc.'. Both of the terms used – 'contingent … in fact' and 'in fact tied to' – suggest an interpretation that requires a close connection between the grant or maintenance of a subsidy and export performance."52

36. In *Canada – Aircraft*, the Panel also considered the "tied to" language of footnote 4 to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance.53 In order to assess whether such conditionality existed, the Panel held that it would be necessary to determine "whether the facts demonstrate that [the Canadian Government's] assistance would not have been granted to the regional aircraft industry but for anticipated exportation or export earnings."54 (original emphasis) The Appellate Body agreed with the term "conditioned" and linked it to the concept of contingency under Article 3.1(a):

48 Appellate Body Report on *Canada – Autos*, para. 104.
49 Panel Report on *Canada – Aircraft*, para. 6.52.
52 Panel Report on *Australia – Automotive Leather II*, para. 9.55.
54 Panel Report on *Canada – Aircraft*, para. 9.332.
"The ordinary meaning of 'tied to' confirms the linkage of 'contingency' with 'conditionality' in Article 3.1(a). Among the many meanings of the verb 'tie', we believe that, in this instance, because the word 'tie' is immediately followed by the word 'to' in footnote 4, the relevant ordinary meaning of 'tie' must be to 'limit or restrict as to ... conditions'. This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must 'demonstrate' that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are contingent upon export performance.\(^{55}\)

37. While the Appellate Body in Canada – Aircraft largely agreed with the findings of the Panel on the interpretation of the term "contingency", it nevertheless criticized the "but for" test established by the Panel on the basis of the term "tied to":

"We note that the Panel considered that the most effective means of demonstrating whether a subsidy is contingent in fact upon export performance is to examine whether the subsidy would have been granted but for the anticipated exportation or export earnings ... . While we consider that the Panel did not err in its overall approach to de facto export contingency, we, and panels as well, must interpret and apply the language actually used in the treaty.\(^{56}\)

38. The Appellate Body in Canada – Aircraft then provided its own reasoning with respect to the ordinary meaning of the text "contingent ... in fact ... on export performance": In doing so, it first emphasized the term "contingent" as a "key word", held that the legal standard encapsulated by this term is the same for both de jure or de facto contingency and framed the distinction between these two types of contingency in terms of the evidence upon which such determination would rest:

"In our view, the key word in Article 3.1(a) is 'contingent'. As the Panel observed, the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else'. This common understanding of the word 'contingent' is borne out by the text of Article 3.1(a), which makes an explicit link between 'contingency' and 'conditionality' in stating that export contingency can be the sole or 'one of several other conditions'.

... In our view, the legal standard expressed by the word 'contingent' is the same for both de jure or de facto contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving de facto export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is contingent in fact ... upon export performance. Instead, the existence of the relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.\(^{57}\)

\(^{55}\) Appellate Body Report on Canada – Aircraft, para. 171.
\(^{56}\) Appellate Body Report on Canada – Aircraft, para. 171, footnote 102.
\(^{57}\) Appellate Body Report on Canada – Aircraft, paras. 166-167.
39. Next, the Appellate Body in Canada – Aircraft examined footnote 4 more closely as "a standard … for determining when a subsidy is 'contingent … in fact … upon export performance'". It identified three elements, i.e. "granting of a subsidy", "tied to" and "anticipated":

"We note that satisfaction of the standard for determining de facto export contingency set out in footnote 4 requires proof of three different substantive elements: first, the 'granting of a subsidy'; second, 'is … tied to …'; and, third, 'actual or anticipated exportation or export earnings'. (emphasis added) … .

The first element of the standard for determining de facto export contingency is the 'granting of a subsidy'. In our view, the initial inquiry must be on whether the granting authority imposed a condition based on export performance in providing the subsidy. In the words of Article 3.2 and footnote 4, the prohibition is on the 'granting of a subsidy', and not on receiving it. The treaty obligation is imposed on the granting Member, and not on the recipient. Consequently, we do not agree … that an analysis of 'contingent … in fact … upon export performance' should focus on the reasonable knowledge of the recipient. 58

The second substantive element in footnote 4 is 'tied to'. The ordinary meaning of 'tied to' confirms the linkage of 'contingency' with 'conditionality' in Article 3.1(a). Among the many meanings of the verb 'tie', we believe that, in this instance, because the word 'tie' is immediately followed by the word 'to' in footnote 4, the relevant ordinary meaning of 'tie' must be to 'limit or restrict as to … conditions'. This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must 'demonstrate' that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports will result. The prohibition in Article 3.1(a) applies to subsidies that are contingent upon export performance.

We turn now to the third substantive element provided in footnote 4. The dictionary meaning of the word 'anticipated' is 'expected'. The use of this word, however, does not transform the standard for 'contingent … in fact' into a standard merely for ascertaining 'expectations' of exports on the part of the granting authority. Whether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence. This examination is quite separate from, and should not be confused with, the examination of whether a subsidy is 'tied to' actual or anticipated exports. A subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is tied to the anticipation of exportation." 59

40. The Panel in Canada – Aircraft, in a statement not specifically addressed by the Appellate Body, also noted that "the nature of the required conditionality [is] that 'one of the conditions for the grant of the subsidy is the expectation that exports will flow thereby'". 60 In the case at hand, the Panel came to the conclusion that "the facts available demonstrate that one of the conditions of the grant of

58 (footnote original) In finding that the knowledge of the recipient is not part of the legal standard of de facto export contingency, we do not suggest that relevant objective evidence relating to the recipient can never be considered by a panel.


60 Panel Report on Canada – Aircraft, para. 9.326.
… contributions to the … industry is indeed such an expectation, in the form of projected export sales anticipated to 'flow' directly from these contributions.\textsuperscript{61}

(ii) Treatment of facts in the determination of de facto export contingency

41. The Panel in \textit{Australia – Automotive Leather II} held that it was required "to examine all the facts concerning the grant or maintenance of the challenged subsidy", emphasizing that the Panel was not precluded from considering any particular fact. The Panel also held that the specific facts to be considered will vary on a case-by-case basis:

"In our view, the concept of 'contingent … in fact … upon export performance', and the language of footnote 4 of the SCM Agreement, require us to examine all of the facts that actually surround the granting or maintenance of the subsidy in question, including the terms and structure of the subsidy, and the circumstances under which it was granted or maintained. A determination whether a subsidy is in fact contingent upon export performance cannot, in our view, be limited to an examination of the terms of the legal instruments or the administrative arrangements providing for the granting or maintenance of the subsidy in question. Such a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a), and render meaningless the distinction between 'in fact' and 'in law' contingency. Moreover, while the second sentence of footnote 4 makes clear that the mere fact that a subsidy is granted to enterprises which export cannot be the sole basis for concluding that a subsidy is 'in fact' contingent upon export performance, it does not preclude the consideration of that fact in a panel's analysis. Nor does it preclude consideration of the level of a particular company's exports. This suggests to us that factors other than the specific legal or administrative arrangements governing the granting or maintenance of the subsidy in question must be considered in determining whether a subsidy is 'in fact' contingent upon export performance.

Based on the explicit language of Article 3.1(a) and footnote 4 of the SCM Agreement, in our view the determination of whether a subsidy is 'contingent … in fact' upon export performance requires us to examine all the facts concerning the grant or maintenance of the challenged subsidy, including the nature of the subsidy, its structure and operation, and the circumstances in which it was provided. In this context, Article 11 of the DSU requires a panel to make an objective assessment of the facts of the case. Obviously, the facts to be considered will depend on the specific circumstances of the subsidy in question, and will vary from case to case. In our view, all facts surrounding the grant and/or maintenance of the subsidy in question may be taken into consideration in the analysis. However, taken together, the facts considered must demonstrate that the grant or maintenance of the subsidy is conditioned upon actual or anticipated exportation or export earnings. The outcome of this analysis will obviously turn on the specific facts relating to each subsidy examined."\textsuperscript{62}

42. The Panel on \textit{Canada – Aircraft}, in a finding later expressly endorsed by the Appellate Body\textsuperscript{63}, confirmed this broad and case-by-case approach to the factual analysis of the Panel on \textit{Australia – Automotive Leather II}. While it also emphasized that no factual considerations should prevail over others, it pointed out that its finding that a broad range of facts should be considered as relevant did not mean that "the de facto export contingency standard is easily met":

\textsuperscript{61} Panel Report on \textit{Canada – Aircraft}, para. 9.346.
\textsuperscript{62} Panel Report on \textit{Australia – Automotive Leather II}, paras. 9.56-9.57.
\textsuperscript{63} Appellate Body Report on \textit{Canada – Aircraft}, para. 169.
"In our view, no fact should automatically be rejected when considering whether the facts demonstrate that a subsidy would not have been granted but for anticipated exportation or export earnings. We note that footnote 4 provides that the 'facts' must demonstrate *de facto* export contingency. Footnote 4 therefore refers to 'facts' in general, without any suggestion that certain factual considerations should prevail over others. In our opinion, it is clear from the ordinary meaning of footnote 4 that any fact could be relevant, provided it 'demonstrates' (either individually or in conjunction with other facts) whether or not a subsidy would have been granted but for anticipated exportation or export earnings. We consider that this is true of the export-orientation of the recipient, or of the reason for the grant of the subsidy, just as it is true of a host of other facts potentially surrounding the grant of the subsidy in question. In any given case, the relative importance of each fact can only be determined in the context of that case, and not on the basis of generalities.

We would emphasise, however, that our finding that a broad range of facts could be relevant in this context does not mean that the *de facto* export contingency standard is easily met. On the contrary, footnote 4 of the SCM Agreement makes it clear that the facts must "demonstrate" *de facto* export contingency. That is, *de facto* export contingency must be demonstrable on the basis of the factual evidence adduced.

43. The Panel in *Australia – Automotive Leather II* drew a temporal limit to this broad standard of factual analysis. It opined that "the pertinent consideration is the facts at the time the conditions for the grant payments were established, and not possible subsequent developments." \(^{64}\)

44. The Appellate Body expressly endorsed and strengthened the finding of the Panel on *Canada – Aircraft* that the fact that a subsidy is granted to enterprises which export may be considered in a determination whether or not a subsidy is *de facto* export contingent, but that this "does not mean that export-orientation alone can necessarily be determinative." \(^{65}\) (In a finding on the same issue, the Panel on *Australia – Automotive Leather II* had held that "the fact of exportation cannot be the sole determinative fact in the evaluation" \(^{66}\):)

"There is a logical relationship between the second sentence of footnote 4 and the 'tied to' requirement set forth in the first sentence of that footnote. The second sentence of footnote 4 precludes a panel from making a finding of *de facto* export contingency for the sole reason that the subsidy is 'granted to enterprises which export'. In our view, merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports. The second sentence of footnote 4 is, therefore, a specific expression of the requirement in the first sentence to demonstrate the 'tied to' requirement. We agree with the Panel that, under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as a relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding." \(^{67}\)

45. The Panel on *Australia – Automotive Leather II* also considered the extent to which circumstances surrounding a loan contract can be facts, on the basis of which, the determination of an export contingent subsidy can be made:

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\(^{64}\) Panel Report on *Australia – Automotive Leather II*, para. 9.70.  
\(^{65}\) Panel Report on *Canada – Aircraft*, para. 9.336.  
\(^{66}\) Panel Report on *Australia – Automotive Leather II*, para. 9.66.  
\(^{67}\) Appellate Body Report on *Canada – Aircraft*, para. 173.
"[T]he mere fact that one possible source of funds to pay off the loan is potential export earnings is insufficient to conclude that the loan was contingent in fact upon anticipated exportation or export earnings. … We recognize that other facts are relevant to our consideration of the nature of the loan contract. Included among these is the significance of exports in Howe's business, and the fact that loan was part of the overall 'assistance package' given to Howe, which Australia acknowledged would probably not have occurred if Howe had not been removed from eligibility under the … programmes. … Moreover, there is nothing in the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings … . These factors persuade us that there is not a sufficiently close tie between the loan and anticipated exportation or export earnings."\textsuperscript{68}

46. The Appellate Body in \textit{Canada – Aircraft} summarized the factual considerations taken into account by the Panel to establish whether TPC assistance to the Canadian regional aircraft industry is "contingent … in fact … upon export performance", in the sense of being "tied to … anticipated exportation or export earnings".\textsuperscript{69} The Appellate Body stated:

"[T]he Panel took into account sixteen different factual elements, which covered a variety of matters, including: TPC's statement of its overall objectives; types of information called for in applications for TPC funding; the considerations, or eligibility criteria, employed by TPC in deciding whether to grant assistance; factors to be identified by TPC officials in making recommendations about applications for funding; TPC's record of funding in the export field, generally, and in the aerospace and defence sector, in particular; the nearness-to-the-export-market of the projects funded; the importance of projected export sales by applicants to TPC's funding decisions; and the export orientation of the firms or the industry supported."\textsuperscript{70}

47. While the Panel on \textit{Canada – Aircraft} found that no one factual consideration should prevail over others in the determination of de facto export contingency, it nevertheless held that "the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings." In this respect, the Panel noted that subsidies for "pure research" or "for general purposes such as improving efficiency or adopting new technology" would be less likely to give rise to de facto export contingency than "subsidies that directly assist companies in bringing specific products to the (export) market."\textsuperscript{71} The Appellate Body did not object to the consideration of this factor by the Panel, but cautioned that "the mere presence … of this factor" will not create "a presumption that a subsidy is 'de facto' contingent upon export performance":

"We recall that the Panel added that 'the further removed a subsidy is from sales on the export market, the less the possibility that the facts may demonstrate that the subsidy' is 'contingent … in fact … upon export performance'. (emphasis added) By these statements, the Panel appears to us to apply what could be read to be a legal presumption. While we agree that this nearness-to-the-export-market factor may, in certain circumstances, be a relevant fact, we do not believe that it should be regarded as a legal presumption. It is, for instance, no 'less … possible' that the facts, taken together, may demonstrate that a pre-production subsidy for research and development is 'contingent … in fact … upon export performance'. If a panel takes this factor into account, it should treat it with considerable caution. In our opinion, the mere presence or absence of this factor in any given case does not give rise to a

\textsuperscript{68} Panel Report on \textit{Australia – Automotive Leather II}, para. 9.75.
\textsuperscript{69} Appellate Body Report on \textit{Canada – Aircraft}, para. 115.
\textsuperscript{70} Appellate Body Report on \textit{Canada – Aircraft}, para. 175.
presumption that a subsidy is or is not de facto contingent upon export performance. The legal standard to be applied remains the same: it is necessary to establish each of the three substantive elements in footnote 4.\(^{72}\)

48. With respect to the three substantive elements in footnote 4 as identified by the Appellate Body, see paragraph 39 above.

49. The Panel on Canada – Aircraft (Article 21.5 – Brazil), in a finding not specifically addressed by the Appellate Body, drew a distinction between "general technological or economic benefits" on the one hand and "export performance" on the other:

"Thus, whereas TPC assistance is conditional on a project having certain technological or net economic benefits …, in our view this simply cannot be assumed to be synonymous with export performance, and therefore it does not mean ipso facto that such assistance is contingent on export performance. This remains true even though TPC administrators know that fulfilment of net economic benefits in certain cases may be likely to result in increased exports. The fact that they will have no concrete quantifiable information on exports in our view will act in practical terms to limit their discretion to select projects on the basis of export performance."\(^{73}\)

50. The Panel on Canada – Aircraft rejected the argument that the subsidy programme at issue was not conditional on exports taking place on the grounds that "there are no penalties if export sales are not realised."\(^{74}\) The Panel supported its rejection with the following statement:

"While this argument may be relevant in determining whether a subsidy would not have been granted but for actual exportation or export earnings, we find this argument insufficient to rebut a prima facie case that a subsidy would not have been granted but for anticipated exportation or export earnings."\(^{75}\)

(c) Footnote 4

(i) "in fact tied to … anticipated exportation or export earnings"

51. With respect to the relationship between "tied to" in footnote 4 and "contingent … in law", see paragraphs 35, 36 and 39 above.

52. With respect to the significance of the phrase "enterprises which export" within the de facto export contingency analysis, see paragraph 44 above.

(d) Relationship with other Articles

(i) Footnote 59

53. In US – FSC, the Appellate Body addressed the United States' claim that footnote 59 exempts a measure from being an export subsidy within the meaning of Article 3.1(a) and that the 1981 Council Action serves as a confirmation for this exemption. In rejecting this argument, the Appellate Body proceeded to examine footnote 59 sentence by sentence:

"The first sentence of footnote 59 is specifically related to the statement in item (e) of the Illustrative List that the 'full or partial exemption remission, or deferral

\(^{73}\) Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.33.
\(^{74}\) Panel Report on Canada – Aircraft, para. 9.343.
\(^{75}\) Panel Report on Canada – Aircraft, para. 9.343.
specifically related to exports, of direct taxes' is an export subsidy. The first sentence of footnote 59 qualifies this by stating that 'deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected.' Since the FSC measure does not involve the deferral of direct taxes, we do not believe that this sentence of footnote 59 bears upon the characterization of the FSC measure as constituting, or not, an 'export subsidy'.

The second sentence of footnote 59 'reaffirms' that, in allocating export sales revenues, for tax purposes, between exporting enterprises and controlled foreign buyers, the price for the goods shall be determined according to the 'arm's length' principle to which that sentence of the footnote refers. Like the Panel, we are willing to accept, for the sake of argument, the United States' position that it is 'implicit' in the requirement to use the arm's length principle that Members of the WTO are not obliged to tax foreign-source income, and also that Members may tax such income less than they tax domestic-source income. We would add that, even in the absence of footnote 59, Members of the WTO are not obliged, by WTO rules, to tax any categories of income, whether foreign- or domestic-source income. The United States argues that, since there is no requirement to tax export-related foreign-source income, a government cannot be said to have 'foregone' revenue if it elects not to tax that income. It seems to us that, taken to its logical conclusion, this argument by the United States would mean that there could never be a foregoing of revenue 'otherwise due' because, in principle, under WTO law generally, no revenues are ever due and no revenue would, in this view, ever be 'foregone'. That cannot be the appropriate implication to draw from the requirement to use the arm's length principle.

54. The Appellate Body further found that the arm's-length principle contained in the second sentence of footnote 59 could not shed light on the issue before the Panel, namely whether the United States' tax measure was a prohibited export subsidy:

"Furthermore, we do not believe that the requirement to use the arm's length principle resolves the issue that arises here. That issue is not, as the United States suggests, whether a Member is or is not obliged to tax a particular category of foreign-source income. As we have said, a Member is not, in general, under any such obligation. Rather, the issue in dispute is whether, having decided to tax a particular category of foreign-source income, namely foreign-source income that is 'effectively connected with a trade or business within the United States', the United States is permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation. Unlike the United States, we do not believe that the second sentence of footnote 59 addresses this question. It plainly does not do so expressly; neither, as far as we can see, does it do so by necessary implication. As the United States indicates, the arm's length principle operates when a Member chooses not to tax, or to tax less, certain categories of foreign-source income. However, the operation of the arm's length principle is unaffected by the choice a Member makes as to which categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the operation of the arm's length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it has selected for itself. In short, the requirement to use the arm's length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the SCM Agreement."

The third and fourth sentences of footnote 59 set forth rules that relate to remedies. In our view, these rules have no bearing on the substantive obligations of Members under Articles 1.1 and 3.1 of the *SCM Agreement.*  

55. The Appellate Body in *US – FSC* then declined to examine the United States’ claim under the fifth sentence of footnote 59, namely that the United States’ measure was one taken to avoid double taxation of foreign-source income. The Appellate Body noted that the issue had not been properly litigated before the Panel and therefore declined to address the United States’ claim.  

(ii) Article 27

56. The Panel in *Brazil – Aircraft* addressed the relationship between Articles 3.1(a), 27.2(b) and 27.4. More specifically, the Panel was called upon to determine the allocation of burden of proof applicable to the special provision of Article 2.7, which establishes that the prohibition contained in Article 3.1(a) shall not apply to developing country Members, provided that the requirements of Article 27.4 are met. The Panel held that "until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a)." The Appellate Body agreed with the Panel’s findings. It emphasized that "the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, not affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply". The Appellate Body then agreed with the Panel "that the burden [of proof] is on the complaining party (in casu Canada) to demonstrate that the developing country Member (in casu Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) *apply* to that developing country Member."  

(e) Relationship with other WTO Agreements

57. In *Canada – Autos*, the Panel, after finding violations of Article III:4 of *GATT 1994* and Article XVII of the *GATS*, exercised judicial economy with respect to alternative claims under Article 3.1(a). The Appellate Body upheld this exercise of judicial economy:

"In our view, it was not necessary for the Panel to make a determination on the … *alternative* claim relating to the CVA requirements under Article 3.1(a) … in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the *alternative* claim … that the CVA requirements are inconsistent with Article 3.1(a) of the *SCM Agreement*."

2. Article 3.1(b)

(a) "subsidies contingent … upon the use of domestic over imported goods"

58. Referring to its Report on *Canada – Aircraft* where it had held that "the ordinary connotation of ‘contingent’ is ‘conditional’ or ‘dependent for its existence on something else’", the Appellate Body

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79 Panel Report on *Brazil – Aircraft*, para. 7.56.
80 Appellate Body Report on *Brazil – Aircraft*, paras. 140-141.
82 Appellate Body Report on *Canada – Aircraft*, para. 166. See para. 90 of this Chapter.
in *Canada – Autos* opined that "this legal standard applies not only to 'contingency' under Article 3.1(a), but also to 'contingency' under Article 3.1(b)."\(^83\)

59. In *Canada – Autos*, the Panel had found that "contingency" under Article 3.1(b) extended only to *de jure* contingency and not also to *de facto* contingency. In making this finding, the Panel relied on the fact that Article 3.1(a) referred explicitly to both subsidies contingent "in law or in fact", while Article 3.1(b) did not contain such an explicit reference.\(^84\) The Appellate Body reversed this finding and held that "contingency" under Article 3.1(b) includes both contingency in law and contingency in fact. In its analysis, the Appellate Body first agreed with the Panel that an omission (of an express provision) must have some meaning, but emphasized that the significance of such omission can vary from one case to another:

"In examining this issue, the Panel appears to have taken the view that the terms of Article 3.1(b), on their own, do not answer the question, and, therefore, it turned to the context provided by Article 3.1(a). In this respect, the Panel relied on the fact that, in Article 3.1(a), there is explicit language applying to subsidies contingent 'in law or in fact' while in Article 3.1(b) there is not. In the view of the Panel, the absence of such an explicit reference in the adjacent and closely-related provision of Article 3.1(b) indicates that the drafters intended Article 3.1(b) to apply only to those subsidies which are contingent 'in law' upon the use of domestic over imported goods.

In our view, the Panel's analysis was incomplete. As we have said, and as the Panel recalled, 'omission must have some meaning.' Yet omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive. Moreover, while the Panel rightly looked to Article 3.1(a) as relevant context in interpreting Article 3.1(b), the Panel failed to examine other contextual elements for Article 3.1(b) and to consider the object and purpose of the SCM Agreement."\(^85\)

60. Having found that the omission of an explicit reference to *de facto* contingency in Article 3.1(b) was not dispositive of the question whether Article 3.1(b) actually extended to *de facto* contingency, the Appellate Body in *Canada – Autos* then considered the ordinary meaning and the context of this provision. While the Appellate Body agreed with the Panel that Article 3.1(a) was relevant context for Article 3.1(b), it held that "other contextual aspects should also be examined":

"We look first to the text of Article 3.1(b). In doing so, we observe that the ordinary meaning of the phrase 'contingent...upon the use of domestic over imported goods' is not conclusive as to whether Article 3.1(b) covers both subsidies contingent 'in law' and subsidies contingent 'in fact' upon the use of domestic over imported goods. Just as there is nothing in the language of Article 3.1(b) that specifically includes subsidies contingent 'in fact', so, too, is there nothing in that language that specifically excludes subsidies contingent 'in fact' from the scope of coverage of this provision. As the text of the provision is not conclusive on this point, we must turn to additional means of interpretation. Accordingly, we look for guidance to the relevant context of the provision.

Although we agree with the Panel that Article 3.1(a) is relevant context, we believe that other contextual aspects should also be examined. First, we note that Article III.4 of the GATT 1994 also addresses measures that favour the use of domestic over imported goods, albeit with different legal terms and with a different

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\(^{83}\) Appellate Body Report on *Canada – Autos*, para. 123.

\(^{84}\) Panel Report on *Canada – Autos*, paras. 10.220-10.222.

scope. Nevertheless, both Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement apply to measures that require the use of domestic goods over imports. Article III:4 of the GATT 1994 covers both de jure and de facto inconsistency. Thus, it would be most surprising if a similar provision in the SCM Agreement applied only to situations involving de jure inconsistency.

... The fact that Article 3.1(a) refers to 'in law or in fact', while those words are absent from Article 3.1(b), does not necessarily mean that Article 3.1(b) extends only to de jure contingency.

Finally, we believe that a finding that Article 3.1(b) extends only to contingency 'in law' upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy.

... For all these reasons, we believe that the Panel erred in finding that Article 3.1(b) does not extend to subsidies contingent 'in fact' upon the use of domestic over imported goods. We, therefore, reverse the Panel's broad conclusion that 'Article 3.1(b) extends only to contingency in law.'

3. Article 3.2

(a) "grant"

61. As the Canada – Aircraft dispute illustrates, under the SCM Agreement a Member may challenge a subsidy programme of another Member "as such" or, alternatively, "as applied". In addressing Brazil's challenge of certain Canadian subsidies "as such", the Panel on Canada – Aircraft recalled the distinction between mandatory and discretionary legislation. In so doing, the Panel invoked what it considered consistent GATT/WTO practice and emphasized that it "must first determine whether the ... programme per se mandates the grant of prohibited export subsidies in a manner inconsistent with Article 3.1(a) and 3.2 of the SCM Agreement." The Panel continued as follows:

"In this regard, we recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in United States – Tobacco the panel 'recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge'."

62. In applying this standard to the facts of the case before it, the Panel on Canada – Aircraft concluded that "a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety

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86 Appellate Body Report on Canada – Autos, paras. 139-143.
of ways. As a consequence, the Panel on Canada – Aircraft held that it "may not make any findings on the EDC programme per se".

The Panel on Brazil – Aircraft was called upon to decide whether Brazil had increased its level of export subsidies within the meaning of Article 27.4; because footnote 55 to Article 27.4 refers to the "grant" of export subsidies, the Panel addressed the question concerning at which particular point in time had Brazil actually been "granting" the disputed subsidies. Under the part of the Brazilian PROEX programme relating to interest equalization payments, the Brazilian Government would first approve a particular export transaction (between the Brazilian manufacturer and a foreign buyer) and issue a "letter of commitment" to the manufacturer; this letter would commit the Government to providing support, on the condition that the contract would indeed be concluded under the terms previously approved by the Government and entered into within a specific period of time. If these conditions were not fulfilled, the letter of commitment would expire. The actual interest equalization payments began after the aircraft had been exported and paid for under the relevant contract. The Brazilian Government, acting through the Brazilian National Treasury, would then issue bonds in the name of the bank financing the transaction; the bonds could be redeemed on a semi-annual basis for the duration of financing or sold for a discount in the securities market. In its analysis, the Panel began by comparing the term "grant" under Articles 3.2 and 27.4:

"We note that Article 3.2 and Article 27.4 are provisions of the same Agreement. Further, both provisions relate to the prohibition on export subsidies set out under that Agreement. We do not perceive any basis to attribute to the term 'grant' as used in Article 3.2 of the SCM Agreement a meaning different from that attributed to that term by this Panel and the Appellate Body as used in Article 27.4 of the SCM Agreement."

The Panel, in a finding subsequently upheld by the Appellate Body, then found that the "granting" of the subsidy at issue occurred when the bonds were issued by the Brazilian National Treasury to the bank financing the export transaction:

"It is clear to us, however, that PROEX payments have not yet been 'granted' at the time a letter of commitment is issued. We note that the issuance of a letter of commitment, even if legally binding on the Government of Brazil in the event certain conditions are fulfilled, provides no assurance that PROEX payments will actually be made … That right to receive the PROEX payments only arises after the conditions relating to receipt of PROEX payments, and specifically the condition that the product in question actually be exported, has been fulfilled …

The question remains whether PROEX payments are 'granted' when the bonds are issued or whether they are granted only when the bonds are redeemed on a semi-annual basis. In our view, PROEX payments should be considered to be 'granted' when bonds are issued and title to those bonds is transferred to the lender financial institution … We note that, while the bonds cannot be immediately redeemed, they are freely negotiable. The parties agree that lenders may exercise their right to sell these bonds – albeit at a discount as determined by the market -- to other entities rather than waiting until maturity to redeem the bonds themselves. Thus, at the point that title to the bonds is passed to the lenders, those lenders are the holders of a property right with a market value which is immediately realisable. Accordingly, we

90 Panel Report on Canada – Aircraft, para. 9.129.
91 Panel Report on Brazil – Aircraft (Article 21.5 – Canada), para. 6.11.
92 Appellate Body Report on Brazil – Aircraft, para. 159.
conclude that PROEX payments are 'granted' at that point, and we will calculate the Brazil's PROEX expenditures on that basis.93

65. In Brazil – Aircraft, while agreeing with the Panel on when the subsidy in question was granted, the Appellate Body criticized the Panel for making findings on whether a subsidy existed. More specifically, the Appellate Body held that in the case at hand, the Panel, in its findings on Article 27.4, did not have to make findings on the existence of a subsidy within the meaning of Article 1 of the SCM Agreement, because the export subsidies in that case were already deemed to "exist".94 The Panel on Brazil – Aircraft (Article 21.5 – Canada), in its analysis of whether Brazil had withdrawn WTO-inconsistent export subsidies under its PROEX programme, built on this distinction made by the Appellate Body in Brazil – Aircraft between the question of the existence of a subsidy and the question of the precise moment of the "granting" of such subsidy. The Panel held that this distinction, drawn by the Appellate Body in the context of Article 27.4, applied equally with respect to Article 3.2 of the SCM Agreement:

"We recognize that the distinction made by the Appellate Body was between the existence of a subsidy and when a subsidy is granted related to when a subsidy is granted for the purposes of Article 27.4 of the SCM Agreement, and not when it was granted for the purposes of Article 3.2. As a matter of logic, however, we cannot perceive ... any basis for us to conclude that, while the existence of a subsidy is a legally distinct issue from when it is granted for the purposes of Article 27.4, it is not a legally distinct issue from when it is granted for the purposes of Article 3.2. In other words, if the issue of when a subsidy is 'granted' for the purposes of Article 27.4 is legally distinct from when it 'exists' for the purposes of Article 1, then it follows that the issue of when a subsidy is granted for the purposes of Article 3.2 is also legally distinct from the issue when it is exists for the purposes of Article 1."95

66. With respect to the relationship with Article 27.4, see paragraphs 63-65 above.

IV. ARTICLE 4

A. TEXT OF ARTICLE 4

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

(footnote original) Any time-periods mentioned in this Article may be extended by mutual agreement.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

(footnote original) As established in Article 24.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.

(footnote original) If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel’s report or the Appellate Body’s report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request.

(footnote original) This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.

(footnote original) This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.
B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

(a) Accelerated procedure and the deadline for the submission of new evidence, allegations and affirmative defences

67. The Panel in Canada – Aircraft rejected the request for a preliminary ruling that the complaining party may not adduce new evidence or allegations after the end of the first substantive meeting of the panel with the parties. Canada had argued that given the accelerated procedure under Article 4 of the SCM Agreement, the late submission of allegations or evidence by Brazil, the other party in the dispute, would be prejudicial to Canada's position, as Canada would effectively be denied an adequate opportunity to respond to these allegations or evidence. The Panel referred to the Appellate Body's finding in Argentina – Textiles and Apparel that "neither Article 11 of the DSU, nor the Working Procedures in Appendix 3 of the DSU, establish precise deadlines for the presentation of evidence by parties to a dispute"\(^{97}\), and concluded that "[t]here is nothing in the DSU, or in the Appendix 3 Working Procedures, to suggest that a different approach should be taken in 'fast-track' cases under Article 4 of the SCM Agreement."\(^{98}\)

68. The Panel in Canada – Aircraft followed the reasoning set out in the previous paragraph regarding the submission of new allegations and stated that "[w]e can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence."\(^{99}\)

69. In the Panel proceedings in Canada – Aircraft, Brazil requested the Panel not to accept any affirmative defences by Canada, the responding party, which had not been submitted prior to the end of the first substantive meeting\(^{100}\), on the basis that "this is particularly important in this fast-track proceeding"\(^{101}\). The Panel stated that "there is nothing in the DSU, or in Appendix 3 Working Procedures, to prevent a party submitting new evidence or allegations after the first substantive meeting. We can see no basis in the DSU to treat the submission of affirmative defences after the first substantive meeting any differently."\(^{102}\) However, the Panel added that "Brazil's due process rights would not be respected if Canada were able to submit an affirmative defence … after the second substantive meeting with the Panel."\(^{103}\)

70. The Panel on US – FSC had found that the European Communities' request for consultations under Article 4.1 of the SCM Agreement contained a sufficient statement of available evidence within the meaning of Article 4.2, and, consequently, rejected the United States' request that the Panel dismiss the European Communities' claim as not properly before it as a result of the alleged insufficiency of the statement of available evidence. Upon appeal, the Appellate Body rejected the United States' appeal with respect to the second point and, as a result, declined to rule on the United States' appeal on the first point, i.e. whether the European Communities had given a sufficient statement of available evidence within the meaning of Article 4.2. In its analysis, the Appellate Body distinguished between the requirements imposed on the complaining party under Article 4.4 of the DSU and Article 4.2 of the SCM Agreement and held that the Panel had not differentiated between these requirements carefully enough:

\(^{96}\) Panel Report on Canada – Aircraft, para. 9.70.
\(^{97}\) Panel Report on Canada – Aircraft, para. 9.72.
\(^{98}\) Panel Report on Canada – Aircraft, para. 9.72.
\(^{100}\) Panel Report on Canada – Aircraft, para. 9.75.
\(^{101}\) Panel Report on Canada – Aircraft, para. 9.75.
\(^{102}\) Panel Report on Canada – Aircraft, para. 9.77.
\(^{103}\) Panel Report on Canada – Aircraft, para. 9.78.
"Article 1.2 of the DSU states that 'the rules and procedures of the DSU shall apply subject to the special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding'. Article 4.2 of the SCM Agreement is listed as a 'special or additional rule or procedure' in Appendix 2 to the DSU. In our Report in Guatemala – Cement, we said that 'the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement' except that, 'in the case of a conflict between them', the special or additional provision prevails.\(^{104}\) Article 4.4 of the DSU requires that all requests for consultations, under the covered agreements, 'give reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.' (emphasis added) It is clear to us that Article 4.4 of the DSU and Article 4.2 of the SCM Agreement can and should be read and applied together, so that a request for consultations relating to a prohibited subsidy claim under the SCM Agreement must satisfy the requirements of both provisions.

Article 4 of the SCM Agreement provides for accelerated dispute settlement procedures for claims involving prohibited subsidies under Article 3 of the SCM Agreement. The determination of whether a prohibited subsidy is being granted or maintained under Article 3 of the SCM Agreement raises complex factual questions, particularly in the case of subsidies that are claimed to be de facto contingent upon export performance. Also, Article 4.5 of the SCM Agreement allows a panel to request the assistance of the Permanent Group of Experts on whether the measure is a prohibited subsidy. Given the accelerated timeframes for disputes involving claims of prohibited subsidies, and given that the issue of whether a measure is a prohibited subsidy often requires a detailed examination of facts, it is important to stress the requirement of Article 4.2 that there be 'a statement of available evidence with regard to the existence and nature of the subsidy in question' at the consultation stage in a dispute.

We emphasize that this additional requirement of 'a statement of available evidence' under Article 4.2 of the SCM Agreement is distinct from – and not satisfied by compliance with – the requirements of Article 4.4 of the DSU. Thus, as well as giving the reasons for the request for consultations and identifying the measure and the legal basis for the complaint under Article 4.4 of the DSU, a complaining Member must also indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and nature of the subsidy in question'. In this respect, it is available evidence of the character of the measure as a 'subsidy' that must be indicated, and not merely evidence of the existence of the measure. We would have preferred that the panel give less relaxed treatment to this important distinction."\(^{105}\)

2. **Article 4.2**

(a) "include a statement of available evidence"

71. Evaluating the suggestion that "any impact on Canada's due process rights caused by the alleged absence of specificity in Brazil's request for establishment is compounded in an accelerated timetable\(^{106}\), the Panel in Canada – Aircraft, in a statement subsequently not addressed by the

\(^{104}\) (footnote original) Appellate Body Report on Guatemala – Cement, fn. 55.

\(^{105}\) Appellate Body Report on US – FSC, paras. 159-161. See discussion of adverse inferences in the Chapter on DSU, paras. 193-194.

\(^{106}\) Panel Report on Canada – Aircraft, para. 9.29.
Appellate Body, noted that "although Article 4.2 of the SCM Agreement requires the Member requesting consultations to provide a 'statement of available evidence', there is nothing in either the DSU or the SCM Agreement to suggest that requests for establishment of panels for 'fast-track' cases should be any more precise than requests for establishment of panels in 'standard' WTO dispute settlement cases."\(^{107}\)

72. With respect to the different evidence to be submitted in the course of consultations under Article 4.4 of the DSU and Article 4.2 of the SCM Agreement, respectively, see paragraph 70 above.

73. In US – FSC, the Appellate Body rejected the United States argument that a complaint should be dismissed because the complainant failed to "include a statement of available evidence" in its request for consultation. The Appellate Body pointed out a variety of facts, for example, that "[f]ollowing the European Communities' request for consultations, the United States and the European Communities held three separate sets of consultations over a period of nearly five months."\(^{108}\) The Appellate Body also invoked Article 3.10 of the DSU and the principle of good faith:

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law."\(^{109}\) This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."\(^{110}\)

74. Rejecting the argument that Article 4.2 "imposes an obligation on the complainant to disclose in its request for consultations, not only facts, but also the argumentation why such facts lead the complainant to believe there is a violation of Article 3.1"\(^{111}\), the Panel in Australia – Automotive Leather II (a case which was not appealed) stated that "[t]he ordinary meaning of the phrase 'include a statement of available evidence' does not, on its face, require disclosure of arguments in the request for consultations. Nothing in the context or object and purpose of Article 4.2 … suggests a different conclusion."\(^{112}\) The Panel in Australia – Automotive Leather II then addressed the claim that Article 4.2 requires the disclosure of all facts and evidence upon which the complaining Member intends to rely in the course of the dispute settlement proceedings:

"Turning to the question of what is required as a 'statement of available evidence', we note that Australia reads this to require disclosure of all facts and evidence on which the complaining Member will rely in the course of the dispute. Indeed, Australia asserts that any exhibits should have been provided at the time

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\(^{107}\) Panel Report on Canada – Aircraft, para. 9.29.


\(^{111}\) Panel Report on Australia – Automotive Leather II, para. 9.17.

\(^{112}\) Panel Report on Australia – Automotive Leather II, para. 9.18.
consultations were requested. The ordinary meaning of the phrase 'statement of available evidence' does not support Australia's position. The word 'evidence' is defined as 'available facts, circumstances, etc., supporting or otherwise a belief, proposition, etc.' 'Available' is defined as 'at one's disposal', and 'statement' is defined as 'expression in words'. Thus, based on the ordinary meaning of the terms, Article 4.2 requires a complaining Member to include in the request for consultations an expression in words of the facts at its disposal at the time it requests consultations in support of the conclusion that it has, in the words of Article 4.1, 'reason to believe that a prohibited subsidy is being granted or maintained'. …

Moreover, nothing in the context or object and purpose of Article 4.2 suggests to us that the statement of available evidence must be as comprehensive as Australia would require. The mere fact that proceedings under Article 4 of the SCM Agreement are accelerated by comparison to dispute settlement proceedings under the DSU does not, in our view, require us to read into Article 4.2 a requirement that the complainant disclose all facts and arguments in its request for consultations. … To the extent that the additional requirement of Article 4.2 can be linked to the expedited nature of the proceedings, the additional requirement of a statement of available evidence satisfies the need adequately to apprise the responding Member of the information upon which the complaining Member bases its request for consultations, and serves in addition to inform the resulting consultations."113

75. The Panel in Australia – Automotive Leather II also rejected the arguments that "the requirement of Article 4.2, that a request for consultations 'include a statement of available evidence', in conjunction with the expedited nature of the proceedings, [requires] a panel to limit the complaining Member to using the evidence and arguments set forth in the request for consultations"114, and "that to allow a complainant to come forward with additional facts and arguments in its first submission is inconsistent with Article 4 of the SCM Agreement".115 In so holding, the Panel referred to its obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it; specifically, the Panel held that "a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfill our obligation to conduct an 'objective assessment' of the matter before us."116

76. In rejecting Australia's claim that in the light of the requirement under Article 4.2 to make a "statement of available evidence", a complainant was disallowed from coming forward with additional facts and arguments in its first submission, the Panel did not rely exclusively on Article 11 of the DSU (see paragraph 75 above). The Panel also referred to the right of panels, under Article 13.2 of the DSU, to seek information from any relevant source, a right which, in the opinion of the Panel, is in no way curtailed by Article 4 of the SCM Agreement. Finally, the Panel also considered the requirements with respect to the request for establishment of a panel:

"Article 4.2 does contain a requirement, not present in the DSU, that a complainant include a 'statement of available evidence' in its request for consultations. However, we do not consider that the scope of the evidence that a panel may consider is limited in any way by such a statement of available evidence. In this respect, we note Article 4.3 of the SCM Agreement, which explicitly states that one of the purposes of consultations 'shall be to clarify the facts of the situation...'. (emphasis added) This provision implies that additional facts or evidence will be developed during

consultations. Moreover, the Appellate Body has recognized that consultations play a significant role in developing the facts in a dispute settlement proceeding. For example, in *India – Patents*, the Appellate Body observed that ‘the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings’. (emphasis added) This is consistent with the view that a central purpose of consultations in general, and of consultations under Article 4 of the SCM Agreement in particular, is to clarify and develop the facts of the situation.

Moreover, we note that panels have, under Article 13.2 of the DSU, a general right to seek information 'from any relevant source'. Indeed, it is a common feature of panel proceedings for panelists to question parties about the facts and arguments underlying their positions. There is nothing in Article 4 of the SCM Agreement to suggest that this right is somehow limited by the expedited nature of dispute settlement proceedings conducted under that provision. If Australia's position were correct, a panel might be constrained from seeking out replacement information from the party … that was limited to reliance on the facts set forth in its request for consultations. Similarly, under Australia's view, the defending party might introduce information during the panel proceedings, which the complaining party … would not be able to rebut, as it would be limited to reliance on the facts set forth in its request for consultations. We do not believe Article 4.2 requires this result.\footnote{Panel Report on *Australia – Automotive Leather II*, para. 9.29.}

77. Finally, the Panel on *Australia – Automotive Leather II* pointed out that a complaining Member is not required to include facts and arguments in its request for the establishment of a panel, although such request comes only after consultations had been held:

"This implies that the scope of the facts and evidence that may be considered in a dispute settlement proceeding should not be limited to those set out in the request for consultations, merely because a proceeding under Article 4 of the SCM Agreement is conducted on an accelerated time schedule. Article 4.2 does require a complaining Member to include more information about its case in its request for consultations than is otherwise required under the DSU. This serves to provide a responding Member with a better understanding of the matter in dispute, and serves as the basis for consultations. Specifically, the statement of available evidence informs the responding Member of the facts at the disposal of the complaining Member at the time it requests consultations that support the complaining Member's conclusion that it has 'reason to believe' that a prohibited subsidy is being granted or maintained by the responding Member. The statement of available evidence thus informs the beginning of the dispute settlement process – it does not limit the scope of evidence and argument for the entire proceeding that may ensue to only what is in the request for consultations.\footnote{Panel Report on *Australia – Automotive Leather II*, paras. 9.27-9.28.}

3. **Article 4.3**

(a) "shall be to clarify the facts of the situation"

78. With respect to this phrase, see paragraph 76 above.
4. Article 4.4

(a) Relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon

79. In *Brazil – Aircraft*, the Panel was presented with the issue regarding "the relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon." Specifically, the Panel had to consider "whether and to what extent a panel is limited in its consideration of the matter identified in its terms of reference by the scope of the matter with respect to which consultations were held." The Appellate Body agreed with this finding of the Panel and stated as follows:

"In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution.' We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."

80. The Panel on *Canada – Aircraft* adopted a very similar approach to the relationship between a panel's terms of reference and the matter consulted upon:

"In our view, a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if, in light of Article 4.1 - 4.4 of the SCM Agreement applied together with Article 4.2 - 4.7 of the DSU, the complaining party's request for establishment were found to cover a 'dispute' that had not been the subject of a request for consultations. Article 4.4 of the SCM Agreement permits a Member to refer a 'matter' to the DSB if 'no mutually agreed solution' is reached during consultations. In our view, this provision complements Article 4.7 of the DSU, which allows a Member to refer a 'matter' to the DSB if 'consultations fail to settle a dispute'. Read together, these provisions prevent a Member from requesting the establishment of a panel with regard to a 'dispute' on which no consultations were requested. In our view, this approach seeks to preserve due process while also recognising that the 'matter' on which consultations are requested will not necessarily be identical to the 'matter' identified in the request for establishment of a panel. The two 'matters' may not be identical because, as noted by the Appellate Body in *India - Patents*, 'the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings'..

(b) Relationship with other WTO Agreements

81. With respect to the relationship between Article 4 of the *SCM Agreement* on the one hand and Articles 4 and 6 of the *DSU* on the other, see paragraphs 79-80 above.

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119 Panel Report on *Brazil – Aircraft*, para. 7.6.
120 Panel Report on *Brazil – Aircraft*, para. 7.6.
121 Appellate Body Report on *Brazil – Aircraft*, paras. 131-132. See also Panel Report on *Brazil – Aircraft*, paras. 7.9-7.11.
5. Article 4.7

(a) "withdraw the subsidy"

82. The Appellate Body in Brazil – Aircraft (Art. 21 – Canada) analysed the meaning of the word "withdraw": "[W]e observe first that this word has been defined as 'remove', or 'take away', and as 'to take away what has been enjoyed; to take from.' This definition suggests that 'withdrawal' of a subsidy, under Article 4.7 of the SCM Agreement, refers to the 'removal' or 'taking away' of that subsidy."\(^{123}\) Applied to the facts of the dispute, the Appellate Body stated: "In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'."\(^{124}\)

83. The Appellate Body in Brazil – Aircraft (Article 21.5 – Canada) considered the argument by Brazil that Brazil had a contractual obligation under domestic law to issue PROEX bonds pursuant to commitments that had already been made, and that Brazil could be liable for damages for breach of contract under Brazilian law if it failed to respect its contractual obligations. The Appellate Body considered that these issues were not relevant to the "issue of whether the DSB's recommendation to 'withdraw' the prohibited export subsidies permitted the continued issuance of NTN-I bonds under letters of commitment issued before [the date set by the Panel for the withdrawal of the prohibited subsidies]."\(^{125}\)

84. In contrast to the findings of the Panel on Brazil – Aircraft (Article 21.5 – Canada), the Panel on Australia – Automotive Leather II (Article 21 – US) did not limit its findings to a situation in which a Member continues to grant a prohibited subsidy. Rather, the Panel addressed the issue whether the term "withdraw the subsidy" is limited to a recommendation with purely prospective effect, or whether it also encompasses repayment:

"Turning first to the ordinary meaning of the term, the word 'withdraw' has been defined as: 'pull aside or back …; take away, remove …; retract … This definition does not suggest that 'withdraw the subsidy' necessarily requires only some prospective action. To the contrary, it suggests that the ordinary meaning of 'withdraw the subsidy' may encompass 'taking away' or 'removing' the financial contribution found to give rise to a prohibited subsidy. Consequently, an interpretation of 'withdraw the subsidy' that encompasses repayment of the prohibited subsidy seems a straightforward reading of the text of the provision."\(^{126}\)

In the case of 'actionable' subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to the interests of the complaining Member. 'If such a finding is made, the subsidizing Member 'shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'. Alternatively, a Member whose domestic industry is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, 'unless the subsidy or subsidies are withdrawn'. In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member. … Thus, the use of the term 'withdraw' elsewhere in the

\(^{123}\) Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 45.
\(^{124}\) Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 45.
\(^{125}\) Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 45.
\(^{126}\) Panel Report on Australia – Automotive Leather II (Article 21.5 – US), para. 6.27.
SCM Agreement further supports the suggestion that it may encompass repayment. (original emphasis)

... An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.”

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85. After rejecting the argument that the phrase "withdraw the subsidy" under Article 4.7 of the SCM Agreement refers to a recommendation with exclusively "prospective effect", the Panel in Australia – Automotive Leather II (Article 21.5 – US) also rejected the notion that a repayment of portions of a subsidy which are deemed allocated over future periods of time should be considered a "prospective" remedy:

"[W]e do not find meaningful the distinction proposed ... between repayment of 'prospective' and 'retrospective' portions of past subsidies in the context of Article 4.7 of the SCM Agreement. We do not agree that it is possible to conclude that repayment of the 'prospective portion' of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is not a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term 'withdraw the subsidy' can properly be understood to encompass repayment of any portion of a prohibited subsidy, 'retroactive effect' exists." 129

86. The Panel on Brazil – Aircraft (Article 21.5 – Canada) rejected Brazil's contention that requiring Brazil to cease issuing bonds pursuant to commitments made prior to the withdrawal date amounted to a retroactive remedy. Rather, the Panel opined that "the obligation to cease performing illegal acts in the future is a fundamentally prospective remedy". 130

87. Addressing the question whether partial repayment can be sufficient, if repayment is necessary to "withdraw the subsidy", the Panel in Australia – Automotive Leather II (Article 21.5 – US) stated: "Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to 'withdraw the subsidy' in a case where repayment is necessary." 131 The Panel, however, rejected the inclusion of interest in the repayment of prohibited subsidies, opining that the remedy under Article 4.7 was not designed to fully restore the status quo ante nor was it a remedy intended to provide for reparation or compensation. 132

(b) Time-period for withdrawal of measures

88. The Panel on Brazil – Aircraft determined that "taking into account the nature of the measures and the procedures which may be required to implement our recommendation, on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other, we conclude that Brazil

130 Panel Report on Brazil – Aircraft (Article 21.5 – Canada), para. 6.15.
shall withdraw the subsidies within 90 days.\textsuperscript{133} Agreeing with the Panel’s conclusion and recommendation, the Appellate Body in Brazil – Aircraft noted that "there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the SCM Agreement. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement."\textsuperscript{134}

89. In Australia – Automotive Leather II, Australia suggested seven and a half months (half of what Australia considered the "normal" period of time for implementation of panel decisions) as the time-period for withdrawal under Article 4.7. The Panel disagreed:

"Even assuming Australia is correct in its consideration of fifteen months as the 'normal' period of time for implementation of panel decisions, a question we do not reach, we do not agree that one-half of that period is appropriate in a dispute involving export subsidies. In the first place, Article 4.12 specifically provides that 'except for time periods specifically prescribed in this Article' the time periods otherwise provided for in the DSU should be halved in export subsidy disputes. Article 4.7, which provides that the subsidy shall be withdrawn 'without delay', and that the panel shall specify the time-period for withdrawal of the measure in its recommendation, in our view establishes that the time-period for withdrawal is 'specifically prescribed in this Article', that is, in Article 4 of the SCM Agreement itself. Moreover, we do not, as a factual matter, believe that a period of seven and one-half months can reasonably be described as corresponding to the requirement that the measure must be withdrawn 'without delay'.\textsuperscript{135}

(c) Relationship with other Articles

(i) Article 7.8

90. The Panel on Australia – Automotive Leather II (Article 21.5 – US) referred to Article 7.8 in support of its finding in relation to the phrase "withdraw the subsidy" under Article 4.7. The Panel noted the wording of Article 7.8 that in case of a finding of adverse effects to the interests of another Member within the meaning of Article 5 of the SCM Agreement, the subsidizing Member "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". The Panel drew the conclusion that "withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member.\textsuperscript{136}

(ii) Article 19.1

91. The Panel on Australia – Automotive Leather II (Article 21.5 – US), in the context of considering whether Article 4.7 allowed "retroactive" remedies, rejected the argument that "Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action. An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable

\textsuperscript{133} Panel Report on Brazil – Aircraft, para. 8.5. See also Panel Report on Canada – Aircraft, para. 10.4.
\textsuperscript{134} Appellate Body Report on Brazil – Aircraft, para. 192.
\textsuperscript{135} Panel Report on Australia – Automotive Leather II, para. 10.6.
\textsuperscript{136} Panel Report on Australia – Automotive Leather II (Article 21.5 – US), para. 6.28.
from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."

6. **Article 4.10**

(a) "appropriate countermeasures"

92. In *Brazil – Aircraft (Article 22.6 - Brazil)*, Canada requested that the DSB authorize it to take appropriate "countermeasures", pursuant to Article 4.10 of the *SCM Agreement*, and Article 22.2 of the *DSU*, in the amount of Can$700 million, in relation to the subsidy which Brazil had been found to be granting to its domestic aircraft producer. In response to Brazil's request, the DSB referred the matter to an arbitrator in accordance with Article 22.6 of the *DSU*. The Arbitrators examined "whether the level of countermeasures should correspond to the amount of subsidy to be withdrawn or be equivalent to the level of nullification or impairment caused to Canada, with a consequence on the number of aircraft sales which should be taken into account", and held that "a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance":

"Examining only the ordinary meaning of the term 'appropriate' does not allow us to reply to the question before us, since dictionary definitions are insufficiently specific. Indeed, the relevant dictionary definitions of the word 'appropriate' are 'specially suitable; proper'. However, they point in the direction of meeting a particular objective.

The first context of the term 'appropriate' is the word 'countermeasures', of which it is an adjective. While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures. We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. When considering the definition of 'countermeasures' in Article 47 of the Draft Articles, we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'.

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138 Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.31.
140 *(footnote original)* See, e.g., the *Nautilus* arbitral award (1928), UN Reports of International Arbitral Awards, Vol. II, p. 1028 and *Case Concerning the Air Services Agreement of 27 March 1946 (France v. United States of America)* (1978) International Law Reports, Vol. 54 (1979), p. 338. See also, *inter alia*, the Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading (January 1997), hereinafter the "Draft Articles" and the draft articles provisionally adopted by the Drafting Committee on second reading, A/CN.4/L 600, 11 August 2000. Even though the latter modify a number of provisions of the Draft Articles, they do not affect the terms to which we refer in this report.
141 *(footnote original)* We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.
142 *(footnote original)* See Article 38 of the Statute of the ICJ.
143 *(footnote original)* We note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law.
We note in this respect that the Article 22.6 arbitrators in the EC – Bananas (1999) arbitration made a similar statement.\textsuperscript{144} We conclude that a countermeasure is 'appropriate' \textit{inter alia} if it \textit{effectively} induces compliance.\textsuperscript{145}

93. Applying their general finding referenced in paragraph 92 above that a countermeasure is appropriate \textit{inter alia} if it effectively induces compliance, the Arbitrators found that in the case of Article 4.7 of the SCM Agreement, "inducing compliance" meant "inducing the withdrawal of the prohibited subsidy":

"In this respect, we recall that the measure in respect of which the right to take countermeasures has been requested is a prohibited export subsidy falling under Article 3.1(a) of the SCM Agreement. Article 4.7 of the SCM Agreement provides in this respect that if a measure is found to be a prohibited subsidy, it shall be withdrawn without delay. In such a case, effectively 'inducing compliance' means inducing the withdrawal of the prohibited subsidy.

In contrast, other illegal measures do not have to be withdrawn without delay. As specified in Article 3.8 of the DSU, if a measure violates a provision of a covered agreement, the measure is considered \textit{prima facie} to cause nullification or impairment. However, if the defendant succeeds in rebutting the charge, no nullification or impairment will be found in spite of the violation. Such a rebuttal may be impossible to make in a number of cases. Yet, this does not change the fact that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrators are of the view that meaning must be given to the fact that the negotiators did not include the concept of nullification or impairment in those articles, whilst it is expressly mentioned in Article 5 of the SCM Agreement, which deals with the adverse effects of actionable subsidies.\textsuperscript{146}

94. The Arbitrators rejected Brazil’s argument that the countermeasures must be equivalent to the level of nullification or impairment pursuant to Article 22.4 of the DSU, noting that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrators explained:

"A first approach would be to consider that the concept of nullification or impairment does not apply to Article 4 of the SCM Agreement. We note in this respect that, in relation to actionable subsidies, Article 5 refers to nullification or impairment as only one of the three categories of adverse effects. This could mean that another test than nullification or impairment could also apply in the context of Article 4 of the SCM Agreement.

That said, we note that the Original Panel concluded that, since a violation had been found, a \textit{prima facie} case of nullification or impairment had been made within the meaning of Article 3.8 of the DSU, which Brazil had not rebutted. In that context, we are more inclined to consider that no reference was expressly made to nullification or impairment in Article 4 of the SCM Agreement for the following reasons:

\textsuperscript{144} (footnote original) Decision by the Arbitrators on EC – Bananas III (Article 22.6 – EC), para. 6.3. In that case, the arbitrators had to determine the level of nullification or impairment. Since the Article 22.6 arbitrators in the EC – Bananas case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the arbitrators in EC – Bananas were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

\textsuperscript{145} Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.43-3.45.

\textsuperscript{146} Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.45-3.46.
(a) A violation of Article 3 of the SCM Agreement entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it;

(b) the purpose of Article 4 is to achieve the withdrawal of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure.\(^{147}\) The former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member;

(c) the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures.\(^{148}\)

95. In their finding that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement, the Arbitrators also noted that a term different from "appropriate countermeasures" was being used in a comparable context in Article 7.9 and 10 of the SCM Agreement:

"We also note that, when the negotiators have intended to limit countermeasures to the effect caused by the subsidy on a Member's trade, they have used different terms than 'appropriate countermeasures'. Article 7.9 and 10, which is the provision equivalent for actionable subsidies to Article 4.9 and 10 for prohibited subsidies, uses the terms 'commensurate with the degree and nature of the adverse effects determined to exist'. In that context, we do not consider the arguments made by Brazil in its oral presentation and based on the central position of the notion of nullification in the GATT to be compelling. As we have seen above, the term 'appropriate countermeasures' does not impose similar constraints.\(^{149}\)

96. Further, the Arbitrators addressed the relevance of footnotes 9 and 10 to Articles 4.10 and 4.11, respectively:

"We agree that, as those footnotes are drafted, it seems difficult to clearly identify how the second part of the sentence ('in light of the fact that the subsidies dealt with under these provisions are prohibited') relates to the first part of the sentence ('This expression is not meant to allow countermeasures that are disproportionate'). This is probably due to the use of the words 'in light of the fact that'. However, since the text of the treaty is supposed to be the most achieved expression of the intent of the parties, we should refrain from second guessing the negotiators at this point. We can nonetheless note that the reference to the fact that the subsidies dealt with are prohibited can most probably be considered more as an aggravating factor than as a mitigating factor. We also find the use of the word 'disproportionate' to be interesting

\(^{147}\) (footnote original) We note that Article 3.7 of the DSU refers to the "withdrawal of the measures concerned" as a first objective. However, we also note that, contrary to Article 3.7 of the DSU, Article 4.7 of the SCM Agreement does not provide for any alternative than the withdrawal of the measure once it has been found to be a prohibited subsidy.

\(^{148}\) Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.47-3.48.

\(^{149}\) Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), para. 3.49.
in light of the term 'out of proportion' used in Article 49 of the Draft Articles. We do not draw any firm conclusions as to the meaning of footnotes 9 and 10. However, we note that footnotes 9 and 10 at least confirm that the term 'appropriate' in Articles 4.10 and 4.11 of the SCM Agreement should not be given the same meaning as the term 'equivalent' in Article 22 of the DSU. \(^{150}\)

97. Further, the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil) addressed Brazil’s argument that certain sales should be excluded because competition was based upon factors other than price, or that there was no competition with the Canadian manufacturer:

"Since we selected the amount of the subsidy as the basis for the countermeasures and not the level of nullification or impairment suffered by Canada, it is appropriate and logical to include in our calculation all the sales of subsidised aircraft, whether they compete or not with Bombardier’s production. However, consistent with our approach on the burden of proof, we excluded all the sales where Brazil demonstrated that no PROEX interest rate equalization payments had been made and we assumed that future sales of the xxx xxxxxxx and xxx would not benefit from the PROEX interest rate equalization payments." \(^{152}\)

98. The Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil) also rejected Brazil’s argument that only sales of aircraft subsequent to the implementation period should be considered although they were delivered after that period:

"We note that, in its report within the framework of the proceedings under Article 21.5 of the DSU, the Appellate Body made the following findings:

'[the Appellate Body] upholds the conclusion of the Article 21.5 Panel that as a result of the continued issuance by Brazil of NTN-I bonds, after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999, Brazil has failed to implement the recommendation of the DSB that it withdraw the prohibited export subsidies under PROEX within 90 days' \(^{153}\)

We, therefore, consider that we have to include in the calculation of the appropriate countermeasures the firm sales for which PROEX letters of commitment were issued before 18 November 1999 and which had not yet been delivered (since the NTN-I bonds are issued at the time of the delivery of the aircraft). \(^{154}\) We do not consider the arguments based on Brazil’s contractual obligations to be compelling. Obligations

\(^{150}\) (footnote original) We are mindful of the fact that, from the point of view of a textual interpretation, "equivalent" and "appropriate" should not be given the same meaning. Interpreters are not permitted to assume such a thing. What we mean is that the term "appropriate", read in the light of footnotes 9 and 10, may allow for more leeway than the word "equivalent" in terms of assessing the appropriate level of countermeasures. A countermeasure remains "appropriate" as long as it is not disproportionate, having also regard to the fact that the measure at issue is a prohibited subsidy.

\(^{151}\) Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), para. 3.51.

\(^{152}\) Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), para. 3.62.

\(^{153}\) (footnote original) Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 82(a).

\(^{154}\) (footnote original) This clarification is made in relation to the use by the Arbitrators of the delivery data provided by Brazil rather than on information relating specifically to the issuance of the NTN-I bonds. Our choice is consistent with the factual finding of the Original Panel (Op. Cit., para. 7.71) and the Appellate Body report in the original proceedings (Op. Cit. para. 154).
under internal law are no justification for not performing international obligations.\textsuperscript{155} \textsuperscript{156}

7. Article 4.11

(a) Task of the Arbitrators under Article 4.11

99. In Brazil – Aircraft (Article 22.6 – Brazil), a case which dealt with Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the SCM Agreement, the Arbitrators described their task under Article 4.11 of the SCM Agreement in the following terms:

"As to our task, we follow the approach adopted by previous arbitrators under Article 22.6 of the DSU.\textsuperscript{157} We will have not only to determine whether Canada’s proposal constitutes 'appropriate countermeasures', but also to determine the level of countermeasures we consider to be appropriate in case we find that Canada's level of countermeasures is not appropriate, if necessary by applying our own methodology."\textsuperscript{158}

100. With respect to arbitration under Article 22.6 of the DSU in general, see Chapter on DSU, paragraphs 286-288.

(b) Burden of proof

101. In Brazil – Aircraft (Article 22.6 – Brazil), Canada requested that the DSB authorize it to take appropriate "countermeasures" pursuant to Article 4.10 of the SCM Agreement, and Article 22.2 of the DSU, in the amount of Can$700 million, in relation to Brazil's subsidy granted to its domestic producer of aircraft. In response to Brazil's request, the DSB referred the matter to an arbitrator in accordance with Article 22.6 of the DSU. With respect to the burden of proof, the Arbitrators held that it was up to Brazil to demonstrate that the countermeasures that Canada was proposing to take were not "appropriate":

"In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency.\textsuperscript{159} In the present case, the action at issue is the Canadian proposal to suspend concessions and other obligations in the amount of CS$700 million as 'appropriate countermeasures' within the meaning of Article 4.10 of the SCM Agreement.\textsuperscript{160} Brazil challenges the conformity of this proposal with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a \textit{prima facie} case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should

\textsuperscript{155} (footnote original) See Article 27 of the Vienna Convention:

"A party may not invoke the provisions of its internal law as justification for the failure to perform a treaty. [...]"

\textsuperscript{156} Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.64-3.65.

\textsuperscript{157} (footnote original) See Article 22.6 arbitrations in EC – Hormones (Article 22.6 – EC), para. 12.

\textsuperscript{158} (footnote original) See WT/DS/46/16.

\textsuperscript{159} (footnote original) See also how this issue is addressed in the decisions by the arbitrators in EC – Hormones (Article 22.6 – EC), paras. 8 to 11.
all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case.

An issue to be distinguished from the question of who bears the burden of proof is that of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. This is why, even though Brazil bears the original burden of proof, we expected Canada to come forward with evidence explaining why its proposal constitutes appropriate countermeasures and we requested it to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes.\(^\text{161,162}\)

(c) Treatment of data supplied by private entities

102. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators evaluated the trustworthiness of data supplied by Brazil, and stated that they "could not treat statements from that company as [they] would have if [the statements] had originated from a subject of international law":

"A related problem faced by the Arbitrators in this case was that, in many instances, the original data necessary for the calculations or assessments was solely in the hands of Brazil. When this information originated in the Brazilian government, we assumed good faith and accepted the information and the supporting evidence provided by Brazil to the extent Canada also accepted it or did not provide sufficient evidence to put in doubt the accuracy of Brazil’s statements and/or evidence. However, since this case relates to subsidies granted for the purchase of aircraft produced by the Brazilian aircraft manufacturer, Embraer, a large number of data essential for the resolution of our task is only available to that company. We assumed that Embraer was independent from the Brazilian government and, for that reason, we could not treat statements from that company as we would have if they had originated from a subject of international law.\(^\text{163}\) When Brazil only provided statements regarding information available solely to Embraer, we requested that Brazil support those statements with materials usually regarded as evidence, such as articles or statements reproduced in the specialized press, company annual reports or any other certified information originating in Embraer or other reliable sources. When Brazil was not in a position to provide documentary evidence, we requested a detailed explanation of the reasons why such evidence was not available and expressed our willingness to consider written declarations from authorised Embraer officials, if duly certified. We then weighed this evidence against the evidence submitted by Canada."\(^\text{164}\)

\(^{161}\) (footnote original) This approach is similar to those followed in the arbitrators' decisions in *EC - Bananas (1999)* and *EC – Hormones (Article 22.6 – EC)*.

\(^{162}\) Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.8-2.9.


\(^{164}\) Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.10-2.11.
(d) Relationship with DSU Article 22.4

103. In Brazil – Aircraft (Article 22.6 – Brazil), the Arbitrators addressed Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the SCM Agreement. Referring to Article 22.4 of the DSU, Brazil argued that the "countermeasures" must be equivalent to the level of nullification or impairment (which argument was rejected by the Arbitrator as referenced in paragraph 94 above). The Arbitrator explained the relationship between Article 4.11 of the SCM Agreement and Article 22.4 of the DSU by characterizing Article 4.11 of the SCM Agreement as "special or additional rules" and held that the concept of "nullification or impairment" was absent from Articles 3 and 4 of the SCM Agreement and that the principle of effectiveness would be counteracted if the "appropriate countermeasures" had to be necessarily limited to the level of nullification or impairment:

"We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in Guatemala – Cement,\textsuperscript{165} we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.

On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case,\textsuperscript{166} other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.

We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The ‘inducing’ effect would most probably be very similar.\textsuperscript{167}"

\textsuperscript{165} (footnote original) Appellate Body on Guatemala – Cement I, para. 65.

\textsuperscript{166} (footnote original) Canada mentioned that it could have applied a counter-subsidy but refrained from doing so for a number of reasons.

\textsuperscript{167} Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.57-3.59.
PART III: ACTIONABLE SUBSIDIES

V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member¹¹;

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994¹²;

(c) serious prejudice to the interests of another Member.¹³

¹¹ The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

¹² The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

¹³ The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization¹⁴ of a product exceeding 5 per cent¹⁵;

(b) subsidies to cover operating losses sustained by an industry;

¹⁴ The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

¹⁵ Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.
(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.\textsuperscript{16}

\textit{footnote original}\textsuperscript{16} Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity\textsuperscript{17} as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

\textit{footnote original}\textsuperscript{17} Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that
can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist\(^\text{18}\) during the relevant period:

\textit{(footnote original)}\(^{18}\) The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, \textit{inter alia}, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

B. \textsc{Interpretation and Application of Article 6}

1. \textbf{Article 6.3}

(a) "the effect of the subsidy"

104. The Panel on \textit{Indonesia – Autos} rejected the argument that it was precluded from considering the effects of a subsidy programme which has expired when analysing whether the subsidies caused serious prejudice to the interests of the complainants.\(^{168}\) The Panel stated:

"[W]e must assess the 'effect of the subsidies' on the interests of another Member to determine whether serious prejudice exists, not the effect of 'subsidy programmes'. We note that at any given moment in time some payments of subsidies have occurred in the past while others have yet to occur in the future. If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were 'expired measures' while future measures could not yet have caused actual serious

\(^{168}\) With respect to the treatment of expired measures in general, see Chapter on \textit{DSU}, paras. 88-94.
prejudice, it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice.\(^{169}\)

(b) "like product"

105. See paragraphs 125-129 below. With respect to the burden of proof regarding the determination of "like product", see paragraph 178 below.

2. Article 6.3(a)

(a) Standing as claimant

106. The Panel on Indonesia – Autos considered whether "the United States may claim that it has suffered serious prejudice as a result of displacement/impedance or of price undercutting with respect to a product which does not originate in the United States solely on the basis that the producer of that product is a 'US company'.\(^{170}\) The Panel drew a distinction between United States products and United States companies/producers and rejected the claim that the nationality of producers is relevant to establishing the existence of serious prejudice:

"In our view, the text of Article XVI [of the GATT 1994] and of Part III of the SCM Agreement make clear that serious prejudice may arise where a Member's trade interests have been affected by subsidization. We see nothing in Article XVI or in Part III that would suggest that the United States may claim that it has suffered adverse effects merely because it believes that the interests of US companies have been harmed where US products are not involved. The United States has cited no language in Article XVI:1 or Part III suggesting that the nationality of producers is relevant to establishing the existence of serious prejudice. Accordingly, given that serious prejudice may only arise in the case at hand where there is 'displacement or impedance of imports of a like product from another Member' or price undercutting 'as compared with the like product of another Member', we do not consider that the United States can convert such effects on products from the European Communities into serious prejudice to US interests merely by alleging that the products affected were produced by US companies.\(^{171}\) (emphasis original)

(b) Demonstration of displacement or impedance

107. The Panel on Indonesia – Autos explored the meaning of the terms "displacement" and "impedance" and considered that:

"[A] complainant need not demonstrate a decline in sales in order to demonstrate displacement or impedance. This is inherent in the ordinary meaning of those terms. Thus, displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded. … \(^{172}\)"


(c) Relationship with other Articles

(i) Article 6.4

108. The Panel on Indonesia – Autos addressed the argument that "there is no reason why the type of analysis set forth in Article 6.4 should not be appropriate also in the case of claims of displacement and impedance of imports from the market of the subsidizing country". The Panel rejected this argument, but nevertheless agreed that market share data may be "highly relevant" for an analysis pursuant to Article 6.3(a):

"Article 6.4 is not relevant in this case. The drafting of the provision is unambiguous, and the specific reference to Article 6.3(b) creates a strong inference that an Article 6.4 type of analysis is not appropriate in the case of Article 6.3(a) claims. The complainants have identified nothing in the context of the provision or the object and purpose of the SCM Agreement that would suggest a different conclusion.

Our conclusion does not of course mean that market share data are irrelevant to the analysis of displacement or impedance into a subsidizing Member's market. To the contrary, market share data may be highly relevant evidence for the analysis of such a claim. However, such data are no more than evidence of displacement and impedance caused by subsidization, and a demonstration that the market share of the subsidized product in the subsidizing Member has increased does not ipso facto satisfy the requirements of Article 6.3(a)."

3. Article 6.3(c)

(a) Standing as claimant

109. With respect to what interest is necessary for standing as claimants under Article 6.3(c), see paragraph 106 above.

(b) "significant price undercutting"

110. The Panel on Indonesia – Autos stated the following on the use of the term 'significant' in connection with the term "price undercutting" in Article 6.3(c): "Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice."

4. Article 6.7

(a) "imports from the complaining Member" and "exports from the complaining Member"

111. The Panel on Indonesia – Autos addressed the question whether the SCM Agreement allows a Member to bring a claim that another Member has suffered serious prejudice as a result of subsidization. The Panel stated the following:

"It is clear from Article 7.2 that the dispute settlement procedures set forth in Article 7 may only be invoked by a Member where that Member believes that it has itself suffered serious prejudice as a result of subsidization.

Our view on these issues is confirmed by Article 6.7, which allows a subsidizing Member to raise a defence to a displacement/impedance claim where ‘imports from the complaining Member’ or ‘exports from the complaining Member’ are affected by such factors as export prohibitions or restrictions, natural disasters, and arrangements limiting exports. These provisions of Article 6.7 assume that the products subject to a claim of serious prejudice arising from displacement or impedance originate in the complaining Member.\(^\text{177}\)

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

*Article 7*

*Remedies*

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice\(^{19}\) caused to the interests of the Member requesting consultations.

(footnote original)\(^{19}\) In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days\(^{20}\), any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

(footnote original)\(^{20}\) Any time-periods mentioned in this Article may be extended by mutual agreement.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel’s terms of reference.

7.6 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB\(^{21}\) unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

(footnote original)\(^{21}\) If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no

case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.\textsuperscript{22} If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.8

(a) Relationship with other Articles

(i) Article 4.7

112. In the context of its finding that the phrase "withdraw the subsidy" under Article 4.7 referred to retroactive remedies (repayment), the Panel on \textit{Australia – Automotive Leather II (Article 21.5 – US)} considered Article 7.8 and the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" therein. See paragraph 84 above.

2. Article 7.9

113. In the context of determining the meaning of the term "appropriate countermeasures" under Article 4.10 of the SCM Agreement, the Arbitrators in \textit{Brazil – Aircraft (Article 22.6 – Brazil)} referred to Article 7.9 and the phrase "commensurate with the degree and nature of the adverse effects determined to exist". See paragraph 95 above.

PART IV: NON-ACTIONABLE SUBSIDIES

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

\textit{Article 8}

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable:\textsuperscript{23} It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.
(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if: 24, 25, 26

(footnote original) 24 Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

(footnote original) 25 Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

(footnote original) 26 The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

the assistance covers 27 not more than 75 per cent of the costs of industrial research 28 or 50 per cent of the costs of pre-competitive development activity 29, 30.

(footnote original) 27 The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

(footnote original) 28 The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

(footnote original) 29 The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

(footnote original) 30 In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria, indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.34

34 (footnote original) 34 It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.2

(a) Relationship with other Articles

114. With respect to Article 8.3, see paragraph 117.

2. Article 8.3

(a) "notified"

115. At its meeting of 22 February 1995, the Committee on Subsidies and Countervailing Measures adopted a Format for Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures178, to "assist WTO Members in making notifications under the first sentence of Article 8.3".179

178 G/SCM/14.
179 G/SCM/14, para. 1.
AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

(b) "updates of … notifications"

116. At its meeting of 23 October 1997, the Committee on Subsidies and Countervailing Measures adopted a Format for Updates of Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures\(^{180}\), which sets out the information which should be provided for each programme notified under Article 8.3.\(^{181}\)

(c) Relationship with other Articles

(i) Article 8.2

117. Referring to the Format for Notifications under Article 8.3 of the Agreement on Subsidies and Countervailing Measures, issued by the SCM Committee\(^{182}\), the SCM Committee stated that "[w]ith regard to the questions in this standard format on arrangements which may exist for monitoring, auditing and evaluation of assistance under a notified programme, it should be stressed that this standard format does not add to or detract from the relevant legal requirements in Article 8.2 of the SCM Agreement."\(^{183}\)

3. Article 8.5

(a) Procedures for arbitration

118. At its meeting of 2 June 1998, the SCM Committee adopted procedures for arbitration under Article 8.5 "with the aim of facilitating the operation of arbitration proceedings and enhancing transparency and predictability for all Members with respect to the application of Article 8 of the Agreement."\(^{184}\)

IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

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\(^{180}\) G/SCM/13.

\(^{181}\) G/SCM/13, para. 1.

\(^{182}\) G/SCM/14.

\(^{183}\) G/SCM/14, para. 3.

\(^{184}\) Procedures for Arbitration under Article 8.5 of the Agreement on Subsidies and Countervailing Measures, G/SCM/19, para. 1.
9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.

PART V: COUNTERVAILING MEASURES

X. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

Application of Article VI of GATT 1994\(^{35}\)

(footnote original) \(^{35}\) The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

Members shall take all necessary steps to ensure that the imposition of a countervailing duty\(^{36}\) on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated\(^{37}\) and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

(footnote original) \(^{36}\) The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

(footnote original) \(^{37}\) The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

B. INTERPRETATION AND APPLICATION OF ARTICLE 10

1. Footnote 36

(a) "offsetting"

119. Discussing the premise that "no countervailing duty may be imposed absent (countervailable) subsidization"\(^{185}\), the Panel in \textit{US – Lead and Bismuth II} considered that this premise "underlies the very purpose of the countervailing measures envisaged by Part V of the SCM Agreement."\(^{186}\) The

\(^{185}\) Panel Report on \textit{US – Lead and Bismuth II}, para. 6.56.

\(^{186}\) Panel Report on \textit{US – Lead and Bismuth II}, para. 6.56.
Panel continued with the statement that "footnote 36 to Article 10 does not envisage the imposition of countervailing duties when no (countervailable) subsidy is found to exist, for in such cases there would be no (countervailable) subsidy to 'offset'."\(^{187}\)

2. Relationship between Article VI of GATT 1994 and the SCM Agreement

120. In its analysis of the relationship between Article VI of GATT 1994 and the SCM Agreement, the Appellate Body in Brazil – Desiccated Coconut relied primarily on Article 10 and stated that "[f]rom 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."\(^{188}\) In this determination, the Appellate Body relied also on Article 32.1 and 32.3 of the SCM Agreement; see paragraph 185 below for Article 32.1 and paragraphs 191-192 below for Article 32.3 below.

121. For a further discussion on the relationship between Article VI of GATT 1994 and the SCM Agreement, see also paragraphs 200-202 below.

3. Relationship with other Articles

122. With respect to the relationship with Articles 32.1 and 32.3, see paragraph 185.

XI. ARTICLE 11

A. Text of Article 11

Article 11

Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application 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 subsidized 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) evidence with regard to the existence, amount and nature of the subsidy in question;

\(^{187}\) Panel Report on US – Lead and Bismuth II, para. 6.56.
\(^{188}\) Appellate Body Report on Brazil – Desiccated Coconut, p. 15.
(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized 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 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 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 expressed in domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. 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 constitutes 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) 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) 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.

11.5 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.

11.6 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 the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy 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.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 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 subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 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 11**

*No jurisprudence or decision of a competent WTO body.*

**XII. ARTICLE 12**

A. **TEXT OF ARTICLE 12**

*Article 12*

**Evidence**

12.1 Interested Members and all interested parties in a countervailing duty 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.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.\(^{40}\) 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)*\(^{40}\) 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 representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 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 11 to the known exporters\(^{41}\) 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 protection of confidential information, as provided for in paragraph 4.

*(footnote original)*\(^{41}\) It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

12.2 Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 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 the supplier 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.42

(footnote original) 42 Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

12.4.1 The authorities shall require interested Members or 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 Members or 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.

12.4.2 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.43

(footnote original) 43 Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. 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 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or 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.

12.8 The authorities shall, before a final determination is made, inform all interested Members and 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.

12.9 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, and

(ii) 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.

12.10 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 subsidization, injury and causality.

12.11 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.

12.12 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 12

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE 13

A. TEXT OF ARTICLE 13

Article 13

Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.\footnote{It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.}

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

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

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

1. General

(a) "calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1"

(i) "benefit"

123. The Panel on US – Lead and Bismuth II rejected the argument that "benefit" should be determined by reference to the market practice prevailing at the time that each of the four types of "financial contribution" [under Article 1.1] … is bestowed."\textsuperscript{189} Instead, the Panel stated that "[n]othing in the text of Article 14 restricts the analysis envisaged in sub-paragraphs (a)-(d) … to the

\textsuperscript{189} Panel Report on US – Lead and Bismuth II, para. 6.74.
time at which the relevant 'financial contribution' was bestowed. ... Article 14 does not ... guide Members as to when th[e] calculation of 'benefit' should take place.”

2. **Relationship with other Articles**

124. With respect to the relationship with Article 1.1(b), see paragraph 26 above.

**XV. ARTICLE 15**

A. **TEXT OF ARTICLE 15**

*Article 15*

**Determination of Injury**

(footnote original) 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.

15.1 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 subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

(footnote original) 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.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized 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 to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 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.

15.4 The examination of the impact of the subsidized imports on the domestic industry 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 output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between

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190 Panel Report on *US – Lead and Bismuth II*, para. 6.74.
the subsidized 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 subsidized 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 subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, 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.

*(footnote original)* 47 As set forth in paragraphs 2 and 4.

15.6 The effect of the subsidized 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 subsidized 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.

15.7 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 subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) 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

(v) 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 subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

1. Footnote 46

(a) "characteristics closely resembling"

125. In its "like product" analysis under footnote 46, the Panel on *Indonesia – Autos* emphasized the physical characteristics of the compared products and held that in its analysis, the Panel would also be guided by the "like product" analysis contained in the Appellate Body Report in *Korea – Alcoholic Beverages*:
"In our view, the analysis as to which cars have 'characteristics closely resembling' those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term 'characteristics closely resembling' in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion.

Although we are required in this dispute to interpret the term 'like product' in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of 'like product' issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in Alcoholic Beverages (1996) that, in this context as in any other, the issue of 'like product' must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgement regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgement.\(^{191}\)

126. Further in its "like products" analysis under footnote 46, the Panel on Indonesia – Autos rejected the argument that it "must consider all passenger cars to be 'like' because any effort to differentiate between passenger cars with a multitude of differing characteristics would inevitably result in arbitrary divisions".\(^{192}\)

"We are aware that there are innumerable differences among passenger cars and that the identification of appropriate deciding lines between them may not be a simple task. However, this does not in our view justify limping all such products together where the differences among the products are so dramatic. ... We must endeavour to find some reasonable way to assess the relative importance of the various differences in the minds of consumers and to devise some sensible means to categorize passenger cars.\(^{193}\)

127. The Panel on Indonesia – Autos decided that "[o]ne reasonable way ... to approach the 'like product' issue is to look at the manner in which the automotive industry itself has analysed market segmentation."\(^{194}\) The Panel opted for an analysis which "considered the physical characteristics of the cars in question when designing its segmentation"; it considered that "an approach, which

segments the market based on a combination of size and price/market position, [is] a sensible one which is consistent with the criteria relevant to 'like product' analysis under the SCM Agreement.\textsuperscript{195}

128. In \textit{Indonesia – Autos}, Indonesia argued that the low price of its Timor car placed it in a "special market niche" and rendered it unlike other, more expensive, car models. The Panel noted that the complainants in the case before it were claiming that the Indonesian Timor was being sold at undercutting prices as a result of subsidization and rejected the argument by Indonesia:

"We do not preclude that price might be a relevant consideration in performing 'like product' analysis, particularly where differences in price represent one way to assess the relative importance of differing physical characteristics to consumers. In this case, however, the complainants allege that the Timor is being sold at undercutting prices as a result of subsidization. If we were to conclude that the low price of the Timor in the Indonesian market were to render the Timor 'unlike' other models which are similar in physical characteristics to the Timor but priced higher, the result would be that, in cases where the subsidization and resulting price undercutting were sufficiently high, price undercutting claims under Article 6 could never prevail. Thus, we do not consider that the Timor's lower price is a basis to conclude that it is unlike the models alleged by the complainants to be 'like' the Timor."\textsuperscript{196}

129. Considering whether "the difference between a product assembled and unassembled is sufficiently important that the unassembled product does not 'closely resemble' the assembled product\textsuperscript{197}, the Panel on \textit{Indonesia – Autos} stated:

"We do not consider that an unassembled product \textit{ipso facto} is not a like product to that product assembled. Recalling the view of the Appellate Body that tariff classification may be a useful tool in like product analysis [footnote omitted], we note that, under the General Rules for the Interpretation of the Harmonized System:

Any reference in a heading to an article shall be taken to include a reference to that article complete or unfinished, provided that, as presented, the incomplete or unassembled article has the essential character of the complete or unfinished article.

We think that a comparable approach to the relation between assembled and unassembled products makes good sense in the context of this dispute."\textsuperscript{198}

\textbf{XVI. ARTICLE 16}

\textbf{A. TEXT OF ARTICLE 16}

\textit{Article 16}

\textit{Definition of Domestic Industry}

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, 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 when producers are related\textsuperscript{199} to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

(footnote original) 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.

16.2. 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 subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied 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 countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, 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.

16.4 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 paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

B. INTERPRETATION AND APPLICATION ARTICLE 16

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

*Article 17*

_Provisional Measures_

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.
17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

No jurisprudence or decision of a competent WTO body.

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

*Article 18*

*Undertakings*

18.1 Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

- the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
- the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member 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.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization 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 an undertaking. In such cases, the authorities concerned 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
subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 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 governments or exporters do not offer such undertakings, or do not 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 subsidized imports continue.

18.6 Authorities of an importing Member may require any government or 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 18

No jurisprudence or decision of a competent WTO body.

XIX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty.

(footnote original) For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.
19.4 No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

(footnote original) As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

1. Article 19.1

(a) Relationship with other Articles

(i) Article 4.7

130. The Panel on Australia – Automotive Leather II (Article 21.5 – US) relied, inter alia, on Article 19.1 in its finding that the phrase "withdraw the subsidy" under Article 4.7 referred to retroactive remedies (repayment). See paragraph 84 above.

(ii) Other Articles

131. For the relationship with Article 19.4, see paragraphs 132-133 below.

2. Article 19.4

(a) General

132. Referring to the ordinary meaning of Article 19.4, the Panel in US – Lead and Bismuth II stated that "no countervailing duty may be imposed on an imported product if no (countervailable) subsidy is found to exist with respect to that imported product, since in such cases the amount of subsidy found to exist with respect to the imported product would be zero. Thus, like Article 19.1, Article 19.4 … establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."

133. The Panel in US – Lead and Bismuth II concluded that "consistent with the fundamental premise underlying Articles 19.1, 19.4, and 21.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, and consistent with the object and purpose of countervailing duties envisaged by Part V of the SCM Agreement, we consider that a countervailing duty may only be imposed on an imported product if it is demonstrated that a (countervailable) subsidy was bestowed directly or indirectly on the manufacture, production or export of that merchandise."

(b) Relationship with other Articles

134. With respect to the relationship with Article 19.1, see paragraphs 132-133 above.

135. With respect to the relationship with Article 21.1, see paragraph 133 above.

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199 Panel Report on US – Lead and Bismuth II, para. 6.52.
XX. **ARTICLE 20**

A. **TEXT OF ARTICLE 20**

**Article 20**

*Retroactivity*

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 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 subsidized imports would, in the absence of the provisional measures, have lead to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing 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.

20.5 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.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 20**

No jurisprudence or decision of a competent WTO body.

XXI. **ARTICLE 21**

A. **TEXT OF ARTICLE 21**

**Article 21**

*Duration and Review of Countervailing Duties and Undertakings*

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 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 countervailing duty, upon request by any interested party which submits positive information
substaining the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, 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 countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing 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 subsidization 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 subsidization and injury.\(^{52}\) The duty may remain in force pending the outcome of such a review.

\((\text{footnote original} )\)\(^{52}\) When the amount of the countervailing duty is assessed 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.

21.4 The provisions of Article 12 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.

21.5 The provisions of this Article shall apply \emph{mutatis mutandis} to undertakings accepted under Article 18.

B. \textbf{INTERPRETATION AND APPLICATION OF ARTICLE 21}

1. \textbf{Article 21.1}

(a) Relationship with other Articles

136. With respect to the relationship with Article 19.4, see paragraph 133 above.

2. \textbf{Article 21.2}

(a) General

137. In \emph{Brazil – Desiccated Coconut}, the Panel found that, if the \emph{SCM Agreement} is not applicable, the imposition of a countervailing duty is not covered by Article VI of the GATT 1994. However, the Panel opined that even measures to which the \emph{WTO Agreement} is not "immediately applicable" will fall under the \emph{SCM Agreement} through reviews pursuant to Article 21.2:

"We recognize that these provisions regarding review are not comparable in effect to the immediate application of the WTO Agreement to all countervailing measures. The effect of reviews regarding the continued need for imposition of countervailing measures will likely be prospective and, depending on the date of imposition of the measure and the circumstances subsequent to its imposition, the exporting country Member may or may not be entitled to an immediate review. Nevertheless, it is clear from this provision that measures to which the WTO Agreement is not immediately applicable will nevertheless be brought under WTO disciplines over time pursuant to reviews under Article 21.2 of the SCM Agreement.\(^{201}\)

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\(^{201}\) Panel Report on \emph{Brazil – Desiccated Coconut}, para. 277.
AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

(b) "necessary to offset subsidization"

138. The Appellate Body in US – Lead and Bismuth II agreed with the panel that "while an investigating authority may presume, in the context of an administrative review under Article 21.1, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution', this presumption can never be 'irrebuttable'."

139. The Appellate Body in US – Lead and Bismuth II rejected the panel's implied view that "in the context of an administrative review under Article 21.2, an investigating authority must always establish the existence of a 'benefit' during the period of review in the same way as an investigating authority must establish a 'benefit' in an original investigation". The Appellate Body stated:

"We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that all conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination."

XXII. ARTICLE 22

A. TEXT OF ARTICLE 22

*Article 22*

*Public Notice and Explanation of Determinations*

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, 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.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

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203 Appellate Body Report on US – Lead and Bismuth II, para. 63 With respect to the issue whether a national authority must conduct an investigation on its own initiative or whether it can limit its investigation to issues raised by the interested parties themselves, see the Chapter on the Safeguards Agreement, paras. 50-52.
(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 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 18, of the termination of such an undertaking, and of the termination of a definitive countervailing 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.

22.4 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 the existence of a subsidy 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 amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 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 an 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 an 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 paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

No jurisprudence or decision of a competent WTO body.
XXIII. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty 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 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

B. INTERPRETATION AND APPLICATION OF ARTICLE 23

No jurisprudence or decision of a competent WTO body.

PART VI: INSTITUTIONS

XXIV. ARTICLE 24

A. TEXT OF ARTICLE 24

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures 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 matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 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.
B. **Interpretation and Application of Article 24**

1. **Rules of procedures**

140. At its meeting of 22 May 1996, the Council for Trade in Goods approved the rules of procedure for the SCM Committee.**204**

2. **Meetings**

141. The SCM Committee reports to the Council for Trade in Goods on an annual basis.**205**

**PART VII: NOTIFICATION AND SURVEILLANCE**

**XXV. ARTICLE 25**

**A. Text of Article 25**

*Article 25*

**Notifications**

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies**54**, Members shall ensure that their notifications contain the following information:

(footnote original) **54** The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

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**footnote original** 54 The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

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

205 The reports are contained in documents G/L/31, 31/Corr.1, 126, 201, 267, 341, 341/Corr.1, 408.
25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

1. General

(a) Questionnaire format for subsidy notifications

142. At its meeting of 21 July 1995, the SCM Committee adopted a Questionnaire Format for Subsidy Notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994, which consists of general rules relating to the notifications and information to be provided in the notifications.

2. Article 25.7

143. The Panel on Canada – Aircraft rejected the argument made by Brazil that assistance under the Canada-Quebec Subsidiary Agreements on Industrial Development (agreements pledging support by the Government of Canada to industrial projects in Quebec) could conceivably be provided in the form of non-repayable contributions. In making this assertion, Brazil was relying on the notification by Canada of these subsidiary agreements to the SCM Committee, made pursuant to Article 25.2 of the SCM Agreement; the Panel held that the mere notification by Canada of the programme under

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206 G/SCM/6.
these subsidiary agreements was an insufficient basis for a finding of a *prima facie* case that subsidiary agreement assistance was provided in the form of non-repayable contributions.\(^{208}\)

3. **Article 25.11**

(a) "shall report … all preliminary or final actions"

144. At its meeting of 13 June 1995, the SCM Committee adopted the requirements for the minimum information to be provided under Article 25.11 of the Agreement in the reports on all preliminary or final countervailing actions.\(^{209}\)

(b) "semi-annual reports"

145. At its meeting of 13 June 1995, the SCM Committee issued guidelines for information to be provided in the semi-annual reports.\(^{210}\)

4. **Relationship with other Articles**

(a) Article 27.4

146. In the *Brazil – Aircraft* dispute, Brazil argued that when determining whether a developing country Member has increased the level of its export subsidies within the meaning of Article 27.4 of the *SCM Agreement*, the Panel or the Appellate Body should consider the Member's budgetary appropriations rather than actual expenditures. In making this argument, Brazil was relying on Article 25 of the *SCM Agreement*, which provides that notifications shall contain the "subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy ..." The Appellate Body in *Brazil – Aircraft* considered Article 25 to be "considerably less useful as context in interpreting the phrase 'the level of its export subsidies' in Article 27.4."\(^{211}\) It noted that "Article 25 has a fundamentally different purpose from Article 27 of the *SCM Agreement*. Whereas Article 25 aims to promote transparency by requiring Members to notify their subsidies, without prejudging the legal status of those subsidies, Article 27 imposes positive obligations on developing country Members with respect to export subsidies."\(^{212}\)

**XXVI. ARTICLE 26**

A. **TEXT OF ARTICLE 26**

*Article 26*

_Surveillance_

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

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\(^{208}\) Panel Report on *Canada – Aircraft*, para. 9.256.
\(^{209}\) G/SCM/3.
\(^{210}\) G/SCM/2.
\(^{211}\) Appellate Body Report on *Brazil – Aircraft*, para. 149.
\(^{212}\) Appellate Body Report on *Brazil – Aircraft*, para. 149.
AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

B. INTERPRETATION AND APPLICATION OF ARTICLE 26

No jurisprudence or decision of a competent WTO body.

PART VIII: DEVELOPING COUNTRY MEMBERS

XXVII. ARTICLE 27

A. TEXT OF ARTICLE 27

**Article 27**

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

(footnote original)  

For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as...
a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unlessnullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of de minimis under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 27**

1. **Article 27.2**

(a) "subject to compliance with the provisions in paragraph 4"

147. The Panel on Brazil – Aircraft rejected the argument that "Article 27 is *lex specialis* to Article 3, in that it provides special rules with regard to export subsidy programmes of developing country Members" and therefore the specific provisions in Article 27 "displace the general provisions of Article 3.1(a)." Referring to the ordinary meaning of Article 27.2, the Panel stated the following:

"It is evident to us from this language that Article 27 does not 'displace' Article 3.1(a) of the SCM Agreement unconditionally … . Rather, the prohibition of Article 3.1(a) shall not apply 'subject to compliance with the provisions of paragraph 4'. The exemption for developing country Members other than those referred to in Annex VII from the application of the Article 3.1(a) prohibition on export subsidies is clearly conditional on compliance with the provision in paragraph 4 of Article 27. Thus, we consider that, where the provisions in Article 27.4 have not been complied with, the Article 3.1(a) prohibition applies to such developing country Members."

148. The Panel on Brazil – Aircraft was called upon to decide the allocation of the burden of proof for claims under Article 27.4 of the SCM Agreement. In doing so, the Panel referred to Article 27.7 as context for Article 27.2(b):

"The phrase 'subject to compliance with the provisions in paragraph 4' contained in Article 27.2(b) can, in our view, be seen as analogous to the phrase 'which are in conformity with paragraphs 2 through 5' contained in Article 27.7. This supports an interpretation of Article 27.2(b) that developing country Members are excluded from the scope of application of the substantive obligation in question provided that they comply with certain specified conditions."

149. With respect to the issue of burden of proof under Article 27.4, see paragraphs 171 and 172 below.

(b) **Relationship with other Articles**

(i) **Articles 27.3**

150. In determining the burden of proof for Article 27.4, the Panel on Brazil – Aircraft referred to Article 27.2(b) in the context of Article 27.3. Specifically, it stated:

"As [context] for Article 27.2(b), [Article 27.3] supports the view that the relevant provisions of Article 27, which extend 'special and differential treatment to developing countries', serve to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of certain substantive obligations found elsewhere in the Agreement for specified periods of time. …"

(ii) **Other Articles**

151. With respect to the relationship with Article 3.1(a), see paragraph 147 above.

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214 Panel Report on Brazil – Aircraft, para. 7.40.
215 Panel Report on Brazil – Aircraft, para. 7.52.
216 Panel Report on Brazil – Aircraft, para. 7.53.
With respect to the relationship with Article 27.4, see paragraphs 147 and 148 above.

With respect to the relationship with Article 27.7, see paragraph 148 above.

2. Article 27.3

(a) General

The Panel on Indonesia – Autos rejected the argument that "the obligations contained in Article III:2 of GATT and the SCM Agreement are mutually exclusive" because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT." The Panel stated:

"Assuming that such 'explicit authorization' is the correct conflict test in the WTO context, we find that, whether or not the SCM Agreement is considered generally to 'authorize' Members to provide actionable subsidies so long as they do not cause adverse effects to the interests of another member, the SCM Agreement clearly does not authorize Members to impose discriminatory product taxes. Nor does a focus on Article 27.3 suggest a different approach. Whether or not Article 27.3 of the SCM Agreement can be reasonably interpreted to 'authorize', explicitly or implicitly, the provision of subsidies contingent on the use of domestic over imported goods (an issue we do not here decide), Article 27.3 is unrelated to, and cannot reasonably be considered to 'authorize', the imposition of discriminatory product taxes."

(b) Relationship with other Articles

With respect to the relationship with Article 27.2(b), see paragraph 150 above.

(c) Relationship with other WTO Agreements

With respect to the relationship with Article III:2 of the GATT 1994, see paragraph 154 above.

3. Article 27.4

(a) "shall phase out its export subsidies"

The Panel on Brazil – Aircraft was faced with interpreting what it termed the "internal contradiction within the text of Article 27.4", created, on the one hand, by "the mandatory language providing that a developing country Member 'shall phase out its export subsidies'" and, on the other, by "the hortatory language in the final clause encouraging Members to perform their phase-out in a progressive manner."

The Panel ultimately found that it was not necessary to resolve this issue. It held that the wording of Article 27.4 of the SCM Agreement does not specify in how many phases the elimination of subsidies should be carried out, what the time-period between these phased reductions should be, and how these phased reductions should be distributed within the eight-year period (the transition period granted to developing country Members). The Panel then found that it could not "conclude on the basis of Brazil's actions in the first four years since the date of entry into force of the

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220 Panel Report on Brazil – Aircraft, para. 7.79.
221 Panel Report on Brazil – Aircraft, para. 7.79.
WTO Agreement that Brazil has failed to comply with the phase-out requirement of Article 27.4 by reason of a failure to undertake phased reductions within the eight-year transition period." 222

158. In the same context as in the preceding paragraph, the Panel on Brazil – Aircraft stated that "we do not consider that the absence of a termination date for PROEX [as of the date of the circulation of the Report, i.e. April 1999] demonstrates that Brazil is not in compliance with its obligation to eliminate its export subsidies by the end of the eight-year period." 223

159. Instead, however, the Panel on Brazil – Aircraft determined that "[b]ecause, under the PROEX interest rate equalization scheme, bonds relating to an export transaction are not issued until it has been confirmed that an export transaction will in fact occur, this strongly suggests that Brazil will continue to issue bonds – and hence to grant new subsidies – after 31 December 2002." 224 The Panel regarded this as "sufficient to show, in advance, that Brazil has not complied with the condition of Article 27.4 that it 'phase out its export subsidies within the eight-year period.'" 225

(b) "a developing country Member shall not increase the level of its export subsidies"

(i) "Granting" of subsidies for the purposes of Article 27.4

160. In considering at what point in time payments can be considered "granted" for the purposes of Article 27.4, the Panel on Brazil – Aircraft had first found that the subsidy under the Brazilian PROEX programme does not take the form of a "potential direct transfer of funds" (the issuance of the letter of commitment), but rather the form of a "direct transfer of funds" when a payment is made or will be made. 226 The Panel then addressed the issue of when the grant of the subsidy by the Brazilian Government occurs; it held that the right to receive the PROEX payments only arises after the conditions relating to receipt of PROEX payments, and specifically the condition that the product in question actually be exported, has been fulfilled. 227 The Appellate Body first criticized the Panel for addressing the first issue:

"The issue in this case is when the subsidies for regional aircraft under PROEX should be considered to have been 'granted' for the purposes of calculating the level of Brazil's export subsidies under Article 27.4 of the SCM Agreement. The issue is not whether or when there is a 'financial contribution', or whether or when the 'subsidy' 'exists', within the meaning of Article 1.1 of that Agreement.

... [W]e see the issue of the existence of a subsidy and the issue of the point at which that subsidy is granted as two legally distinct issues." 228

161. The Appellate Body in Brazil – Aircraft then proceeded to agree with the findings of the Panel on the precise moment of the grant of subsidy under the PROEX programme:

"We agree with the Panel that 'PROEX payments may be 'granted' where the unconditional legal right of the beneficiary to receive the payments has arisen, even if the payments themselves have not yet occurred.' We also agree with the Panel that the export subsidies for regional aircraft under PROEX have not yet been 'granted' when

222 Panel Report on Brazil – Aircraft, para. 7.81.
223 Panel Report on Brazil – Aircraft, para. 7.82.
224 Panel Report on Brazil – Aircraft, para. 7.84.
225 Panel Report on Brazil – Aircraft, para. 7.85.
226 Panel Report on Brazil – Aircraft, para. 7.70.
227 Panel Report on Brazil – Aircraft, para. 7.71.
228 Appellate Body Report on Brazil – Aircraft, paras. 154-156.
the letter of commitment is issued, because, at that point, the export sales contract has not yet been concluded and the export shipments have not yet occurred. For the purposes of Article 27.4, we conclude that the export subsidies for regional aircraft under PROEX are 'granted' when all the legal conditions have been fulfilled that entitle the beneficiary to receive the subsidies.\textsuperscript{229}

162. For the relationship between the meaning of the word "grant" in Article 27.4 and Article 3.2 and the distinction between the existence of a subsidy and the moment of its "granting", see paragraphs 63-65 above.

(ii) \textit{Constant or nominal values}

163. In assessing whether a developing country Member's level of export subsidies has increased, the Panel on \textit{Brazil – Aircraft} used constant dollars instead of nominal dollars. The Panel considered it "appropriate in this case to use constant dollars, as that will provide a more meaningful assessment"\textsuperscript{230} and noted that in this case, "the conclusion with respect to this issue would be the same whether constant or nominal dollars are used."\textsuperscript{231} The Appellate Body in \textit{Brazil – Aircraft} agreed with the Panel's decision and noted that the Panel "did not make a legal finding that the level of a developing country Member's export subsidies must be measured, in every case, using a constant value. The Panel simply made a pragmatic observation that using constant dollars is appropriate \textit{in this case}."\textsuperscript{232} The Appellate Body also stated that "[m]oreover, in our view, to take no account of inflation in assessing the level of export subsidies granted by a developing country Member would render the special and differential treatment provision of Article 27 meaningless."

(iii) \textit{Benchmark period}

164. In \textit{Brazil – Aircraft}, the parties disagreed "as to the benchmark period against which an examination as to whether a Member has increased the level of its export subsidies should be made."\textsuperscript{234} Referring to footnote 55 of Article 27.4, the Panel stated:

"[Footnote 55] offers for such Members a ceiling level of export subsidies based on their 1986 level. Implicit in this explanation is that, absent footnote 55, a developing country Member which granted no export subsidies \textit{as of the date of entry into force of the WTO Agreement} would be prohibited from providing any export subsidies during the eight-year transition period. Thus, footnote 55 indicates that the relevant benchmark period against which the obligation not to increase the level of export subsidies should be measured is a period immediately preceding the date of entry into force of the WTO Agreement."\textsuperscript{235}

(iv) \textit{Actual expenditures or budgeted amounts}

165. Considering whether actual expenditures or budgeted amounts should be used when examining the level of export subsidies, the Panel on \textit{Brazil – Aircraft} found that "the level of a Member's export subsidies in its ordinary meaning refers to the level of subsidies actually provided,

\textsuperscript{229} Appellate Body Report on \textit{Brazil – Aircraft}, para. 158.
\textsuperscript{230} Panel Report on \textit{Brazil – Aircraft}, para. 7.73.
\textsuperscript{231} Panel Report on \textit{Brazil – Aircraft}, para. 7.73.
\textsuperscript{232} Appellate Body Report on \textit{Brazil – Aircraft}, para. 162.
\textsuperscript{233} Appellate Body Report on \textit{Brazil – Aircraft}, para. 163.
\textsuperscript{234} Panel Report on \textit{Brazil – Aircraft}, para. 7.61.
\textsuperscript{235} Panel Report on \textit{Brazil – Aircraft}, para. 7.62.
not the level of subsidies which a Member planned or authorized its government to provide through its budgetary process."\(^{236}\) The Panel continued as follows:

"This reading is in our view confirmed by footnote 55 . . . . The verb 'grant' has been defined to mean, \textit{inter alia}, 'to bestow by a formal act' and 'give, bestow, confer'. Thus, the verb 'grant' in its ordinary meaning implies the actual provision of a subsidy, not its mere budgeting."\(^{237}\)

166. In its finding that actual expenditures rather than the budgeted amounts should be used when examining whether a developing country Member has increased the level of its subsidies within the meaning of Article 27.4, the Panel on \textit{Brazil – Aircraft} added that "an expenditure-based measurement is consistent with the object and purpose of the SCM Agreement, which is to reduce economic distortions caused by subsidies."\(^{238}\) The Appellate Body in \textit{Brazil – Aircraft} agreed with the Panel's reasoning on the use of actual expenditures rather than the budgeted amounts when examining the level of subsidies of a developing country Member under Article 27.4 and stated:

"To us, the word 'granted' used in this context means 'something actually provided'. Thus, to determine the amount of export subsidies 'granted' in a particular year, we believe that the actual amounts \textit{provided} by a government, and not just those \textit{authorized} or \textit{appropriated} in its budget for that year, is the proper measure. A government does not always spend the entire amount appropriated in its annual budget for a designated purpose. Therefore, in this case, to determine the level of export subsidies for the purposes of Article 27.4, we believe that the proper reference is to actual expenditures by a government, and not to budgetary appropriations."\(^{239}\)

(c) Footnote 55

167. With respect to footnote 55, see paragraphs 164-165 above.

(d) "use of subsidies inconsistent with its development needs"

168. Noting the difficulties for a panel to determine whether export subsidies are inconsistent with a developing country Member's development needs, the Panel on \textit{Brazil – Aircraft} considered that "it is the developing country Member itself which is best positioned to identify its development needs and to assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country Member in question."\(^{240}\)

169. The Panel on \textit{Brazil – Aircraft} considered that the burden is on the claiming party to demonstrate that, because the developing country Member "has not complied with the conditions set forth in Article 27.4, the Article 3.1(a) prohibition on export subsidies applies to [the developing country Member]."\(^{241}\) The Panel concluded that "in order to prevail on this issue Canada must present evidence and argument sufficient to raise a presumption that the use of export subsidies by Brazil is inconsistent with Brazil's development needs."\(^{242}\)

\(^{236}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.65.
\(^{237}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.65.
\(^{238}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.66.
\(^{239}\) Appellate Body Report on \textit{Brazil – Aircraft}, para. 148.
\(^{240}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.89.
\(^{241}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.90.
\(^{242}\) Panel Report on \textit{Brazil – Aircraft}, para. 7.90.
170. In *Brazil – Aircraft*, Canada argued that the Brazilian PROEX programme was inconsistent with Brazil's development needs, because the Brazilian value-added of the aircraft, according to Canada, was "relatively low". The Panel was unconvinced by this argument:

"In our view, the fact that Brazil has a generally applicable rule regarding the relationship between the domestic content of an exported product and the extent of the PROEX interest rate equalization available with respect to that product does not mean that the deviation from that rule in a particular case is necessarily inconsistent with a developing country Member's development needs. Nor do we see any basis to conclude that PROEX payments on regional aircraft are necessarily inconsistent with Brazil's development needs merely because the Brazilian value-added of the aircraft being exported is relatively low. There could be any number of reasons why the provision of export subsidies might be consistent with a Member's development needs in such a case."243

(e) Burden of proof

171. In *Brazil – Aircraft*, the Panel and the Appellate Body were called upon to address the issue of allocation of the burden of proof under Article 27.4. More specifically, the question was raised as to who bore the burden of proof with respect to the conditions contained in Article 27.4, conditions which determine whether Article 3.1(a) applies to a developing country Member. The Panel opined that the fundamental issue in this respect was "whether the prohibition in Article 3.1(a) of the SCM Agreement applies to the developing country Member in question, rather than whether the developing country Member, having been found to be subject to the substantive obligations of Article 3.1(a), and having been found to have acted inconsistently with these obligations, can find justifying protection by invoking Article 27.2(b) in conjunction with Article 27.4."244 Based on this reasoning, the Panel then found that the burden of proof under Article 27.4 is on the complaining Member, in this case Canada. The Appellate Body upheld this finding of the Panel, emphasizing that the fundamental issue was whether Article 3.1(a) was applicable to the developing country Member in question:

"With respect to the application of the prohibition of export subsidies in Article 3.1(a) of the SCM Agreement, paragraphs 2 and 4 of Article 27 contain a carefully negotiated balance of rights and obligations for developing country Members. During the transitional period ... certain developing country Members are entitled to the non-application of Article 3.1(a), provided that they comply with the specific obligation set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply does not apply to that developing country Member."245

172. The Panel on *Brazil – Aircraft* had opined that until non-compliance with the conditions set out in Article 27.4 is demonstrated, there is also, on the part of a developing country Member within the meaning of Article 27.2(b), no inconsistency with Article 3.1(a). The Panel therefore concluded that "it is for the Member alleging a violation of Article 3.1(a) of the SCM Agreement to demonstrate that the substantive obligation in that provision – the prohibition on export subsidies – applies to the

243 Panel Report on *Brazil – Aircraft*, para. 7.92.
244 Panel Report on *Brazil – Aircraft*, para. 7.56.
245 Appellate Body Report on *Brazil – Aircraft*, para. 139.
developing country Member complained against.\textsuperscript{246} The Appellate Body agreed with these conclusions:

"Both from its title and from its terms, it is clear that Article 27 is intended to provide special and differential treatment for developing country Members, under specified conditions. In our view, too, paragraph 4 of Article 27 provides certain obligations that developing country Members must fulfill if they are to benefit from this special and differential treatment during the transitional period. On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are positive obligations for developing country Members, not affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does not comply with those obligations, Article 3.1(a) does apply.

For these reasons, we agree with the Panel that the burden is on the complaining party (\textit{in casu} Canada) to demonstrate that the developing country Member (\textit{in casu} Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) apply to that developing country Member.\textsuperscript{247}

(f) Relationship with other Articles

173. With respect to the relationship with Article 3.1(a), see paragraph 171 above.

174. With respect to the relationship with Article 3.2, see paragraphs 63-65 above.

175. With respect to the relationship with Article 25, see paragraph 146 above.

176. With respect to the relationship with Article 27.2(b), see paragraphs 171-172 above.

4. Article 27.7

(a) Relationship with other Articles

177. With respect to the relationship with Article 27.2(b), see paragraph 148 above.

5. Article 27.8

(a) "in accordance with the provisions of paragraphs 3 through 8 of Article 6"

178. The Panel on \textit{Indonesia – Autos} stated that while a complaining party is, pursuant to Article 27.8, deprived of the rebuttable presumption of serious prejudice under Article 6.1(a) when trying to prove serious prejudice by virtue of a subsidy granted to a developing country Member, Article 27.8 does not establish a legal standard for making a prima facie case higher than that normally applicable under Article 6:

"We do not agree, however, that the complainants bear a heavier than usual burden of proof in this dispute or that the concept of 'like product' should be interpreted more narrowly than usual because Indonesia is a developing country Member. … [B]ecause Indonesia is a developing country Member, Article 27.8 requires

\textsuperscript{246} Panel Report on \textit{Brazil – Aircraft}, para. 7.57.

\textsuperscript{247} Appellate Body Report on \textit{Brazil – Aircraft}, paras. 140-141.
complainants to demonstrate serious prejudice by positive evidence 'in accordance with the provisions of paragraphs 3 through 8 of Article 6' rather than taking advantage of the rebuttable presumption of serious prejudice that otherwise would have applied under Article 6.1(a). Article 27 does not, however, impose a higher burden of proof on complainants than that normally applicable under Article 6, nor does it provide that the term 'like product' is to be defined differently in the case of subsidization provided by a developing country Member.\footnote{Panel Report on Indonesia – Autos, para. 14.167.}

6. 

**Article 27.9**

179. The Panel on Indonesia – Autos described the provision in Article 27.9 as follows:

"Article 27.9 provides that, in the usual case, developing country Members may not be subject to a claim that their actionable subsidies have caused serious prejudice to the interests of another Member. Rather, a Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member's subsidies or that subsidized imports into the complaining Member have caused injury to a domestic industry."\footnote{Panel Report on Indonesia – Autos, para. 14.156.} (emphasis in original)

7. 

**Article 27.11**

(a) "notified"

180. At its meeting of 22 February 1995, the SCM Committee adopted a Format for Notifications under Article 27.11 of the Agreement on Subsidies and Countervailing Measures, which sets out the information to be provided in the notification.\footnote{Format for Notifications under Article 27.11 of the Agreement on Subsidies and Countervailing Measures, G/SCM/16.}

8. 

**Article 27.13**

(a) "notified"

181. At its meeting of 22 February 1995, the SCM Committee adopted a Format for Notifications under Article 27.13 of the Agreement on Subsidies and Countervailing Measures, which sets out the information and documents to be provided in the notification.\footnote{Format for Notifications under Article 27.13 of the Agreement on Subsidies and Countervailing Measures, G/SCM/15.}

**PART IX: TRANSITIONAL ARRANGEMENTS**

**XXVIII. ARTICLE 28**

A. **TEXT OF ARTICLE 28**

**Article 28**

*Existing Programmes*

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:
(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

B. INTERPRETATION AND APPLICATION OF ARTICLE 28

1. Article 28.1

(a) "inconsistent with the provisions of this Agreement"

182. The Panel on Indonesia – Autos addressed the question of whether Indonesia had extended the scope of a subsidy programme which was "inconsistent" with the provisions of the SCM Agreement, contrary to the prohibition contained in Article 28.2. Under Article 27.3, the prohibition of Article 3.1(b) was not applicable to Indonesia at the time of the dispute; therefore, the Indonesian programme did not violate the SCM Agreement. Nevertheless, the United States argued that the term "inconsistent" under Article 28.1 was to be understood as distinct from the concept of "prohibited"; more specifically, the United States argued that a subsidy programme could be inconsistent with the provisions of the SCM Agreement, regardless of the applicability of Article 3 in a particular case. The Panel rejected this argument:

"In the SCM Agreement … the drafters have chosen to express the concept of subsidies meeting the substantive conditions of Article 3 by referring to subsidies 'falling under the provisions of Article 3' (See Article 2.3). If they had intended to express the same concept in Article 28, they could have used comparable language."

XXIX. ARTICLE 29

A. TEXT OF ARTICLE 29

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 29

No jurisprudence or decision of a competent WTO body.

PART X: DISPUTE SETTLEMENT

XXX. ARTICLE 30

A. TEXT OF ARTICLE 30

Article 30

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.253

B. INTERPRETATION AND APPLICATION OF ARTICLE 30

183. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the SCM Agreement were invoked:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Case Number</th>
<th>Invoked Articles</th>
</tr>
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<tbody>
<tr>
<td>1 US – Lead and Bismuth II</td>
<td>WT/DS138</td>
<td>Articles 1 and 27.13</td>
</tr>
<tr>
<td>2 Australia – Automotive Leather II</td>
<td>WT/DS126</td>
<td>Article 3.1(a)</td>
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<td>3 US – FSC</td>
<td>WT/DS108</td>
<td>Articles 3.1(b)</td>
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<td>4 Canada – Aircraft</td>
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<td>5 Brazil – Aircraft</td>
<td>WT/DS46</td>
<td>Articles 3, 27.4 and 27.5</td>
</tr>
<tr>
<td>6 Indonesia – Autos</td>
<td>WT/DS54</td>
<td>Articles 1, 2, 6.3(a), 6.3(c), 27.3 and 28.2</td>
</tr>
<tr>
<td>7 Brazil – Desiccated Coconut</td>
<td>WT/DS22</td>
<td>Article 32.3</td>
</tr>
</tbody>
</table>

184. In US – Lead and Bismuth II, the United States claimed that under the SCM Agreement, the standards of review as set forth in Article 17.6 of the Anti-Dumping Agreement applied by virtue of a Ministerial Declaration which states that "[t]he 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." Both the Panel and the Appellate Body rejected the United States’ argument.254 The Appellate Body opined that the

253 In Marrakesh, the Ministerial Conference adopted a 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 XXXIV.

Declaration is couched in hortatory language and does not specify any particular action to be taken or any particular standards of review to be applied. In its finding, the Appellate Body noted the provisions of Article 30 and concluded that the *SCM Agreement* does not "contain any 'special or additional rules' on the standard of review to be applied by panels."\(^{255}\)

**PART XI: FINAL PROVISIONS**

XXXI. **ARTICLE 31**

A. **TEXT OF ARTICLE 31**

*Article 31*

*Provisional Application*

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 31**

*No jurisprudence or decision of a competent WTO body.*

XXXII. **ARTICLE 32**

A. **TEXT OF ARTICLE 32**

*Article 32*

*Other Final Provisions*

32.1 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.\(^{56}\)

(footnote original) \(^{56}\) This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, 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.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing 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 at that date already included a clause of the type provided for in that paragraph.

32.5 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 to the Member in question.

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\(^{255}\) Appellate Body Report on *US – Lead and Bismuth II*, para. 45. See also para. 210 of this Chapter.
32.6 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.

32.7 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.

32.8 The Annexes to this Agreement constitute an integral part thereof.

B. INTERPRETATION AND APPLICATION OF ARTICLE 32

1. Article 32.1

(a) "except in accordance with the provisions of GATT 1994, as interpreted by this Agreement"

185. The Panel on Brazil – Desiccated Coconut considered the relevance of Article 32.1 to the question of separability of Article VI of GATT 1994 and the SCM Agreement. The Panel emphasized that Article 32.1 makes evident that the SCM Agreement is an "interpretation" of the subsidies provisions contained in the GATT 1994. The Panel concluded that, as a result, the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement, since Article VI of GATT 1994 "might have a different meaning if read in isolation than if read in conjunction with the SCM Agreement". In addition, the Panel pointed out that the general interpretive note to Annex 1A of the WTO Agreement reveals the possibility of conflict between GATT 1994 and the annexed agreements and that, therefore, there could also be conflicts "between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an [annexed] agreement." The Appellate Body agreed with the findings of the Panel but took a slightly different approach in that it focused on the phrase "in accordance with the provisions of GATT 1994, as interpreted by this Agreement"

"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 …" 258

186. With respect to Article 32.3 and the term "this Agreement", see also paragraph 192 below.

187. With respect to the discussion on the applicability of Article VI of GATT 1994 in circumstances where the SCM Agreement does not apply, see also paragraphs 200-202 below.

(b) Relationship with other Articles

188. With respect to the relationship with Article 10, see paragraph 185 above.

189. With respect to the relationship with Article 32.3, see paragraph 192 below.

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256 See Sections XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL and XLI.
2. Article 32.3

(a) Transitional rule

190. The Panel on *Brazil – Desiccated Coconut* described Article 32.3 as "a transition rule which defines with precision the temporal application of the SCM Agreement." Addressing this temporal application of the SCM Agreement, the Appellate Body in *Brazil – Desiccated Coconut* examined Article 32.3 as "an express statement of intention" referred to in Article 28 of the Vienna Convention, concerning the non-retroactivity of treaties. The Appellate Body stated:

"The Appellate Body sees Article 32.3 of the SCM Agreement as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or review. … the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new WTO Agreement to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a link had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the WTO Agreement came into effect."

191. While discussing Article 32.3 with reference to the issue of separability of Article VI of *GATT 1994* and the SCM Agreement, the Appellate Body in *Brazil – Desiccated Coconut* agreed that the transitional decisions approved by the Tokyo Round Subsidies and Countervailing Measures Committee and the CONTRACTING PARTIES "do not modify the scope of rights and obligations under the WTO Agreement". Rather, the Appellate Body held these decisions "contribute to understanding the significance of Article 32.3 of the SCM Agreement as a transitional rule":

"Like the Panel, 'we are hesitant, in interpreting the WTO Agreement, to give great weight to the effect of decisions that had not yet been taken at the time the WTO Agreement was signed'. We agree with the Panel's statement that:

'The availability of Article VI of GATT 1994 as applicable law in this dispute is a matter to be determined on the basis of the WTO Agreement, rather than on the basis of a subsequent decision by the signatories of the Tokyo Round SCM Code taken at the invitation of the Preparatory Committee."

While we agree with the Panel that these transitional decisions are of limited relevance in determining whether Article VI of the GATT 1994 can be applied independently of the SCM Agreement, they reflect the intention of the Tokyo Round SCM Code signatories to provide a forum for dispute settlement arising out of disputes under the Tokyo Round SCM Code for one year after its legal termination date. At the time the Tokyo Round SCM Code signatories agreed to these decisions,

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259 Panel Report on *Brazil – Desiccated Coconut*, para. 228.
they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement.*\(^\text{264}\)

(b) "this Agreement"

192. After a contextual analysis of Article 32.3 the Appellate Body in *Brazil – Desiccated Coconut* concluded 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 Agreement and Article VI of the GATT 1994'\(^\text{265}\).

193. With respect to further discussion on the applicability of Article VI of GATT 1994 in circumstances where, pursuant to Article 32.3, the *SCM Agreement* does not apply, see paragraph 200 below.

(c) "investigations"

194. The Panel on *Brazil – Desiccated Coconut,* in a finding subsequently not addressed by the Appellate Body, rejected the argument that the reference in Article 32.3 to "investigations" limits the application of the *SCM Agreement* to the "procedural" aspects of investigations. Rather, the Panel concluded that "the concept of 'investigations' as expressed in Article 32.3 includes both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto.\(^\text{266}\) The Panel also held that "one object and purpose of Article 32.3 is to prevent WTO Members from having to redo investigations begun before the entry into force of the WTO Agreement in accordance with the new and more detailed procedural provisions of the SCM Agreement. In our view, however, this consideration is equally applicable to the substantive provisions of the SCM Agreement.\(^\text{267}\)

(d) "reviews of existing measures"

195. The Panel on *Brazil – Desiccated Coconut,* in a finding subsequently not addressed by the Appellate Body, rejected the argument that Article 32.3 does not preclude the application of the *SCM Agreement* to the continued collection of duties after the date of entry into force of the WTO Agreement. It stated:

"It is thus through the mechanism of reviews provided for in the SCM Agreement, 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. If … a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if … that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply -- and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist -- at the time the determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity.\(^\text{268}\)"


\(^{265}\) Appellate Body Report on *Brazil – Desiccated Coconut,* p. 17.

\(^{266}\) Panel Report on *Brazil – Desiccated Coconut,* para. 229.

\(^{267}\) Panel Report on *Brazil – Desiccated Coconut,* para. 229.

XXXIII. RELATIONSHIP WITH OTHER WTO AGREEMENTS

A. RELATIONSHIP WITH GATT 1994

1. Article III

(a) General conflict between the SCM Agreement and Article III of GATT 1994

196. Considering whether there is a general conflict between the SCM Agreement and Article III of GATT 1994, the Panel on Indonesia – Autos stated:

"As was the case under GATT 1947, we 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.

..." According to the Panel, there is no general conflict between these two sets of provisions.\(^\text{269}\)

197. The Panel on Indonesia – Autos further acknowledged that while Article III of GATT 1994 and the SCM Agreement may overlap to a certain extent, the two sets of provisions serve different purposes:

"[T]he 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 ... [the] argument that the application of Article III to subsidies would reduce the SCM Agreement to 'inutility'.

...

[T]he obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and ... different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.\(^\text{270}\)"

(b) Conflict between the SCM Agreement and Article III:2 of GATT 1994

198. The Panel on Indonesia – Autos rejected the argument that "the obligations contained in Article III:2 of GATT and the SCM Agreement are mutually exclusive"²⁷¹ because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT."²⁷² The Panel stated:

"We also recall that the obligations of the SCM Agreement and Article III:2 are not mutually exclusive. It is possible … to respect … obligations under the SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such. Similarly, it is possible … to respect the obligations of Article III:2 without violating … obligations under the SCM Agreement since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises. At most, the SCM Agreement and Article III:2 are each concerned with different aspects of the same piece of legislation."²⁷³

199. See also paragraph 154 above.

2. Article VI

200. 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."²⁷⁴ 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 regulation by the WTO Agreement of countervailing measures. In making this finding, the Panel relied on the existence of the general interpretive note to Annex 1A of the WTO Agreement and on the fact that certain provisions of Article VI are not "replicated or elaborated" in the SCM Agreement.²⁷⁵ The Appellate Body in Brazil – Desiccated Coconut confirmed the statement by the Panel that the SCM Agreement did not supersede Article VI of GATT 1994.²⁷⁶ In making this finding, the Appellate Body emphasized the integrated nature of the WTO Agreement and the annexed agreements. More specifically, the Appellate Body found that although the provisions of GATT 1947 were now incorporated into GATT 1994, they did not represent the totality of rights and obligations of WTO Members in a given subject area:

"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.\textsuperscript{277}

201. The Appellate Body in \textit{Brazil – Desiccated Coconut} 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."\textsuperscript{278} Apart from the integrated structure of the WTO Agreement and the annexed agreements, the Appellate Body therefore focused on these two provisions of the SCM Agreement. The Appellate Body then explicitly agreed with the Panel's statement that:

"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 and obligations of a potential user of countervailing measures."\textsuperscript{279}

202. The Appellate Body then proceeded to find that:

"[C]ountervailing 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. If there is a conflict between the provisions of the SCM Agreement and Article VI of the GATT 1994, furthermore, the provisions of the SCM Agreement would prevail as a result of the general interpretative note to Annex 1A.

... The fact that Article VI of the GATT 1947 could be invoked independently of the Tokyo Round SCM Code under the previous GATT system does not mean that Article VI of GATT 1994 can be applied independently of the SCM Agreement in the context of the WTO. The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system.\textsuperscript{280}

\textsuperscript{277} Appellate Body Report on \textit{Brazil – Desiccated Coconut}, p. 15.

\textsuperscript{278} Appellate Body Report on \textit{Brazil – Desiccated Coconut}, p. 16.


\textsuperscript{280} Appellate Body Report on \textit{Brazil – Desiccated Coconut}, pp. 16 and 18.
3. Article XVI

203. With respect to the relationship between Article XVI:4 and the SCM Agreement, see paragraph 10 above.

B. TRIMs Agreement

204. The Panel on Indonesia – Autos considered the issue of whether a measure covered by the SCM Agreement can also be subject to the obligations contained in the TRIMs Agreement. The Panel first noted that the general interpretive note to Annex 1A of the WTO Agreement did not apply in this context and opined that it had to resort to the relevant provision of general international law. In so doing, the Panel emphasized the general international law presumption against conflicts:

"We note first that the interpretive 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.

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."  

205. The Panel on Indonesia – Autos proceeded to emphasize the different types of obligations and the different subject matters covered by the SCM Agreement on the one hand and the TRIMs Agreement on the other. It explored how bringing a national measure into consistency with one of the agreements could nevertheless fail to remove the incompatibility with the other agreement. The Panel ultimately concluded that both the TRIMs Agreement and the SCM Agreement were applicable to the dispute before it:

"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 foci, and they impose different types of obligations.

... We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the ... programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute.

We consider ... that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.²⁸²

C. DSU

1. Article 4

206. With respect to the relationship between Article 4.4 of the SCM Agreement and Article 4 of the DSU, see paragraphs 79-80 above.

2. Article 11

207. With respect to the relationship between Article 4.2 of the SCM Agreement and Article 11 of the DSU, see paragraph 75 above.

3. Article 13.2

208. With respect to Article 4.2 of the SCM Agreement and Article 13.2 of the DSU, see paragraph 76 above.

4. Article 21.3

209. With respect to the relationship between Article 4.7 of the SCM Agreement and Article 21.3 of the DSU, see paragraph 88 above

XXXIV. RELATIONSHIP WITH MINISTERIAL DECISIONS AND DECLARATIONS

A. TEXT OF DECLARATION

Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade or Part V of the Agreement on Subsidies and Countervailing Measures

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

1. Standard of review

210. The Appellate Body in US – Lead and Bismuth II rejected the argument that, "by virtue of the Declaration, the standard of review specified in Article 17.6 of the Anti-Dumping Agreement also applies to disputes involving countervailing duty measures under Part V of the SCM Agreement." The Appellate Body emphasized the hortatory language of the Declaration and the fact that the Declaration does not provide for the application of any particular standards of review to be applied. See also the Chapter on the DSU, paragraph 182.

211. With respect to this issue, see also paragraph 184 above.

XXXV. ANNEX I

A. TEXT OF ANNEX I

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(footnote original) The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.  

(footnote original) For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

(footnote original) The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(footnote original) Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.
(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

B. INTERPRETATION AND APPLICATION OF ANNEX I

1. Item (d)

212. The Panel on Brazil – Aircraft, in a finding subsequently not addressed by the Appellate Body, described the test whether a measure is a prohibited export subsidy under item (d) as "a comparison of the terms and conditions of the goods or services being provided by the government with the terms and conditions that would otherwise be available to the exporters receiving the alleged export subsidy". As a consequence, the Panel rejected the argument that the relevant test depends upon "whether the measure merely offsets advantages bestowed on competing products from another Member". The Panel noted that "the fact that a foreign competitor had access to the same goods or services on better terms than those available to the exporters in question would not be a defense."

2. Items (e), (f), (g), (h) and (i)

213. Similarly to its finding with respect to item (d), the Panel on Brazil – Aircraft, in the context of items (e), (f), (g), (h), and (i), rejected the argument that whether a measure is a prohibited export subsidy should be decided based on whether the measure at issue merely serves to offset advantages bestowed on competing products from another Member. Regarding items (e) to (i), the Panel stated that "there is no hint that a tax advantage would not constitute an export subsidy simply because it reduced the exporter's tax burden to a level comparable to that of foreign competitors."

3. Footnote 59

214. With respect to the relationship between footnote 59 to item (e) and Article 3.1(a), see paragraphs 53-55 above.

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284 Panel Report on Brazil – Aircraft, para. 7.25.
285 Panel Report on Brazil – Aircraft, para. 7.25.
286 Panel Report on Brazil – Aircraft, para. 7.25.
287 Panel Report on Brazil – Aircraft, para. 7.25.
4. Item (k)

(a) General

215. In both the Brazil – Aircraft and the Brazil – Aircraft (Article 21.5 – Canada) disputes, Brazil asserted that the first paragraph of item (k) could be interpreted in an *a contrario* manner, so as to establish that subsidies constituting "payments", "of all or part of the costs incurred by exporters or financial institutions in obtaining credits", but which were *not* "used to secure a material advantage in the field of export credit terms", would not be prohibited export subsidies within the meaning of Article 3.1(a). In Brazil – Aircraft, the Panel noted that it was unconvinced that item (k) could be used in such an *a contrario* manner; however, it stated that even assuming *arguendo* that Brazil was correct in asserting item (k) as an affirmative defence, it had not proven that the PROEX interest equalization payments were *not* used so as to secure a material advantage in the field of export credit terms. In the Brazil – Aircraft (Article 21.5 - Canada) dispute, the Panel then expressly rejected the possibility of an *a contrario* interpretation of item (k). In so doing, the Panel noted that footnote 5 to Article 3.1(a) of the SCM Agreement provides that measures *affirmatively* listed in the Illustrative List were justified under the SCM Agreement; the Panel held that it could not find any such affirmative statement in the first paragraph of item (k). The Panel also rejected Brazil's claim that not allowing item (k) to be read in the suggested *a contrario* manner would render item (k) to nullity. Rather, the Panel found that the purpose of the Illustrative List was to provide guidance as to what measures are to be considered prohibited export subsidies and that this purpose would not nullified by not reading item (k) in an *a contrario* manner; the Appellate Body reacted to the Panels' findings in the following manner: In the Brazil – Aircraft dispute the Appellate Body did not make an explicit finding whether it was permissible to use item (k) in an *a contrario* manner; rather, the Appellate Body found that Brazil had not met its burden of proof of showing that the PROEX payments were not used to secure a material advantage in the field of export credit terms. In Brazil – Aircraft (Article 21.5 – Canada), the Appellate Body made the same finding about the revised PROEX programme. In this report, however, the Appellate Body made an additional statement: "If Brazil had demonstrated that the payments made under the revised PROEX were not 'used to secure a material advantage in the field of export credit terms', and that such payments were 'payments' by Brazil of 'all or part of the costs incurred by exporters or financial institutions in obtaining credits', then we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List. However, Brazil has not demonstrated that those conditions of item (k) are met in this case. In making this observation, we wish to emphasize that we are not interpreting footnote 5 of the SCM Agreement, and we do not opine on the scope of footnote 5, or on the meaning of any other items in the Illustrative List. However, we do not believe it is necessary for us to rule on these general questions in order to resolve this dispute. We, therefore, hold that the Article 21.5 Panel's finding that 'the first paragraph of item (k) cannot be used to establish that a subsidy which is contingent upon export performance within the meaning of Article 3.1(a) is 'permitted' is moot, and, thus, is of no legal effect."
(b) "payments of all or part of the costs incurred by exporters or financial institutions in obtaining credits"

216. In interpreting the phrase "payments of all or part of the costs incurred by exporters or financial institutions in obtaining credits", the Panel on Brazil – Aircraft (Article 21.5 – Canada) started with the ordinary meaning of the terms and opined that "the word 'credits' refers to 'export credits' as used earlier in the paragraph. Next, it also found that the costs involved must relate to obtaining export credits, not to providing them."²⁹³ Finally, the Panel rejected an argument by Brazil that cost incurred by a financial institution in raising capital could be equated with the cost of "obtaining" export credits.²⁹⁴ The Appellate Body in Brazil – Aircraft (Article 21.5 – Canada) did not believe that it was necessary to examine this issue (the Appellate Body had found that Brazil had not proven that the PROEX interest equalization payments were not used to secure a material advantage) and therefore did not address the Panel's findings. The Appellate Body stated that "[t]hese findings of the Article 21.5 Panel are moot, and, thus, of no legal effect."²⁹⁵

217. With respect to the term "export credit practice" under the second paragraph of item (k), see paragraph 224 below.

(c) "used to secure a material advantage"

218. The Panel on Brazil – Aircraft opined that a payment is used to "secure a material advantage in the field of export credit terms" when it provides the recipient with export credits on terms which are more favourable than those available in the absence of such payments, i.e. on the "marketplace". The Panel considered it "evident that PROEX payments result in the availability of export credit for Brazilian regional aircraft on terms which are more favourable than the terms that would otherwise be available with respect to the transaction in question."²⁹⁶ In this context, the Panel also recalled a statement by Brazil to the effect that PROEX would presumably always be more favourable to the purchaser than the terms it could obtain on its own.²⁹⁷ The Appellate Body in Brazil – Aircraft rejected this interpretation by the Panel of the phrase "used to secure a material advantage". More specifically, the Appellate Body criticized the Panel for not adequately considering the term "material" and disagreed with equating the term "material advantage" under item (k) of the Illustrative List to the term "benefit" under Article 1.1(b):

"We agree with the Panel's statement that the ordinary meaning of the word 'advantage' is 'a more favorable or improved position' or a 'superior position'. However, we note that item (k) does not refer simply to 'advantage'. The word 'advantage' is qualified by the adjective 'material'. As mentioned before, in its ultimate interpretation of the phrase 'used to secure a material advantage' which the Panel finally adopted and applied to the export subsidies for regional aircraft under PROEX, the Panel read the word 'material' out of item (k). This, we consider to be an error.

..."

We note that the Panel adopted an interpretation of the 'material advantage' clause in item (k) of the Illustrative List that is, in effect, the same as the interpretation of the term 'benefit' in Article 1.1(b) ... . If the 'material advantage' clause in item (k) is to have any meaning, it must mean something different from 'benefit' in Article 1.1(b).

²⁹⁴ Panel Report on Brazil – Aircraft (21.5 - Canada ), para. 6.72.
²⁹⁵ Appellate Body Report on Brazil – Aircraft (21.5 - Canada ), para. 78.
²⁹⁶ Panel Report on Brazil – Aircraft, para. 7.34.
²⁹⁷ Panel Report on Brazil – Aircraft, para. 7.34.
It will be recalled that for any payment to be a 'subsidy' within the meaning of Article 1.1, that payment must consist of both a 'financial contribution' and a 'benefit'. The first paragraph of item (k) describes a type of subsidy that is deemed to be a prohibited export subsidy. Obviously, when a payment by a government constitutes a 'financial contribution' and confers a 'benefit', it is, a 'subsidy' under Article 1.1. Thus, the phrase in item (k), 'in so far as they are used to secure a material advantage', would have no meaning if it were simply to be equated with the term 'benefit' in the definition of 'subsidy'. As a matter of treaty interpretation, this cannot be so. Therefore, we consider it an error to interpret the 'material advantage' clause in item (k) of the Illustrative List as meaning the same as the term 'benefit' in Article 1.1(b) of the SCM Agreement.  

219. Rather than considering the terms of export credits available to a purchaser in the absence of the PROEX interest equalization payments, the Appellate Body in Brazil – Aircraft held that the determination of whether a payment is "used to secure a material advantage" implies a comparison between the export credit terms available under the measure at issue and some other "market benchmark". The Appellate Body further viewed the second paragraph of item (k) as "useful context for interpreting the 'material advantage' clause in the text of the first paragraph." In this respect, the Appellate Body stated that the Commercial Interest Reference Rate (the "CIRR"), defined in the Arrangement on Guidelines for Officially Supported Export Credits (the "OECD Arrangement"), could be "appropriately viewed as … a market benchmark" for assessing whether a payment "is used to secure a material advantage". The Appellate Body nevertheless conceded that:

"[T]he Article 21.5 Panel correctly concluded from our Report in Brazil – Aircraft that "the CIRR was not intended as the exclusive and immutable benchmark applicable in all cases." The Article 21.5 Panel then stated that:

'... we consider that a Member may under the first paragraph of item (k) as interpreted by the Appellate Body establish that a payment was not used to secure a material advantage in the field of export credit terms, even if it resulted in a below-CIRR interest rate, ...' (emphasis added)."

220. The Appellate Body then set forth the manner in which Brazil could prove that the PROEX interest equalization payments did not secure a material advantage to Brazilian exporters:

"To establish that subsidies under the revised PROEX are not 'used to secure a material advantage in the field of export credit terms', Brazil must prove either: that the net interest rates under the revised PROEX are at or above the relevant CIRR, the specific 'market benchmark' we identified in the original dispute as an 'appropriate' basis for comparison; or, that an alternative 'market benchmark', other than the CIRR, is appropriate, and that the net interest rates under the revised PROEX are at or above this alternative 'market benchmark'.

... Brazil contends ... that the revised PROEX is not 'used to secure a material advantage in the field of export credit terms' within the meaning of the first paragraph of item (k) of the Illustrative List.

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298 Appellate Body Report on Brazil – Aircraft, paras. 177 and 179.  
299 Appellate Body Report on Brazil – Aircraft, paras. 177 and 179.  
300 Appellate Body Report on Brazil – Aircraft, para. 181.  
301 (footnote original) Article 21.5 Panel Report, para. 6.84.  
302 (footnote original) Article 21.5 Panel Report, para. 6.92.  
303 Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 63.
To prove this argument, Brazil must establish both of two elements: first, Brazil must prove that it has identified an appropriate ‘market benchmark’; and, second, Brazil must prove that the net interest rates under the revised PROEX are at or above that benchmark.\textsuperscript{304}

(d) "in the field of export credit terms"

221. With respect to the phrase "in the field of export credit terms", the Panel on Brazil – Aircraft held that in its ordinary meaning, that phrase would refer to "items directly related to export credits, such as interest rates, grace periods, transaction costs, maturities and the like."\textsuperscript{305} Furthermore, the Panel opined that that the term "field of export credit terms" did not encompass the price at which a product is sold."\textsuperscript{306} Although the Appellate Body in Brazil – Aircraft made no specific reference to this statement by the Panel, it rejected the Panel's interpretation of the phrase "used to secure a material advantage"\textsuperscript{307} which was made in the same context as the above statements on the term "in the field of export credit terms".

(c) "international undertaking on official export credits"

222. In Canada – Aircraft (Article 21.5 – Brazil), Canada claimed that as part of the revision of its subsidies programmes following the Appellate Body Report on Canada – Aircraft, it had implement a new policy guideline for its Canada Account financing under which "any financing which does not comply with the OECD Arrangement would not be in the national interest". Canada argued that compliance with the OECD Arrangement meant that such financing would not be a prohibited export subsidy, according to the second paragraph of item (k). Although the Panel – whose report was not appealed – ultimately found against Canada, it did agree that the OECD Arrangement was an "international undertaking on official export credits" within the meaning of item (k):

"[I]t is well accepted that the OECD Arrangement is an 'international undertaking on official export credits' in the sense of the second paragraph of item (k). Moreover, in practice the OECD Arrangement is at present the only international undertaking that fits this description. Thus, we understand the essence of the second paragraph of item (k) at least at present to be that 'an export credit practice' which is in 'conformity' with 'the interest rates provisions' of the OECD Arrangement 'shall not be considered an export subsidy prohibited by' the SCM Agreement".\textsuperscript{309}

(f) "a successor undertaking"

223. Considering that "in practice eligibility for item (k)'s safe haven from the prohibition on export subsidies is defined entirely in terms of the OECD Arrangement, at least for the time being"\textsuperscript{310}, the Panel on Canada – Aircraft (Article 21.5 – Brazil) stated the following:

"We take note of the reference to 'a successor undertaking' in the second paragraph of item (k). In this regard, first, it is clear from this reference that to the extent that the [OECD] Arrangement today is the only undertaking of the kind referred to in the second paragraph of item (k), if in the future a 'successor undertaking' were to take effect, export credit practices conforming with the interest rate provisions of that undertaking also would be eligible for the safe haven in that paragraph. Thus, our

\textsuperscript{304} Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), paras. 67-69.
\textsuperscript{305} Panel Report on Brazil – Aircraft, para. 7.28.
\textsuperscript{306} Panel Report on Brazil – Aircraft, para. 7.28.
\textsuperscript{307} Appellate Body Report on Brazil – Aircraft, para. 186.
\textsuperscript{308} Appellate Body Report on Brazil – Aircraft, para. 286.
\textsuperscript{309} Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.79.
\textsuperscript{310} Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.78.
detailed analysis of the Arrangement in its present form is not in any way intended to exclude this possibility. Second, for purposes of our analysis of the Arrangement, we assume that the Sector Understandings on Export Credits for Ships, for Nuclear Power Plant, and for Civil Aircraft, contained in Annexes I-III of the Arrangement, form an integral part of the Arrangement itself. Even if in the strict sense this were not the case (an issue that we do not here decide), in our view these Sector Understandings at a minimum would constitute 'successor undertakings' in the sense of the second paragraph of item (k), as the Arrangement as originally implemented in 1979 did not contain these Annexes. … The Sector Understandings were negotiated and implemented later, and incorporate by reference provisions of the Arrangement. Thus, if they are not formally integral to the Arrangement, there is no doubt that these Understandings at a minimum constitute successor undertakings, and thus, conformity with the 'interest rates provisions' of the Understandings would qualify an export credit practice for the safe haven in the second paragraph of item (k).”

(g) "export credit practice"

224. In the context of Canada’s defence under the second paragraph of item (k), the Panel on Canada – Aircraft (Article 21.5 – Brazil) considered that the phrase "export credit practice", must, in its ordinary meaning, be a relatively broad term. The Panel, whose report was not appealed, continued:

"[T]his term on its own suggests any practices that might be associated in some way with export credits (i.e., export financing). This certainly would involve export credits as such, but presumably other sorts of practices as well. The first paragraph of item (k) provides useful context in this regard. In particular, we note that the first paragraph refers exclusively to 'export credits' and 'credits', in contrast to the second paragraph’s reference to 'export credit practices'. This supports the conclusion that the second paragraph of item (k) concerns a broader range of 'practices' than export credits as such."

225. Following an analysis of the provisions of the OECD Arrangement, the Panel on Canada – Aircraft (Article 21.5 – Brazil) concluded that at the time of the dispute, only export credit practices in certain forms qualified for the "safe haven" under the second paragraph of item (k). Specifically, the Panel held that practices involving floating interest rates or support for export credits with shorter maturity were not eligible for this exception:

"[T]he safe haven in the second paragraph of item (k) at present is potentially available only to export credit practices in the form of direct credits/financing, refinancing, and interest rate support at fixed interest rates with repayment terms of two years or more. In other words, any such practices involving floating interest rates, as well as official support for export credits with shorter maturity or in the forms of guarantees and insurance, because none are subject to the Arrangement’s ‘interest rates provisions’, most especially the CIRR but also the sector-specific minimum interest rates in the Sector Understandings, would not be eligible for the safe haven, as it simply would not be possible to judge their ‘conformity’ with the relevant interest rate provisions of the Arrangement, all of which pertain exclusively to fixed rates."

311 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.78, footnote 69.
312 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.80.
313 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.80.
314 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.106.
With respect to conformity with the interest rate provisions of export credit practices under the OECD Arrangement, the Panel on Canada – Aircraft (Article 21.5 – Brazil) concluded that "full conformity with the 'interest rates provisions' – in respect of 'export credit practices' subject to the CIRR – must be judged on the basis not only of full conformity with the CIRR but in addition full adherence to the other rules of the [OECD] Arrangement that operate to support or reinforce the minimum interest rate rule by limiting the generosity of the terms of official financing support."  

The Panel on Canada – Aircraft (Article 21.5 – Brazil) considered that the text of the OECD Arrangement provides the following guidance on how the term "conformity" should be understood:

"In the first place, the Arrangement text provides explicitly that derogations from provisions of the Arrangement, and the matching of such derogations, do not 'conform' with the provisions of the Arrangement. Thus, any transaction that involves derogations or matching of derogations by definition cannot be in conformity with the interest rate provisions of the Arrangement, as ... conformity with the interest rate provisions requires conformity not just with the minimum interest rate rule but also with the other provisions that support/reinforce that rule. As such, an otherwise eligible transaction involving derogations or matching of derogations could not qualify for the safe haven of the second paragraph of item (k). On the other hand, the Arrangement explicitly defines permitted exceptions and the matching of permitted exceptions, within the allowed limits, to be in compliance, i.e., in conformity with the relevant provisions of the Arrangement. Therefore, ... making use of permitted exceptions, within the specified limits, would not disqualify an eligible transaction from the safe haven, so long as the transaction conformed with the minimum interest rate and all of the other applicable disciplines."

The Panel on Canada – Aircraft (Article 21.5 – Brazil) set forth the propositions which would have to be proven by a Member in order to qualify, with respect to specific individual transactions, for the "safe haven" provided under the second paragraph of item (k):

"[F]irst, it would need to be determined that the transaction was in the form of either direct credits/financing, refinancing or interest rate support with repayment terms of at least two years, at fixed interest rates, and therefore was subject to the Arrangement generally and to the CIRRs (or a sector-specific minimum interest rate, if applicable) specifically. Second, it would need to be determined whether the interest rate was at or above the CIRR (or the applicable sector-specific rate). Third, it would need to be determined which of the other provisions of the Arrangement that operate to reinforce the minimum interest rate rule applied to that particular transaction (a determination that would need to be made on a case-by-case, transaction-specific basis). Fourth, the details of the transaction would need to be examined to determine whether or not it respected all such additional provisions, and did not involve any derogations or matching of derogations."

After setting out the standard applicable under the second paragraph of item (k), the Panel on Canada – Aircraft (Article 21.5 – Brazil) found that the Canadian Policy Guideline did not qualify for the "safe haven" under the second paragraph of item (k) of the Illustrative List. The Panel first held that it was "incumbent upon Canada to provide an explanation not only of what in its view constitutes

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315 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.114.
316 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.126.
conformity with the interest rate provisions of the *OECD Arrangement*, but also how the Policy Guideline ensures such conformity.\footnote{Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.142.} The Panel then turned to the Policy Guideline and found:

"[E]ven if the Policy Guideline contained all of the details that Canada has provided in its arguments concerning 'conformity' with the 'interest rates provisions' of the *Arrangement*, we would find on substantive grounds that it would not ensure that future Canada Account transactions would so conform. We note, however, that in fact the Policy Guideline contains no details at all, but simply indicates that transactions that 'do not comply' with 'the OECD Arrangement' will not be considered to be in the national interest. Thus, we find that the Policy Guideline is insufficient to accomplish what Canada says it will accomplish, namely to 'ensure that any future Canada Account financing transactions will be in conformity with the interest rate provisions of the [OECD] Arrangement and therefore the provisions referred to in the second paragraph of item (k)'.

In particular, the Policy Guideline is both generally worded and worded in the negative. In both of these aspects it seems to fall considerably short of what might reasonably be considered the minimum sufficient assurance which Canada wishes to provide. Concerning the generality of the wording, as just noted, the Policy Guideline simply refers to compliance with the *OECD Arrangement*. As has been discussed in detail, however, general conformity with whichever provisions of the *Arrangement* happen to apply to a given transaction would not appear to be sufficient to qualify for the relatively narrow safe haven in the second paragraph of item (k). Rather, only conformity with the *Arrangement*’s interest rate provisions, which presupposes that those provisions apply (i.e., that the practice in question is in the form of official financing support at fixed interest rates), along with conformity with the *Arrangement*’s other disciplines on financing terms, would qualify a practice for the safe haven."\footnote{Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 5.143-5.144.}

\begin{enumerate}
\item \textbf{Burden of proof}
\end{enumerate}

230. The Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)* found that "Brazil's argument under item (k) constituted an alleged 'affirmative defence' for which Brazil bore the burden of proof."\footnote{Appellate Body Report on *Brazil – Aircraft*, para. 65.} Referring to its report on *United States – Wool Shirts and Blouses*, the Appellate Body confirmed that Brazil, as the party asserting a defence, bore the burden of proof of proving that the revised PROEX was justified under the first paragraph of item (k). (However, as noted in paragraph 215 above, the Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* did not make a finding on whether the first paragraph of item (k) could in fact be used in an *a contrario* manner as an affirmative defence.) The Appellate Body then set forth in what manner Brazil could successfully prove that the revised subsidies scheme was not "used to secure a material advantage in the field of export credit terms":

"To establish that subsidies under the revised PROEX are not 'used to secure a material advantage in the field of export credit terms', Brazil must prove either: that the net interest rates under the revised PROEX are at or above the relevant CIRR, the specific 'market benchmark' we identified in the original dispute as an 'appropriate' basis for comparison; or, that an alternative 'market benchmark', other
than the CIRR, is appropriate, and that the net interest rates under the revised PROEX are at or above this alternative 'market benchmark'.”

231. The Panel on Canada – Aircraft (Article 21.5 – Brazil) did not state explicitly that Canada bore the burden of proving that its measure qualified for the "safe haven" clause under the second paragraph of item (k) of the Illustrative List. However, the Panel termed Canada's invocation of the second paragraph of item (k) a "defense to Brazil's claim".322

(j) Relationship with other Articles

232. With respect to the relationship between the first and second paragraph of item (k), see paragraph 215 above.

233. With respect to the relationship between "export credits" and "credits" used in the first paragraph of item (k) and "export credit practice" used in the second paragraph of item (k), see excerpts from the panel report referenced in paragraph 224 above.

234. With respect to the relationship with Article 1.1(b), see paragraph 218 above.

XXXVI. ANNEX II

A. TEXT OF ANNEX II

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS61

(footnote original) 61 Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

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322 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.73.
II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

B. INTERPRETATION AND APPLICATION OF ANNEX II

No jurisprudence or decision of a competent WTO body.
ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.
B. **INTERPRETATION AND APPLICATION OF ANNEX III**

_NO JURISPRUDENCE OR DECISION OF A COMPETENT WTO BODY._

**XXXVIII. ANNEX IV**

A. **TEXT OF ANNEX IV**

**ANNEX IV**

**CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION**

(Paragraph 1(a) of Article 6)\(^{62}\)

\(^{62}\) In cases where the existence of serious prejudice has to be demonstrated.

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.\(^{64}\)

\(^{64}\) The recipient firm is a firm in the territory of the subsidizing Member.

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.\(^{65}\)

\(^{65}\) Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

B. **INTERPRETATION AND APPLICATION OF ANNEX IV**

1. **Relationship with other Articles**

235. See paragraph 29 above.
XXXIX. ANNEX V

A. TEXT OF ANNEX V

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a Panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized product.\(^{66}\) This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.\(^{67}\)

\(^{66}\) In cases where the existence of serious prejudice has to be demonstrated.

\(^{67}\) The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, \textit{inter alia}, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.
6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party’s position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

B. INTERPRETATION AND APPLICATION OF ANNEX V

1. Relationship with other WTO Agreements

236. With respect to the drawing of adverse inferences, see also Chapter on the DSU, paragraphs 193-194 and 217.

XL. ANNEX VI

A. TEXT OF ANNEX VI

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

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. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such
a visit may only be made if (a) the authorities of the importing Member notify the representatives of the government 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 VI

No jurisprudence or decision of a competent WTO body.

XLI. ANNEX VII

A. TEXT OF ANNEX VII

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(a) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum\(^ {68} \): Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

\(^ {68} \) The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

B. INTERPRETATION AND APPLICATION OF ANNEX VII

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby agree as follows:
B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In *Korea – Dairy*, the Appellate Body referred to the Preamble of the *Agreement on Safeguards* as additional support for its finding that all provisions of both Article XIX of *GATT 1994* and the *Agreement on Safeguards* apply cumulatively and must be given their full meaning and legal effect:¹

"Our reading … is consistent with the desire expressed by the Uruguay Round negotiators in the Preamble to the *Agreement on Safeguards* 'to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX …, to re-establish multilateral control over safeguards and eliminate measures that escape such control …' In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations, which are fundamental to the WTO Agreement, such as those in Article II and Article XI of the GATT 1994."²

2. In a finding subsequently upheld by the Appellate Body, the Panel on *US – Lamb* rejected the United States argument that the "domestic industry" under Article 4.1(c) should be defined on the basis of a "continuous line of production" and a "coincidence of economic interests". The Panel then referred to the object and purpose of the *Agreement on Safeguards*, as evidenced in the Preamble, as relevant context for its more restrictive approach to the concept of "domestic industry":

"In our view, [our] reading of the industry definition is consistent with the object and purpose of the Safeguards Agreement. In particular, this reading is consistent with the Agreement's objectives of, on the one hand, creating a mechanism for effective, temporary protection from imports to an industry that is experiencing serious injury or threat thereof from imports in the wake of trade liberalization, and on the other hand, encouraging 'structural adjustment', and 'clarify[ing] and reinforc[ing] the disciplines of … Article XIX of GATT', in view of 'the need to enhance rather than limit competition in international markets'.

If WTO law were not to offer a 'safety valve' for situations in which, following trade liberalization, imports increase so as to cause serious injury or threat thereof to a domestic industry, Members could be deterred from entering into additional tariff concessions and from engaging in further trade liberalization. It is for this reason that the safeguard mechanism in Article XIX has always been an integral part of the GATT. … [W]e note that SG Article XIX of GATT 1994 as well as SG Article 11.1 both refer to safeguard measures as 'emergency' measures, and the Appellate Body has characterized them as 'extraordinary' remedies.³ A conceptual approach to defining the relevant domestic industry which would leave it to the discretion of competent national authorities how far upstream and/or downstream the production chain of a given 'like' end product to look in defining the scope of the domestic industry could easily defeat the Safeguards Agreement's purpose of reinforcing

¹ With respect to Article XIX of *GATT 1994* in general and the term "unforeseen developments" in particular, see paras. 4-10 of this Chapter.
² Appellate Body Report on *Korea – Dairy*, para. 88. See also Appellate Body Report on *Argentina – Footwear*, para. 95.
³ (footnote original) Appellate Body Report on *Argentina – Footwear*, para. 94.
3. The Appellate Body in *US – Lamb* referred to the object and purpose of the *Agreement on Safeguards* in distinguishing between the concepts of "serious injury" under the *Agreement on Safeguards* and "material injury" under the *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Duties*:

"We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'. Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures …"\(^4\)

II. **ARTICLE 1**

A. **TEXT OF ARTICLE 1**

   **Article 1**

   **General Provision**

   This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 1**

1. **Relationship between the Agreement on Safeguards and Article XIX of the GATT 1994**

4. In *Korea – Dairy* and *Argentina – Footwear (EC)*, one of the issues 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)* had 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;\(^5\) the Panel 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."\(^6\) The Panel on *Korea – Dairy* came to a similar conclusion.\(^7\) In reviewing the Panel's findings 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 Agreement*, and, on the other, Articles 1 and 11.1(a) of the *Agreement on Safeguards*.\(^8\) In the latter regard, the Appellate Body held:

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\(^4\) Panel Report on *US – Lamb*, paras. 7.76 and 7.77.
\(^6\) Panel Report on *Argentina – Footwear (EC)*, para. 8.58.
\(^7\) Panel Report on *Argentina – Footwear (EC)*, para. 8.69.
\(^8\) Panel Report on *Korea – Dairy*, para. 7.48.
\(^9\) For the Appellate Body's analysis under Article II of the *WTO Agreement*, see Chapter on *WTO Agreement*, para. 12.
\(^10\) 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
'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 measure 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.'

5. In Argentina – Footwear (EC), the Appellate Body reversed a conclusion by the Panel in that dispute 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." 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, 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."
6. From the above statements on the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards, the Appellate Body in Argentina – Footwear (EC) drew the conclusion that:

"[A]ny safeguard measure" 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.\(^\text{18}\)

7. In reaching the conclusion that both Article XIX and the Agreement on Safeguards apply to a national safeguard measure, the Appellate Body in Argentina – Footwear (EC) addressed the contrary argument put forward by the Panel that because the clause "[i]f, as a result of unforeseen developments … concessions" 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 rejected this conclusion of the Panel as inconsistent with the principles of effective treaty interpretation\(^\text{19}\) and with the ordinary meaning 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."\(^\text{20}\)

8. The Panel Report in US – Lamb, referring to the statements by the Appellate Body on the relationship between the Agreement on Safeguards and Article XIX of 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."\(^\text{21}\)

9. 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 GATT 1994 and observes:

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\(^\text{16}\) Appellate Body Report on Argentina – Footwear (EC), para. 83.

\(^\text{17}\) (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.

\(^\text{18}\) Appellate Body Report on Argentina – Footwear (EC), para. 84.

\(^\text{19}\) With respect to treaty interpretation in general, see Chapter on DSU, paras. 15-19, see also para. 33.

\(^\text{20}\) Appellate Body Report on Argentina – Footwear (EC), para. 89.

\(^\text{21}\) Panel Report on US – Lamb, para. 7.11.
"[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."\(^{22}\)

10. Nevertheless, the obligation to apply the provisions of Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994 cumulatively\(^{23}\) does not preclude the Panel from exercising judicial economy as regards claims concerning 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. 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."\(^{24}\) In US – Wheat Gluten, the Appellate Body reiterated this 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.\(^{25}\)

III. ARTICLE 2

A. TEXT OF ARTICLE 2

\textit{Article 2}

\textit{Conditions}

1. A Member\(^{\text{1}}\) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

\textit{(footnote original)\(^{\text{1}}\)} 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 injury or 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 injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

1. \textbf{Article 2.1}

(a) Relationship between Article 2.1 of the Agreement on Safeguards and Article XIX of GATT 1994

11. With respect to the relationship with Article XIX of GATT 1994, see paragraphs 4-9 above.

\(^{22}\) Appellate Body Report on \textit{US – Lamb}, para. 70.

\(^{23}\) Appellate Body Report on \textit{Argentina – Footwear (EC)}, para. 89.


(b) Findings under Article 4 and under Article 2

12. The question whether a violation of Article 4 necessarily implies a violation of Article 2 of the Agreement on Safeguards has been addressed mainly at the Panel level. The Appellate Body has confirmed these findings. The Panel Report in Korea – Dairy discussed the relationship between claims under Article 4 and claims under Article 2 of the Agreement on Safeguards and concluded that a violation of parts of Article 4 would constitute a violation of Article 2:

"The European Communities raised various other arguments in support of its claims that Korea violated Article 4, and consequently Article 2, of the Agreement on Safeguards, namely that Korea did not adequately demonstrate the existence of serious injury and a causal link with the increased imports. We shall address the EC argument that Korea did not perform an adequate assessment of whether the products under investigation were being imported into its territory in such increased quantities and under such conditions as to cause serious injury to the domestic industry when we examine the European Communities' more specific claims of inadequate serious injury and causation assessments made pursuant to Article 4.1 and 4.2 of the Agreement on Safeguards. We note that a violation of Article 4.2 or 4.3 (sic) would constitute a violation of Article 2 of the Agreement on Safeguards." 

13. However, despite holding that a violation of Article 4 would necessarily imply a violation of Article 2 of the Agreement on Safeguards, the Panel on Korea Dairy declined to reach a conclusion on Article 2, referring to the fact that this violation had not been argued by the complaining party:

"Article 2.1 permits the application of a safeguard measure only if, inter alia, there has been a determination of serious injury pursuant to Article 4.2. Since we find that Korea's determination of serious injury does not meet the requirements of Article 4.2, the application of the safeguard measure at issue would necessarily also violate Article 2.1 of the Agreement on Safeguards. We note that in its request for establishment of a panel, the European Communities claims generally that Korea violated Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12.1 to 12.3 of the Agreement on Safeguards. However, in its submissions, the European Communities did not argue specifically, nor did it submit any evidence, in support of its claim under Article 2.1, other than those relating to 'under such conditions' …Therefore, we do not reach any conclusion on the issue of whether Korea's determination of serious injury violates the provisions of Article 2.1 of the Agreement on Safeguards."

14. The Panel on Argentina – Footwear (EC) considered Articles 2 and 4 largely in parallel:

"[W]e conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c)."

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26 Panel Report on Korea – Dairy, para. 7.53.
27 Panel Report on Korea – Dairy, para. 7.86.
Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement. As such, we find that Argentina's investigation provides no legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure.

15. The Panel on US – Wheat Gluten also linked violations of Article 4 to Article 2.1, finding, inter alia:

"In light of the findings made in section VIII above, we conclude that the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination is inconsistent with Articles 2.1 and 4 of the Agreement on Safeguards in that:

(i) the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports; and

(ii) imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a 'substantial share' of total imports and whether they 'contributed importantly' to the 'serious injury' caused by total imports)."

16. The Panel Report in US – Lamb also addressed the relationship between violations of Article 4 and Article 2, finding that the safeguard measure at issue was applied inconsistently with Articles 4.1(c) and 4.2(b) and subsequently holding:

"By virtue of the above violations of Article 4 of the Agreement on Safeguards, the United States also has acted inconsistently with Article 2.1 of the Agreement on Safeguards."  

17. The Appellate Body in US – Lamb confirmed that a violation of Article 4.1(c) necessarily also implies a violation of Article 2:

"As a result, the imposition of the safeguard measure at issue was based on a determination of serious injury caused to an industry other than the relevant 'domestic industry'. In addition, that measure was imposed without a determination of serious injury to the 'domestic industry', which, properly defined, should have been limited only to packers and breakers of lamb meat. Accordingly, we uphold the Panel's finding, in paragraph 7.118 of the Panel Report, that the safeguard measure at issue is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards."

18. The Appellate Body in US – Lamb made an even clearer statement with respect to Article 4.2(b) and Article 2:

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"In the absence of [an explanation by the investigating authority as to/concerning/regarding how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports ], we uphold, albeit for different reasons, the Panel's conclusions that the United States acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, and, hence, with Article 2.1 of that Agreement.\footnote{Appellate Body Report on US – Lamb, para. 188.}

(c) "that such product is being imported \ldots in such increased quantities"

(i) \textit{Quantity versus value of imports}

19. The Panel on Argentina – Footwear (EC) acknowledged that both parties had referred to data on both the quantity and the value of imports in connection with this requirement, but observed:

\textit{"The Agreement is clear that it is the data on import quantities \ldots in absolute terms and relative to (the quantity of) domestic production that are relevant in this context, in that the Agreement refers to imports “in such increased quantities” \ldots Therefore, our evaluation will focus on the data on import quantities." }\footnote{(footnote original) We note that the trends in the data on import values generally confirm those on import quantities. Panel Report on Argentina – Footwear (EC), para. 8.152.}

(ii) \textit{Relationship between Article 2.1 and Article 4.2(a)}

20. The Panel on Argentina – Footwear (EC), in examining whether in the case at hand there were "increased imports in the sense of Article 2.1 and 4.2(a) of the Agreement," noted that Article 2.1 "sets forth the conditions for the application of a safeguard measure," and that Article 4.2 "sets forth the operational requirements for determining whether the conditions in Article 2.1 exist."\footnote{Panel Report on Argentina – Footwear (EC), para. 8.140. The Appellate Body characterized Article 2.1 as a provision which sets forth the conditions for imposing a safeguard measure. See para. 37 of this Chapter.} The Panel in this connection made the following statement, subsequently expressly confirmed by the Appellate Body:

\textit{"Thus, to determine whether imports have increased in 'such quantities' for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production."}\footnote{Panel Report on Argentina – Footwear (EC), para. 8.141. See Appellate Body Report on Argentina – Footwear (EC), para. 144, confirming the Panel's finding.}

(iii) \textit{Nature and timing of the increase in imports}

21. The Panel on Argentina – Footwear (EC) examined whether there is consistency with Articles 2.1 and 4.2(a) in making a finding of increased imports on the basis of a comparison between the volume of imports at the starting-point of an investigation period and the volume of imports at the end of that period ("end-point-to-end-point-comparison") The Panel, later upheld in this respect by the Appellate Body, came to the conclusion that:

\textit{"[I]n assessing whether an end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1, the sensitivity of the comparison to the specific years used as the end-points is important as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or ending-point of the}
investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion that there are increased imports.

In other words, if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where as here their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1.”

22. In *Argentina – Footwear (EC)*, the Panel, in a finding subsequently confirmed by the Appellate Body, considered, in this connection, that an analysis of intervening trends of imports was indispensable:

"[T]he question of whether any decline in imports is 'temporary' is relevant in assessing whether the 'increased imports' requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated. In our view this constitutes a requirement that the intervening trends of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change.

23. The Panel on *Argentina – Footwear (EC)* found that in the case before it the decline in the volume of imports could not be characterized as a temporary reversal of an increase in the volume of imports. It then stated that:

"[T]he Agreement requires not just an increase (i.e., any increase) in imports, but an increase in 'such…quantities' as to cause or threaten to cause serious injury. …the increase in imports must be judged in its full context, in particular with regard to its 'rate and amount' as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether there has been an increase in imports 'in such quantities' in the sense of Article 2.1.

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38 *(footnote original)* We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "such increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.


Where … the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a 'temporary' reversal of an increase has taken place (as reflected as well in the sensitivity of the outcome of the comparison to a one-year shift of its start or end year).\textsuperscript{41}

24. In applying this analytical standard to the facts of the case in \textit{Argentina – Footwear (EC)}, the Panel came to a conclusion contrary to the determination effectuated by the Argentine authorities:

"In sum, we find highly significant that the absolute volume of footwear imports and the ratio of those imports to domestic production, increased only until 1993, i.e., during the first two years of the period for which Argentina collected data, and declined continuously thereafter. We also find significant that these decreases were of such a magnitude that a one-year change in base year of the data series on the volume of imports transforms the increase relied upon by Argentina into a decline, and that the resolution applying the provisional measure refers only to anticipated increases in imports, showing that at that time, no increase in imports was present.\textsuperscript{42}

25. In \textit{Argentina – Footwear (EC)}, the Panel found, in interpreting the phrase "is being imported … in such quantities", that an investigation period of five years "can be quite useful" to the national authorities. The Panel also expressly rejected the argument that the \textit{Agreement on Safeguards} requires a "sharply increasing" trend in imports at the end of the investigation period. The Appellate Body reversed both of these findings. First, it did not find a five-year investigative period reasonable in the light of the phrase "is being imported" and emphasized the need to focus the investigation on the "recent past":

"[T]he actual requirement, and we emphasize that this requirement is found in \textit{both} Article 2.1 of the \textit{Agreement on Safeguards} and Article XIX:1(a) of the GATT 1994, is that 'such product is being imported … in such increased quantities' 'and under such conditions as to cause or threaten to cause serious injury to the domestic industry'. Although we agree with the Panel that the 'increased quantities' of imports cannot be just \textit{any} increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the \textit{Agreement on Safeguards} and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.\textsuperscript{43} In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent.\textsuperscript{44}

26. Second, with regard to the nature of the increase in imports, the Appellate Body in \textit{Argentina – Footwear (EC)}, in contrast to the Panel, held that the increase in imports must have been sudden and sharp:

"[T]he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other

\textsuperscript{41} Panel Report on \textit{Argentina – Footwear (EC)}, paras. 8.161-8.162.
\textsuperscript{42} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.164.
\textsuperscript{43} (footnote original) The Panel … recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to \textit{end} no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only \textit{end} in the very recent past, the investigation period should \textit{be} the recent past.
\textsuperscript{44} Appellate Body Report on \textit{Argentina – Footwear (EC)}, para. 130.
words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just any increased quantities of imports will suffice. There must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'.

27. Subsequently, the Panel Report in US – Wheat Gluten, echoing the findings of the Appellate Body in Argentina – Footwear (EC), interpreted the phrase "in such increased quantities":

"[A]rticle XIX:1(a) of the GATT 1994 and Article 2.1 [of the Agreement on Safeguards ("SA")] do not speak only of an 'increase' in imports. Rather, they contain specific requirements with respect to the quantitative and qualitative nature of the 'increase' in imports of the product concerned. Both Article XIX:1(a) of the GATT 1994 and Article 2.1 SA require that a product is being imported into the territory of the Member concerned in such increased quantities (absolute or relative to domestic production) as to cause or threaten serious injury. Thus, not just any increase in imports will suffice. Rather, we agree with the Appellate Body's finding in Argentina – Footwear Safeguard that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury."

(d) "and under such conditions"

28. The Panel reports in Korea – Dairy, Argentina – Footwear (EC) and US – Wheat Gluten have held that the phrase "under such conditions" in Article 2.1 does not constitute a separate analytical requirement in a safeguards investigation. Related to this, these Panel Reports observe that this phrase does not necessarily require an analysis of the prices of imported products and like or directly competitive products. The Appellate Body agreed with these findings in US – Wheat Gluten.

29. Thus, the Panel Report in Korea – Dairy states:

"We consider that the phrase 'and under such conditions' does not provide for an additional criterion or analytical requirement to be performed before an importing Member may impose a safeguard measure. We are of the view that the phrase 'and under such conditions' qualifies and relates both to the circumstances under which the products under investigation are imported and to the circumstances of the market into which products are imported, both of which must be addressed by the importing country when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing the like or directly competitive products. In this sense, we consider that the phrase 'under such conditions' refers more generally to the obligation imposed on the importing country

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47 Panel Report on Korea – Dairy, para. 7.52.
to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation.\textsuperscript{51}

30. In this connection, the Panel on \textit{Argentina – Footwear (EC)} considered that the phrase "under such conditions" in Article 2.1 of the \textit{Agreement on Safeguards} indicated the need for an analysis of the conditions of competition between the imported product and the domestic like or directly competitive products in the market of the importing country as part of the analysis under Articles 4.2(a) and (b):

"In our view, the phrase 'under such conditions' does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2. We consider that Article 2.1 sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 then further develops the operational aspects of these requirements."\textsuperscript{52}

31. In \textit{Argentina – Footwear (EC)}, the Panel considered the phrase "under such conditions" as referring to the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. The Panel held that the phrase "under such conditions" in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b):

"We believe that the phrase 'under such conditions' would indicate the need to analyse the \textit{conditions of competition} between the imported product and the domestic like or directly competitive products in the \textit{importing country's market}. That is, it is these 'conditions of competition' in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads 'under such conditions \textit{as to cause} or threaten to cause serious injury' (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are such that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities 'evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry', which is further reinforced by Article 4.2(b)'s requirement that the analysis be conducted on the basis of 'objective evidence'. In our view, these provisions give meaning to the phrase 'under such conditions', and support as well our view that for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase 'under such conditions' in fact refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b)."\textsuperscript{53}

32. In the view of the Panel on \textit{Argentina – Footwear (EC)}, the factors underlying competition between domestic and imported like products are to be analysed within the context of the causation analysis:

"We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may

\textsuperscript{51} Panel Report on \textit{Korea – Dairy}, para. 7.52.
\textsuperscript{52} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.249.
\textsuperscript{53} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.250.
be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry." 54

33. The Panel on US – Wheat Gluten also effectively equated the phrase "under such conditions" with the causation analysis:

"We are of the view that the phrase 'under such conditions' does not impose a separate analytical requirement in addition to the analysis of increased imports, serious injury and causation. Rather, this phrase refers to the substance of the causation analysis that must be performed under Article 4.2(a) and (b) SA." 55

34. The issue of the analysis of price competition between domestic and imported like products has been specifically addressed within the context of the phrase "under such conditions". The Panel on Korea – Dairy held:

"Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2 56, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country." 57

35. The Panel on US – Wheat Gluten also adopted an approach to price analysis as a non-mandatory, but potentially relevant point of analysis:

"'Price' is not expressly listed in Article 4.2(a) [of the Agreement on Safeguards ("SA")] as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.

Therefore, in the context of safeguards measures, the relevance of 'price' will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the 'price' factor under the Agreement on Safeguards, we consider that the phrase 'under such conditions' does not necessarily, in every case, require a price analysis." 58

36. However, as the Panel Report in Argentina – Footwear (EC) reveals, a price analysis may be required in the specific circumstances of a particular case:

56 (footnote original) Contrary to the explicit references to prices in Article 3 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") and Article 15 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").
57 Panel Report on Korea – Dairy, para. 7.51.
"Therefore, in the present dispute, while the phrase 'under such conditions' does not require a price analysis per se, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case. Moreover, the absence of an analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imported with the domestic product is explained in the report on the investigation (including inter alia a price analysis where relevant), results in an incomplete analysis of the causal link."\(^{59}\)

37. In *US – Wheat Gluten*, the Appellate Body expressed its agreement with the Panel's analysis. Like the Panel, the Appellate Body considered the phrase "under such conditions" to refer to the analysis to be performed under Article 4.2. The Appellate Body also referred to the phrase "under such conditions" in Article 2.1 as support for its view that Article 4.2 contemplates an analysis of whether increased imports, in conjunction with other relevant factors, cause serious injury.\(^{60}\)

"Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure', including those relating to causation. The rules on causation, which are elaborated further in the remainder of the *Agreement on Safeguards*, therefore, find their roots in Article 2.1. According to that provision, a safeguard measure may be applied if a 'product is being imported … in such increased quantities … and under such conditions as to cause …' serious injury. Thus, under Article 2.1, the causation analysis embraces two elements: the first relating to increased 'imports' specifically and the second to the 'conditions' under which imports are occurring.

Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the 'increased quantities' of imports, both in 'absolute' terms and 'relative to domestic production', Article 4.2(a) states, correspondingly, that 'the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports' are relevant.

As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the 'conditions' in the marketplace for the product concerned that may influence the domestic industry. Thus, the phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.\(^{61,62}\)

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\(^{59}\) Panel Report on *Argentina – Footwear (EC)*, para. 8.252.

\(^{60}\) With respect to the analysis of other relevant factors, see paras. 131-143 of this Chapter.

\(^{61}\) (*footnote original*) We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports alone.

Scope of application of a safeguard measure in the case of a regional trade agreement

38. The Panel on Argentina – Footwear (EC) considered whether "Argentina was permitted under the Safeguards Agreement to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed." The Panel first analysed this question on the basis of the ordinary meaning of the footnote to Article 2.1 of the Agreement on Safeguards. The Panel then examined Article XXIV:8 of GATT 1994. It concluded that "...in the case of a customs union the imposition of a safeguard measure only on third country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union." Upon appeal, the Appellate Body reversed the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1. As a result, the footnote to Article 2.1 of the Agreement on Safeguards does not appear to be applicable merely by virtue of the fact that the Member imposing the measure at issue is part of a customs union; rather, for the footnote to be applicable, it has to be the customs union itself as a unit or expressly on behalf of a Member:

"We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the Agreement on Safeguards applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State". MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina.

... It is Argentina that is a Member of the WTO for the purposes of Article 2 of the Agreement on Safeguards, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into its territory and the effects of those imports on its domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case."

39. The Appellate Body in Argentina – Footwear (EC) also rejected the Panel's view that Article XXIV of GATT 1994 was relevant to the issue before it. Recalling its finding in Turkey – Textiles, the Appellate Body reiterated that Article XXIV may serve as an "affirmative defence" and emphasized that Argentina had not argued expressly that Article XXIV provided it with such an affirmative defence:

"This issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of 'increased imports' of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures. In our Report in Turkey – Restrictions on Imports of Textile and Clothing Products, we stated that under certain conditions, 'Article XXIV may

63 Panel Report on Argentina – Footwear (EC), para. 8.75.
64 Panel Report on Argentina – Footwear (EC), paras. 8.76-8.91.
justify a measure which is inconsistent with certain other GATT provisions.' We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure 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 'that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.'

In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the Agreement on Safeguards. 68

40. Also in Argentina – Footwear (EC), the Appellate Body examined "...whether ... there is an implied 'parallelism between the scope of a safeguard investigation and the scope of the application of safeguard measures.'"69 In this connection, the Appellate Body held:

"Taken together, the provisions of Articles 2.1 and 4.1(c) of the Agreement on Safeguards demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic industry within its territory. According to Articles 2.1 and 4.1(c), therefore, all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.

While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard investigation, these provisions do not resolve the matter of the scope of application of a safeguard measure. In that context, Article 2.2 of the Agreement on Safeguards provides:

'Safeguard measures shall be applied to a product being imported irrespective of its source.'

As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States. 70

41. The Appellate Body agreed with the Panel on Argentina – Footwear (EC) as to the existence of parallelism between the scope of a safeguard investigation and the scope of the application of safeguard measures:

70 Appellate Body Report on Argentina – Footwear (EC), paras. 111-112.
"On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures."\(^{71}\)

42. The Appellate Body in *Argentina – Footwear (EC)* stressed that in this case it was not ruling on:

"[W]hether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure.\(^{72}\)

43. In *US – Wheat Gluten*, the Appellate Body upheld the finding by the Panel in that dispute that the United States had acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* when, after including imports from all sources in their investigation of increased imports of wheat gluten into the United States and the consequent effects of such imports on the domestic industry, the United States investigating authorities excluded imports from Canada from the application of the safeguard measure. This exclusion was based on a separate inquiry concerning whether Canada accounted for a substantial share of total imports and whether imports from Canada contributed "importantly" to the serious injury caused by imports. The Appellate Body reiterated its findings from *Argentina – Footwear (EC)* on the existence of parallelism between a safeguard investigation and the application of a safeguard measure:

"[A]rticle 2.1 of the *Agreement on Safeguards* … provides that a safeguard measure may only be applied when 'such increased quantities' of a "product [are] being imported into its territory … under such conditions as to cause or threaten to cause serious injury to the domestic industry'. As we have said, this provision, as elaborated in Article 4 of the *Agreement on Safeguards*, sets forth the conditions for imposing a safeguard measure. Article 2.2 of the *Agreement on Safeguards*, which provides that a safeguard measure 'shall be applied to a product being imported irrespective of its source', sets forth the rules on the application of a safeguard measure.

The same phrase – 'product … being imported' – appears in both these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the same meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a different meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from all sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.\(^{73}\)^\(^{74}\)

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\(^{71}\) Appellate Body Report on *Argentina – Footwear (EC)*, para. 113.

\(^{72}\) Appellate Body Report on *Argentina – Footwear (EC)*, para. 114.

\(^{73}\) (footnote original) The United States relies on Article 9.1 of the *Agreement on Safeguards* in support of its argument that the scope of the serious injury investigation need not correspond exactly to the scope of application of a safeguard measure. Article 9.1 is an exception to the general rules set out in the
44. Furthermore, the Appellate Body in *US – Wheat Gluten* rejected the United States argument that its safeguard measure was nevertheless justified because its authorities had conducted an additional investigation focusing specifically on imports from Canada:

"In the present case, the United States asserts that the exclusion of imports from Canada from the scope of the safeguard measure was justified because, following its investigation based on imports from all sources, the USITC conducted an additional inquiry specifically focused on imports from Canada. The United States claims, in effect, that the scope of its initial investigation, *together with its subsequent and additional inquiry* into imports from Canada, did correspond with the scope of application of its safeguard measure.

In our view, however, although the USITC examined the importance of imports from Canada separately, it did not make any explicit determination relating to increased imports, *excluding imports from Canada*. In other words, although the safeguard measure was applied to imports from all sources, *excluding* Canada, the USITC did not establish explicitly that imports from these *same* sources, excluding Canada, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Thus, we find that the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the United States."  

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(f) Relationship with other Articles

45. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the *Agreement on Safeguards*.  

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46. The Panel on *Argentina – Footwear (EC)* considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it did not find it necessary to make a finding concerning a claim under Article 6.  

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2. Article 2.2

(a) Scope of application of safeguard measures in the case of regional trade agreements

47. With respect to the scope of application of safeguard measures in the case of regional trade agreements, see paragraphs 38-44 above.

(b) Relationship with other Articles

48. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of *GATT 1994*), exercised judicial
economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the Agreement on Safeguards.  

(c) Relationship with other WTO Agreements

49. The Panel on US – Lamb, after making findings of inconsistency with Article XIX:1(a) of GATT 1994 (and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards), exercised judicial economy with respect to claims raised under Article 2.2 (and Articles 3.1, 5.1, 8, 11 and 12) of the Agreement on Safeguards.

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

Investigation

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned 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.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.1

(a) "investigation"

50. In US – Wheat Gluten, the Appellate Body referred to Article 3.1 as part of the context for the interpretation of the requirement of Article 4.2(a) to evaluate "all relevant factors". The Appellate Body addressed the question whether, and to what extent, national authorities must, in their investigation, seek out pertinent information on possible injury factors other than those explicitly raised as relevant by the parties to the national investigation. The Appellate Body first stressed the "central role" of the interested parties in the investigation:

"The ordinary meaning of the word 'investigation' suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter
before them.\footnote{80} The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study … must actively seek out pertinent information.

The nature of the 'investigation' required by the Agreement on Safeguards is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities 'shall include' in order to seek out pertinent information. …The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The Agreement on Safeguards, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.\footnote{81}

51. Subsequently, however, the Appellate Body reversed the Panel on US – Wheat Gluten, which had held that national authorities need only consider other factors that are "clearly raised before them as relevant by the interested parties in the domestic investigation" \footnote{82} and held that national authorities may not limit their investigation to information submitted and claims raised by the parties.

"However, in our view, that does not mean that the competent authorities may limit their evaluation of 'all relevant factors', under Article 4.2(a) of the Agreement on Safeguards, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the Agreement on Safeguards. Moreover, Article 4.2(a) requires the competent authorities – and not the interested parties – to evaluate fully the relevance, if any, of 'other factors'. If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. … In that respect, we note that the competent authorities' 'investigation' under Article 3.1 is not limited to the investigative steps mentioned in that provision, but must simply 'include' these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors."\footnote{83}

52. The Appellate Body in US – Wheat Gluten nevertheless limited this duty of the national authorities to undertake additional investigative steps:

"However, … we also reject the … argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."\footnote{84}
53. The Panel on Argentina – Footwear (EC) considered the question "which document or documents constitute the published report(s) referred to in Article 3.1 and 4.2":

"[W]e recall that annexed to its first submission, Argentina submitted among other documents both Act 338 and the 'Technical Report Prior to the Final Determination' ('Technical Report') of the investigation prepared by the CNCE. We further recall that we sought clarification from Argentina, in a written question, concerning which of the documents submitted to the Panel constituted the published report referred to in Article 3.1 of the Agreement. Argentina replied that Act 338 is the published report of the CNCE's findings regarding serious injury, and that it incorporates by reference the Technical Report. According to Argentina, the Technical Report provides a detailed summary of all of the factual data gathered during the investigation. Argentina further stated that all interested parties had access to the complete record of the investigation except the information therein designated as confidential, and were provided with additional information in connection with the hearings held during the investigation. Argentina also stated in response to a question from the Panel that Act 338 addresses the relevance of each factor considered (as required under Article 4.2(c)), on the basis of the detailed information contained in the Technical Report.

We conclude from the foregoing that Act 338 constitutes both the published report 'setting forth [the] findings and reasoned conclusions reached on all pertinent issues of fact and law' referred to in Article 3.1 of the Safeguards Agreement, and the published document containing the 'detailed analysis of the case under investigation' and the 'demonstration of the relevance of the factors examined' referred to in Article 4.2(c). Thus, we will base our review in the first instance on Act 338. We note, however, that Act 338 is based on and summarises information that is set forth in more detail in the Technical Report. Thus, while Act 338 is the most relevant document, the Technical Report also forms an integral part of the record of the investigation and is closely related to Act 338."

54. In US – Lamb, the Appellate Body stated that a published report within the meaning of Article 3.1. must also contain a finding on the existence of "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994:

"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'."

(d) Relationship with other Articles

55. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of *GATT 1994*), exercised judicial economy with respect to claims raised under Article 3.1 (and Articles 2.2, 5.1, 8, 11 and 12) of the *Agreement on Safeguards*. 87

(c) Relationship with other WTO Agreements

56. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 3.1 (and Articles 2.2, 5.1, 8, 11 and 12) of the *Agreement on Safeguards*. 88

2. Article 3.2

(a) Confidential information

57. In examining a claim concerning the omission from the published report of a safeguards investigation of certain information considered to be confidential by the investigating authorities, the Panel on *US – Wheat Gluten* interpreted the requirements of Article 3.2 concerning the treatment to be accorded to such confidential information:

"Article 3.2 [of the *Agreement on Safeguards* ("SA")] places an obligation upon domestic investigating authorities not to disclose – including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law and demonstrating the relevance of the factors examined – information which is 'by nature confidential or which is provided on a confidential basis' without permission of the party submitting it. Article 3.2 SA does not define the term 'confidential' nor does it contain any examples of the type of information that might qualify as 'by nature confidential' or 'information that is submitted on a confidential basis'.

Article 3.2 SA requires that information that is by nature confidential or which is submitted on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. In the absence of a detailed elaboration or definition of the types of information that must be treated as confidential, we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as 'confidential'. While Article 3.2 does not specifically address the nature of any policies pertaining to the treatment of such 'confidential' information which a Member's investigating authority may or must adopt, that provision does specify that such 'information shall not be disclosed without permission of the party submitting it'. The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties." 89

58. The Panel subsequently addressed the argument that certain aggregate data could not be considered to be "confidential" within the meaning of Article 3.2, and that, even if it was confidential, it could have been presented in percentages and indexes:

"While the United States has described the USITC's efforts to characterize as much confidential information as possible in its Report without compromising the confidential nature of that information, the USITC might ideally have been more creative in trying to provide the essence of the confidential information in its findings in the published USITC Report. We draw attention to the provision in Article 3.2 SA that parties providing confidential information in a domestic safeguard investigation 'may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided…' The language of this provision is hortatory. However, this is one vehicle envisaged by the Agreement on Safeguards that may provide a greater degree of transparency while respecting the confidentiality of qualifying information.

Nevertheless, given the small number of firms comprising the United States domestic industry (and the non-US producers and exporters) in this case; the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not 'cause' has been shown for information to be treated as 'confidential'; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information 'which is by nature confidential or which is provided on a confidential basis', including aggregate data."  

3. General

(a) Absence of a claim under Article 3

59. The Panel on Korea – Dairy observed that the absence of a claim under Article 3 concerning the requirement to publish a report on a safeguard investigation did not preclude the possibility of claims relating to other aspects of an injury determination or safeguard measure. (The Appellate Body did not address this Panel finding in its report):

"[T]he absence of a claim under Article 3 of the Agreement on Safeguards means at most that the European Communities agrees that the report is WTO compatible for the purpose of Article 3.1 of the Agreement on Safeguards. The European Communities has the right to raise more specific claims under Article 4 of the Agreement on Safeguards and has done so. We consider that if a Member wants to challenge the WTO compatibility of the manner in which an 'injury' determination was performed, or the choice of an appropriate measure to be imposed, this Member does not have to challenge the publication of the final report as such."  

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91 Panel Report on Korea – Dairy, para. 7.22.
(b) Relationship with other WTO Agreements

60. The Panel on *US – Wheat Gluten* noted that it had taken certain steps to have access to certain information that had not been included in the published report of the investigation at issue on account of its confidential nature, and that the parties were unable to reach agreement on the procedures proposed by the Panel for viewing this information. In light of this disagreement between the parties, the Panel had decided not to adopt these procedures. The report then comments as follows on the relationship between Article 3.2 of the *Agreement on Safeguards* and Article 13 of the *DSU*:

"In our view, the protracted exchange of communications between the parties about the circumstances under which the Panel should view the requested information demonstrates the existence of a serious systemic issue as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member's investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU. The Panel's efforts to develop a consensual approach to the conditions under which the Panel might view the requested information were ultimately unsuccessful."

61. Although in *US – Wheat Gluten*, the Panel ultimately concluded that the record before it, without the confidential information, provided a sufficient basis for an objective assessment of the facts as required by Article 11 of the DSU, it cautioned that:

"[T]he WTO dispute settlement system cannot function optimally if relevant information is withheld from a panel."

62. The Appellate Body in *US – Wheat Gluten* endorsed this finding:

"[W]e agree] with the panel that a 'serious systemic issue' is raised by the question of the procedures which should govern the protection of information requested of a panel under Article 13.1 of the DSU and which is alleged by a Member to be 'confidential'. We believe that these issues need to be addressed."

63. The Appellate Body in *US – Wheat Gluten* also shared the concerns expressed by the Panel related to the proper functioning of the WTO dispute settlement system:

"[T]he refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the 'prompt' and 'satisfactory' resolution of disputes under the procedures 'for which they bargained in concluding the DSU'."

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96 Appellate Body Report on *US – Wheat Gluten*, para. 171. Faced with a Member's refusal to grant access to confidential information, a WTO panel has the discretion, under Article 11 of the *DSU*, to draw inferences "adverse" to such Member's position in a particular dispute. With respect to adverse inferences in general, see Chapter on *DSU*, para. 194.
V. **ARTICLE 4**

A. **TEXT OF ARTICLE 4**

*Article 4*

**Determination of Serious Injury or Threat Thereof**

1. For the purposes of this Agreement:
   
   (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
   
   (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and
   
   (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

   (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

   (c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 4**

1. **Article 4.1(a)**

   (a) "serious injury" as "significant overall impairment"

64. The Appellate Body in *US – Lamb* described "serious injury" as a "very high standard of injury":

   "[I]n making a determination on … the existence of 'serious injury' … panels must always be mindful of the very high standard of injury implied by these terms."^[97]

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65. Similarly, in *US – Wheat Gluten*, the Appellate Body held that "serious injury" should be determined on the basis of all relevant factors:

"The term 'serious injury' is defined as 'a significant overall impairment in the position of a domestic industry'. (emphasis added) The breadth of this term also suggests that all factors relevant to the overall situation of the industry should be included in the competent authorities' determination."\(^98\)

66. Further, the Appellate Body in *US – Lamb* emphasized the ordinary meaning of the word "serious":

"The standard of 'serious injury' set forth in Article 4.1(a) is, on its face, very high. Indeed, in *United States – Wheat Gluten Safeguard*, we referred to this standard as 'exacting'. Further, in this respect, we note that the word 'injury' is qualified by the adjective 'serious', which, in our view, underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met."\(^99\)

67. Moreover, the Appellate Body, also in *US – Lamb*, juxtaposed the concept of "serious injury" in the *Agreement on Safeguards* and the concept of "material injury" contained in the *Anti-Dumping Agreement* and the *SCM Agreement*:

"We are fortified in our view that the standard of 'serious injury' in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures* (the 'SCM Agreement') and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'.\(^100\) Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures, since, as we have observed previously:

'[t]he 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.'\(^101\)\(^\text{102}\)

68. In *Argentina – Footwear (EC)*, the Appellate Body discussed the relationship between the definition of "serious injury" in Article 4.1(a) and the requirement of an evaluation of "all relevant factors" in Article 4.2(a):

"[I]t is only when the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that

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\(^100\) (footnote original) We find support for our view that the standard of "serious injury" is higher than "material injury" in the French and Spanish texts of the relevant agreements, where the equivalent terms are, respectively, *dommage grave* and *dommage important*; and *daño grave* and *daño importante*.
\(^101\) (footnote original) Appellate Body Report, *Argentina – Footwear Safeguard*, para. 94.
\(^102\) Appellate Body Report on *US – Lamb*, para. 124.
industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. Obviously, any such evaluation will be different for different industries in different cases, depending on the facts of the particular case and the situation of the industry concerned. An evaluation of each listed factor will not necessarily have to show that each such factor is 'declining'. In one case, for example, there may be significant declines in sales, employment and productivity that will show 'significant overall impairment' in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry. Thus, in addition to a technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the Agreement on Safeguards into account in its review of any determination of 'serious injury'.

69. Panels have elaborated in more detail on the meaning of the term "serious injury". Their findings have met with approval by the Appellate Body. For instance, the Panel on US – Wheat Gluten stated:

"[A] determination as to the existence of such 'significant overall impairment' can be made only on the basis of an evaluation of the overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry.

..."[W]e do not consider that a negative trend in every single factor examined is necessary in order for an industry to be in a position of significant overall impairment. Rather, it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination. Thus, such upturns in a number of factors would not necessarily preclude a determination of serious injury. It is for the investigating authorities to assess and weigh the evidence before them, and to give an adequate, reasoned and reasonable explanation of how the facts support the determination made."

70. In reviewing a determination of the existence of a threat of serious injury, the Panel on US – Lamb found that not each of the listed injury factors in Article 4.2 (a) need show a declining tendency. Rather, a determination of serious injury within the meaning of Article 4.1(b) requires an assessment of all injury factors "as a whole":

"[W]e do not exclude that in the particular circumstances of a case, e.g., prices remaining at a depressed level for a longer period may be sufficient for a determination on the whole that an industry is threatened with serious injury even if a given injury factor does not show a recent, sharp and sudden decline. Also, a threat finding does not require that, e.g., financial performance of each individual firm operating in the industry show a decline. A competent national authority may arrive at a threat determination even if the majority of firms within the relevant industry is not facing declining profitability, provided that an evaluation of the injury factors as a whole indicates threat of serious injury.

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103 Appellate Body Report on Argentina – Footwear (EC), para. 139.
... Article 4.1(b) and 4.2(a) do not require the competent national authority to show that each listed injury factor is declining, i.e., point in the direction of serious injury or threat thereof. The competent national authority is required to make its determination in the light of the developments of injury factors on the whole in order to determine whether the relevant industry's condition is facing 'significant overall impairment' in the industry's condition is imminent."  

(b) "current" serious injury

71. The Panel on US – Wheat Gluten considered that, as the investigation of increased imports should focus on recent imports, serious injury should also be found to exist within the recent past. (the Appellate Body did not specifically address this finding):

"[A]ny determination of serious injury must pertain to the recent past. This flows from the wording of the text of Article XIX:1(a) of the GATT 1994 and Article 2.1 SA, which requires an examination as to whether a product 'is being imported' 'in such increased quantities … and under such conditions as to cause or threaten serious injury…'. The use of the present tense of the verb in the phrase 'is being imported' in that provision indicates that it is necessary for the competent authorities to examine recent imports. It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that current serious injury be found to exist, up to and including the very end of the period of investigation.  

2. Article 4.1(b)

(a) Serious injury "that is clearly imminent"; determination of a threat of serious injury "based on facts and not merely on allegation, conjecture or remote possibility"

72. The Panel on US – Lamb interpreted Article 4.1(b) to signify that an industry's overall impairment "needs to be 'ready to take place'  or 'be impending, soon to happen … event, especially danger or disaster'." Next, the Panel stated that a determination of a threat of serious injury has to be based on facts and not on allegation, conjecture, or remote possibility. The Panel concluded (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past (i.e. the latter part of an investigation period) as a starting-point so as to avoid basing a determination on allegation, conjecture or remote possibility; (ii) that factual information from the recent past, complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is imminent in the near future; (iii) that the analysis needs to determine whether

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106 (footnote original) Except, of course, in a case involving threat of serious injury, where the issue involves future injury.
injury of a serious degree will actually occur in the near future unless safeguard action is taken.\footnote{Panel Report on US – Lamb, paras. 7.127-7.129.}

The Appellate Body’s approach largely coincided with the Panel’s:

"[W]e note that th[e] term ['threat of serious injury'] is concerned with 'serious injury' which has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of 'serious injury' by providing that, in order to constitute a 'threat', the serious injury must be 'clearly imminent'. The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated 'serious injury' must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or remote possibility.' (emphasis added) To us, the word 'clearly' relates also to the factual demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury."\footnote{Appellate Body Report on US – Lamb, para. 126.}

73. In US – Lamb, the Appellate Body also reiterated the strict standard of "serious injury" in the context of the "threat of serious injury":

"We recall that, in Argentina – Footwear Safeguard, we stated that 'it is essential for a panel to take the definition of 'serious injury' in Article 4.1(a) of the Agreement on Safeguards into account in its review of any determination of 'serious injury'. The same is equally true for the definition of 'threat of serious injury' in Article 4.1(b) of that Agreement. Thus, in making a determination on either the existence of 'serious injury', or on a 'threat' thereof, panels must always be mindful of the very high standard of injury implied by these terms."\footnote{Appellate Body Report on Argentina – Footwear (EC), para. 139.}

74. The Panel on US – Lamb considered that a focus on the recent data available pertaining to the end of an investigation period was logical in view of the future-oriented nature of a threat of serious injury analysis:

"In our view, due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period. While the SG Agreement does not specify the appropriate duration of the time-period to be considered in an investigation, the Panel and Appellate Body in Argentina – Footwear both considered this issue to some extent. Both concluded that (for an actual serious injury finding) the most recent data were clearly the most relevant. In particular, the Appellate Body stated that 'the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past'.

Given that a threat of serious injury pertains to imminent significant overall impairment, i.e., an event to take place in the immediate future, the same principle should hold true a fortiori for threat determinations compared with present serious injury determinations. This supports the view that the USITC was correct to focus on the most recent data available from the end of the investigation period. We also
consider that data from 1997 and interim-1998 cover an adequate and reasonable time-period if complemented by projections extrapolating existing trends into the imminent future so as to ensure the prospective analysis which a threat determination requires.

Therefore, we consider that, by basing its determination on events at the end of the investigation period (i.e., one year and nine months) rather than over the course of the entire investigation period, the USITC analysed sufficiently recent data for making a valid evaluation of whether significant overall impairment was "imminent" in the near future. By the same token, we also consider that, by basing its determination at all on data about events from the recent past, rather than relying exclusively on projections for the various industry indicators into the future, the USITC made its threat determination on the basis of objective and quantifiable facts, and 'not merely on allegation, conjecture or remote possibility'."  

(b) Increased imports as a prerequisite for a determination of threat of serious injury

75. The Panel on Argentina – Footwear (EC) considered that a mere threat of increased imports is insufficient for the purposes of a determination of threat of serious injury (the Appellate Body did not explicitly address this issue):

"[I]f only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious injury due to a threat of increased imports would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b)."  

76. The Panel on US – Lamb, in a finding subsequently not reviewed by the Appellate Body, addressed the question whether, once imports have increased to already cause already some degree of injury, there is a requirement of additional increased imports in order to legitimately determine the existence of a threat of serious injury:

"The complainants further claim that the US reference to projections of future increases in imports in defending its threat analysis amounts to equating a 'threat of increased imports' with a 'threat of serious injury', which the Argentina – Footwear panel found not to be permissible.

..."

We agree in general with the complainants' argument that a threat of increased imports as such cannot be equated with threat of serious injury. However, in our view, this is not what the USITC has done in this case. Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period may, if unchecked, go on to cause serious injury (i.e., may threaten to cause serious injury). That is, if increased imports at a certain point in time cause less than serious injury, it is not necessarily true that a threat of serious injury can only be caused by a further increase, i.e., additional increased imports. In our view, in the particular circumstances of a case, a

continuation of imports at an already recently increased level may suffice to cause such threat.\textsuperscript{116}

c) Relationship between a determination of the existence of serious injury and a determination of the existence of a threat of serious injury

77. The Panel on Argentina – Footwear (EC) observed that in the dispute before it, it was not necessary "to rule on the question of whether it is possible to make simultaneously findings of serious injury and threat of serious injury."\textsuperscript{117}

d) Relationship with other Articles

78. In US – Lamb, the Panel held that the definition of domestic industry by the United States authorities was inconsistent with Article 4.1(c) of the Agreement on Safeguards. The Panel then explained its decision not to exercise judicial economy, but rather to proceed to examine other claims, including those pertaining to Article 4.1(b):

"A finding that the industry definition used by the USITC is inconsistent with SG Article 4.1(c) would appear to compromise the investigation and determination overall. … [T]he Appellate Body focuses on the need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute and adds that providing only a partial resolution of the matter at issue would be false judicial economy. It is in the spirit of the Appellate Body's statements in Australia – Salmon that we continue with an analysis of other claims in the alternative, assuming arguendo either (1) that the USITC's industry definition were consistent with the Safeguards Agreement or (2) that, as the United States argues in the alternative, the USITC would have made a finding of threat of serious injury even if the industry definition had been limited to packers and breakers."\textsuperscript{118}

3. Article 4.1(c)

(a) "domestic industry"–"producers as a whole…of the like…products"

79. In US – Lamb the Appellate Body concurred with the finding of the Panel in that dispute that in the context of an investigation in which the relevant like product was defined as lamb meat, the term "domestic industry" could not be interpreted as including growers and feeders of live lambs. The Appellate Body began by identifying the analytical approach towards defining "domestic industry":

"Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible then to identify the 'producers' of those products."\textsuperscript{119}

80. The Appellate Body first considered the definition of "domestic industry" with reference to products:

"[A] safeguard measure is imposed on a specific 'product', namely, the imported product. The measure may only be imposed if that specific product ('such product') is having the stated effects upon the 'domestic industry that [produces like or directly

\textsuperscript{117} Panel Report on Argentina – Footwear (EC), para. 8.285.
\textsuperscript{118} Panel Report on US – Lamb, para. 7.119.
\textsuperscript{119} Appellate Body on US – Lamb, para. 87.
competitive products’. (emphasis added) The conditions in Article 2.1, therefore, relate in several important respects to specific products. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are not 'like or directly competitive products' in relation to the imported product.”

81. After addressing the definition of "domestic industry" with respect to products, the Appellate Body in *US – Lamb* then proceeded to consider the issue of producers:

"As the Panel indicated, 'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence. This meaning of 'producers' is, however, qualified by the second element in the definition of 'domestic industry'. This element identifies the particular products that must be produced by the domestic 'producers' in order to qualify for inclusion in the 'domestic industry'. According to the clear and express wording of the text of Article 4.1(c), the term 'domestic industry' extends solely to the 'producers … of the like or directly competitive products'. (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are not 'like or directly competitive products' do not, according to the text of the treaty, form part of the domestic industry.”

82. In *US – Lamb*, the Appellate Body upheld the findings of the Panel and also concluded that the definition of "domestic industry" by the United States authorities was too broad:

"There is no dispute that in this case the 'like product' is 'lamb meat', which is the imported product with which the safeguard investigation was concerned. The USITC considered that the 'domestic industry' producing the 'like product', lamb meat, includes the growers and feeders of live lambs. The term 'directly competitive products' is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case." 

"In this respect, we are not persuaded that the words 'as a whole' in Article 4.1(c), appearing in the phrase 'producers as a whole', offer support to the United States position. These words do not alter the requirement that the 'domestic industry' extends only to producers of 'like or directly competitive products'. The words 'as a whole' apply to 'producers' and, when read together with the terms 'collective output' and 'major proportion' which follow, clearly address the number and the representative nature of producers making up the domestic industry. The words 'as a whole' do not imply that producers of other products, which are not like or directly competitive with the imported product, can be included in the definition of domestic industry. Like the Panel, we see the words 'as a whole' as no more than 'a quantitative

120 Appellate Body on *US – Lamb*, para. 86.
121 Appellate Body on *US – Lamb*, para. 84.
122 (footnote original) We note that two Commissioners (Askey and Crawford) did not join in the findings of the USITC on this point. These two Commissioners both found that live lambs, produced by growers and feeders, are directly competitive with lamb meat and that, accordingly, the "domestic industry" includes the producers of these competing products. USITC Report, pp. I-8 and I-9, footnotes 7 (Commissioner Askey) and 8 (Commissioner Crawford). The United States has not argued, before the Panel or before us, that live lambs are directly competitive with lamb meat, and that issue as we stated earlier, does not form part of this appeal.
benchmark for the proportion of producers … which a safeguards investigation has to cover.\textsuperscript{123}

83. The Appellate Body in \textit{US – Lamb} expressed scepticism that the degree of integration of production processes within an industry should have any bearing on the determination of the "domestic industry".

"Although we do not disagree with the Panel's analysis of the USITC Report, nor with the conclusions it drew from that analysis, we have reservations about the role of an examination of the degree of integration of production processes for the products at issue. As we have indicated, under the Agreement on Safeguards, the determination of the "domestic industry" is based on the 'producers … of the like or directly competitive products'. The focus must, therefore, be on the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced.\textsuperscript{124,125}

(b) "those whose collective output...constitutes a major proportion"

84. The Panel Report in \textit{US – Wheat Gluten} addressed the link between the phrase "major proportion" and the question of data coverage:

"[T]he Agreement expressly envisages that, in certain circumstances, the 'domestic industry' may consist of those domestic producers 'whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'. This implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage. In this case, the fact that the USITC record included full period data for only two domestic producers was partially a result of the fact that Heartland became part of the domestic industry only in 1996. Furthermore, the profitability data provided by ADM did not pertain specifically to the domestic industry under investigation and was therefore excluded.

Moreover, the USITC found that '[p]rofitability reflected the trends in average unit value prices, which initially rose and then fell.' The USITC had before it data pertaining to unit value from all producers, including ADM. The concurrence in trends between these two factors supports the view that the profitability data used by the USITC was representative of the domestic industry's situation.

On the basis of the information contained, or referred to, in the sections of the USITC Report relating to profits and losses and the statement by the USITC that the three domestic producers that provided usable financial data on wheat gluten 'accounted for the substantial majority of domestic production of wheat gluten', we find that the United States did not act inconsistently with Article 4.2(a) in terms of the coverage of the 'profits and losses' data.\textsuperscript{126}

\textsuperscript{123} Appellate Body on \textit{US – Lamb}, para. 91.
\textsuperscript{124} (footnote original) We can, however, envisage that in certain cases a question may arise as to whether two articles are \emph{separate products}. In that event, it may be relevant to inquire into the production processes for those products.
\textsuperscript{125} Appellate Body Report on \textit{US – Lamb}, para. 94.
85. In contrast to the Panel's findings in US – Wheat Gluten, the Panel on US – Lamb held that the data gathered by the investigating authorities in the specific case were not sufficiently representative of those producers whose collective output constitutes a major proportion of the products in question:

"[T]he crucial problem with the data used by the USITC relates to the representativeness of the questionnaire data where they were used (e.g., employment, financial indicators), and not with the use of USDA data where available. In particular the low data coverage for growers and feeders (approximately six per cent), the lack of financial data for interim 1997 and 1998 for grower/feeders, and the uneven data coverage for packers and breakers (especially in the financial data as outlined above) raises serious doubts as to whether the data represent a "major proportion" of the domestic industry, in the sense of SG Article 4.1(c)."\textsuperscript{127}

86. The Panel also pointed out that an incorrect determination of what constitutes the "domestic industry" will likely vitiate also the representativeness of data related to such incorrectly determined domestic industry:

"This lack of representativeness is likely compounded by the fact that the USITC defined the domestic industry broadly as including growers and feeders, as the conclusions drawn from the data pertaining to only a small proportion of US growers and feeders are central to the USITC's overall finding of threat of serious injury."\textsuperscript{128}

87. The Panel made clear that a national authority is not under an obligation to collect information from all domestic producers so as to ensure the representativeness of the data used for its final determination. Nevertheless, the Panel invoked, among other things, the need for a "statistically valid sample":

"We agree with the United States that the Safeguards Agreement does not specify any particular methodology to ensure the representativeness of data collected in an investigation. But we also note that the USITC itself concedes that the questionnaire responses do not constitute a statistically valid sample of the producers which, in the USITC's view, form an essential part of the domestic industry. While, again accepting arguendo the USITC's industry definition,\textsuperscript{129} we recognize that in practical terms it would have been impossible for the USITC to collect data from all of the more than 70,000 growers, we nevertheless believe that the USITC could have obtained data from a larger percentage of the growers than it did or from a statistically valid sample, so as to ensure that the data collected were representative of growers as a whole. In any case, petitioners requesting the initiation of an investigation could not automatically be taken to represent a major proportion of the domestic industry.

In the light of the foregoing, we conclude that on the basis of the information made available by the United States in this dispute (and absent more detailed information on the exact coverage of the questionnaire responses), by industry segment and by injury factor, we are not persuaded that the data used as a basis for the USITC's determination in this case was sufficiently representative of those producers whose

\textsuperscript{127} Panel Report on US – Lamb, para. 7.218.

\textsuperscript{128} Panel Report on US – Lamb, para. 7.219.

\textsuperscript{129} (footnote original) Of course, only once the relevant domestic industry has been defined consistently with SG Article 4.1(c) is it logically possible to select producers representing a "major proportion" of the collective output of the like or directly product in question, or to develop a valid statistical sample that would ensure that the data collected are representative of a major proportion of the domestic industry.
collective output ... constitutes a major proportion of the total domestic production of those products' within the meaning of SG Article 4.1(c).”

(c) Relationship with other Articles

88. The Panel on US – Lamb, after making findings of inconsistency with Article XIX:1(a) of GATT 1994 and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards. 131

89. With respect to the relationship with Article 4.1(b), see paragraph 78 above.

4. Article 4.2(a)

(a) "shall evaluate all relevant factors"

(i) Relationship between the requirement to evaluate all relevant factors and the definition of serious injury in Article 4.1(a)

90. With respect to the relationship between the requirement to evaluate all relevant factors and the definition of serious injury in Article 4.1(a), see paragraphs 68-70 above.

(ii) "All" relevant factors – factors relating to imports and factors relating to the domestic industry

91. In the context of reversing the interpretation by the Panel on US – Wheat Gluten of the requisite causal link between increased imports and serious injury, the Appellate Body held that a national authority should consider all the factors listed in Article 4.2(a), regardless of whether they relate to imports specifically or to the domestic industry more generally. The Appellate Body did not consider that Article 4.2(a) attached any special significance to any one of these factors in particular:

"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.” 132

92. In the same case, after finding that the phrase "all relevant factors" under Article 4.2(a) refers to factors relating both to imports and to the domestic industry, the Appellate Body further held that the determination of "causality" under Article 4.2(b) must give the phrase "all relevant factors" the same meaning as under Article 4.2(a). The Appellate Body noted that Article 4.2(a) imposes an obligation to evaluate (and by implication to include) the effect of all the relevant factors on the domestic industry and went on to state that this obligation under Article 4.2(a) would be violated if the very same effects, caused by those same factors, were – with the exception of increased imports – to be excluded from consideration under Article 4.2(b).  

(iii) Requirement to consider all factors listed in Article 4.2(a)

93. The Panel on Korea – Dairy found, with respect to the list of factors contained in Article 4.2(a), that the national investigating authority was under an obligation to evaluate all of these factors:

"This provision sets out the general principle regarding the economic factors which need to be considered in a serious injury investigation, and provides a list of factors that are a priori considered to be especially relevant and informative of the situation of the domestic industry. The use of the wording 'in particular' makes it clear to us that, among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry."  

94. In the context of its discussion of the applicable standard of review, the Panel on Argentina – Footwear (EC) addressed the argument that the requirement to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the industry" implies an obligation to evaluate factors only to the extent that they are relevant but not an obligation to examine each and every factor.  

"We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of 'all relevant factors', in particular those listed in that article. Second, Article 6.4 of the ATC contains no such express requirement and recognises that 'none of these factors ... can necessarily give decisive guidance. Nonetheless, the panels on United States - Underwear and United States - Shirts and Blouses ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate 'all relevant factors' we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required.

... we must consider, first, whether all injury factors listed in the Agreement were considered by Argentina as the text of Article 4.2(a) of the Agreement ('all relevant factors....including ...changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment') is unambiguous that at a minimum
each of the factors listed, in addition to all other factors that are 'relevant', must be considered.\textsuperscript{136}

95. The Appellate Body agreed "with the Panel's interpretation that Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."\textsuperscript{137}

96. The Panel Report in \textit{US – Wheat Gluten} reiterates this standard:

"[T]he language in this provision is mandatory ('shall...'). Furthermore, this list is preceded by the term 'in particular...'. On the basis of the text of the provision, we therefore concur with the shared view of the parties that all of the factors listed in Article 4.2(a) must be evaluated. Of course, an examination of any one of those factors in a given case 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.\textsuperscript{138}

\textbf{(iv) Standard of review}

97. In \textit{US – Lamb}, the Appellate Body articulated the standard of review for a national authority's determination of serious injury or threat thereof:

"[I]n examining a claim under Article 4.2 of the Agreement on Safeguards, a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a formal matter, evaluated all relevant factors and, second, a panel must review whether those authorities have, as a substantive matter, provided a reasoned and adequate explanation of how the facts support their determinations.\textsuperscript{139}

98. The Appellate Body's application of its standard of review toward a national authority's determination of serious injury or threat thereof is illustrated by its findings in \textit{US – Lamb}. Here, after criticising the United States authorities determination of threat of serious injury, the Appellate Body stated:

"We wish to emphasize again that our remarks about the price data are not intended to suggest that the domestic industry was not threatened with serious injury. Rather, our conclusion is simply that the USITC has not adequately explained how the facts relating to prices support its determination, under Article 4.2(a), that the domestic industry was threatened with such injury.\textsuperscript{140}

99. Although in \textit{US – Lamb} the Appellate Body agreed with the Panel's articulation of the appropriate standard of review, it held that the Panel had not applied this standard correctly in that case. The Appellate Body took issue with the fact that the Panel had considered the evaluation of certain factors to be 'a sufficient basis' for the national authorities' determination, but did not engage in any substantive review of these factors. The Appellate Body found that the Panel had not applied the required standards of review because:

\textsuperscript{136} Panel Report on \textit{Argentina – Footwear (EC)}, paras. 8.123 and 8.206.
\textsuperscript{137} Appellate Body Report on \textit{Argentina – Footwear (EC)}, para.136.
\textsuperscript{139} Appellate Body Report on \textit{US – Lamb}, para. 141.
\textsuperscript{140} Appellate Body Report on \textit{US – Lamb}, para. 160.
"[B]y failing to review the USITC's determination in light of these detailed substantive arguments, [it] failed to examine critically whether the USITC had, indeed, provided a reasoned and adequate explanation of how the facts supported its determination that there existed a 'threat of serious injury'.”¹⁴¹

(v) "of an objective and quantifiable nature"

(a.1) General

100. In its determination of what would constitute "factors of an objective and quantifiable nature" within the meaning of Article 4.2(a), the Appellate Body in US – Lamb opined that the requirement of objectivity and quantifiability applies, not to factors, but to data, the evaluation of which would "enable the measurement and quantification of these factors". The Appellate Body then specified that for data to be "objective and quantifiable", such data would have to be both sufficient and representative of the domestic industry:

"We note that no provision of the Agreement on Safeguards specifically addresses the question of the extent of data collection, and in particular, whether competent authorities must have before them data that is representative of the domestic industry. However … competent authorities are obliged to 'evaluate' all relevant factors of an 'objective and quantifiable' nature … We recognize that the clause 'of an objective and quantifiable nature' refers expressly to 'factors', but not expressly to data. We are, however, convinced that factors can only be 'of an objective and quantifiable nature' if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of 'objective evidence'. Such evidence is, in principle, objective data. The words 'factors of an objective and quantifiable nature' imply, therefore, an evaluation of objective data which enables the measurement and quantification of these factors.

'The requirement for competent authorities to evaluate the 'bearing' that the relevant factors have on the 'domestic industry' and, subsequently, to make a determination concerning the overall 'situation of that industry', means that competent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the 'domestic industry'. The need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the 'domestic industry'. Indeed, a determination made on the basis of insufficient data would not be a determination about the state of the 'domestic industry', as defined in the Agreement, but would, in reality, be a determination pertaining to producers of something less than 'a major proportion of the total domestic production' of the products at issue. Accordingly, we agree with the Panel that the data evaluated by the competent authorities must be sufficiently representative of the 'domestic industry' to allow determinations to be made about that industry."¹⁴²

101. The Appellate Body in US – Lamb nevertheless stressed that data could fulfil the requirement of being representative even if they did not cover all domestic producers whose production constitutes a major proportion of the domestic industry:

"We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some

instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'. What is sufficient in any given case will depend on the particularities of the 'domestic industry' at issue.\(^{143}\)

(a.2) Nature and temporal focus of data in a threat analysis

102. In US – Lamb, the Appellate Body addressed what it calls the "tension between a future-oriented 'threat' analysis" on the one hand, and the "need for a fact-based determination of serious injury" on the other:

"[W]e agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a "threat" determination be based on "facts" and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the Agreement on Safeguards, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.\(^{144,145}\)

103. With respect to the temporal focus of data used in a threat analysis, the Appellate Body held:

"[W]e note that the Agreement on Safeguards provides no particular methodology to be followed in making determinations of serious injury or threat thereof. However, whatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past … [I]n principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry."\(^{146}\)

104. The Appellate Body, also in US – Lamb, nevertheless cautioned against the use of recent data in isolation from data pertaining to the entire period of investigation:

"However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle

\(^{143}\) Appellate Body, US – Lamb, para. 132.

\(^{144}\) (footnote original) We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.


\(^{146}\) Appellate Body Report on US – Lamb, para. 137.
of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period. 

(vi) "Rate and amount" of the increase; "changes" in the level of sales

105. The Panel Report in Argentina – Footwear (EC), subsequently upheld on this point by the Appellate Body, read the requirement under Article 4.2(a) to evaluate the rate and amount of the increase in imports to mean a requirement to analyse the trends of imports over the period of investigation:

"[W]e recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated. In our view this constitutes a requirement that the intervening trends of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change."

106. The Appellate Body affirmed this interpretation of the words "rate and amount" in Article 4.2(a) by agreeing:

"[W]ith the Panel that the specific provisions of Article 4.2(a) require that 'the rate and amount of the increase in imports … in absolute and relative terms' …must be evaluated. Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)."

107. With respect to the coincidence between trends in injury factors and import trends, see paragraphs 123-126 below.

147 (footnote original) We note that, at footnote 130 of our Report in Argentina – Footwear Safeguard, …, we said that "the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.

148 (footnote original) We recognize that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "such increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.


150 Appellate Body Report on Argentina – Footwear (EC), para. 129.
"productivity"

108. The Panel Report in *US – Wheat Gluten* held that the term "productivity" may refer to the overall productivity of an industry and encompasses productivity of both labour and capital (the Appellate Body did not address this particular finding):

"[T]he Agreement on Safeguards provides no precise definition of the term 'productivity' that appears in Article 4.2(a) SA. The context of this term includes the rest of the text of Article 4.2(a) – and in particular, the phrase 'all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry' … We consider that this term, read in its context, may refer to the overall productivity of the industry."

It is apparent to us from the USITC Report that the USITC gathered and analysed data on capital investment in the industry as well as data pertaining to worker productivity. In these Panel proceedings, the United States asserts that 'it is simple mathematics that if production declines (as it did in 1996-1997 from 1995 levels), while the amount of capital in the industry increases (as it did from the capital projects adding capacity), the productivity of capital will correspondingly decline.' We would have preferred a more integrated examination in the USITC Report of 'productivity' that explicitly encompassed overall industry productivity -- particularly in light of the acknowledgement by the USITC that 'production of wheat gluten is extremely capital intensive and requires very few production workers'. Nevertheless, we consider that the data and statements pertaining to worker productivity, in conjunction with those on capital investments, in the overall context of the USITC Report, indicate that the USITC considered industry productivity as required by Article 4.2(a).

Factors not listed in Article 4.2(a)

109. In *US – Wheat Gluten*, the Appellate Body disagreed with the interpretation by the Panel in that dispute that, with regard to factors not enumerated in Article 4.2(a), competent authorities are obliged only to evaluate factors "clearly raised" as relevant by interested parties in a domestic investigation. The Appellate Body first established a link between the requirement, under Article 4.2(a) to evaluate "all relevant factors" and the obligation, under Article 3.1, to conduct an investigation:

"The word 'all' has a broad meaning which, if read alone, would suggest that the scope of the obligation on the competent authorities to evaluate 'relevant factors' is without limits or exceptions. However, the word cannot, of course, be read in isolation. … the text of Article 4.2(a) itself imposes certain explicit qualifications on the obligation to evaluate 'all relevant factors' as it states that competent authorities need only evaluate factors which are 'objective and quantifiable' and which '[have] a bearing on the situation of that industry'.

The obligation to evaluate 'relevant factors' must also be interpreted in light of the duty of the competent authorities to conduct an "investigation" under the *Agreement on Safeguards*. The competent authorities must base their evaluation of the

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154 (footnote original) *The New Shorter Oxford English Dictionary*, (Brown, ed.) (Clarendon Press, 1993), Vol. I, p. 52, indicates that, when the word 'all' is used as an adjective preceding a noun in the plural form (as in 'all … factors'), it means 'The entire number of; the individual constituents of, without exception.'
relevance, if any, of a factor on evidence that is 'objective and quantifiable'. The 
competent authorities will, in principle, obtain this evidence during the investigation 
they must conduct, under Article 3.1, into the situation of the domestic industry. The 
scope of the obligation to evaluate 'all relevant factors' is, therefore, related to the 
scope of the obligation of competent authorities to conduct an investigation.

We turn, therefore, for context, to Article 3.1 of Agreement on Safeguards, which is 
entitled 'Investigation'\(^{155}\).

110. The Appellate Body in US – Wheat Gluten then reversed the Panel's finding that the 
competent authorities are obliged only to evaluate factors "clearly raised" as relevant by interested 
parties in a domestic investigation. Rather, the Appellate Body held that the investigating authorities 
must, where necessary, "undertake additional investigative steps … in order to fulfill their obligation 
to evaluate all relevant factors":

"The competent authorities must, in every case, carry out a full investigation to enable 
them to conduct a proper evaluation of all of the relevant factors expressly mentioned 
in Article 4.2(a) of the Agreement on Safeguards. Moreover, Article 4.2(a) requires 
the competent authorities – and not the interested parties – to evaluate fully the 
relevance, if any, of "other factors". If the competent authorities consider that a 
particular 'other factor' may be relevant to the situation of the domestic industry, 
under Article 4.2(a), their duties of investigation and evaluation preclude them from 
remaining passive in the face of possible short-comings in the evidence submitted, 
and views expressed, by the interested parties. In such cases, where the competent 
authorities do not have sufficient information before them to evaluate the possible 
relevance of such an 'other factor', they must investigate fully that 'other factor', so 
that they can fulfill their obligations of evaluation under Article 4.2(a). In that 
respect, we note that the competent authorities' 'investigation' under Article 3.1 is not 
limited to the investigative steps mentioned in that provision, but must simply 
include' these steps. Therefore, the competent authorities must undertake additional 
investigative steps, when the circumstances so require, in order to fulfill their 
obligation to evaluate all relevant factors.

Thus, we disagree with the Panel's finding that the competent authorities need only 
examine 'other factors' which were 'clearly raised before them as relevant by the 
interested parties in the domestic investigation.' (emphasis added) … However, as is 
clear from the preceding paragraph of this Report, we also reject the European 
Communities' argument that the competent authorities have an open-ended and 
unlimited duty to investigate all available facts that might possibly be relevant."\(^{156}\)

(ix) Consideration of "all relevant factors" in the case of a segmented domestic industry

111. The Panel Report in Korea – Dairy held that while it is permissible to analyse distinct market 
segments in order to make a finding of serious injury to the whole domestic industry, the investigating 
authorities must nevertheless comply with certain requirements in this respect:

"[T]he definition of the domestic industry in this case as comprising two different 
s segments of the dairy products market has consequences for the evaluation of the

\(^{155}\) Appellate Body Report on US – Wheat Gluten, paras. 51-53. See also paras. 50-52 of this Chapter.

\(^{156}\) Appellate Body Report on US – Wheat Gluten, paras. 55-56. The Appellate Body also found, based 
on an examination of the evidence of record, that the factor which the investigating authorities had allegedly 
failed to evaluate was not a particular relevant factor requiring evaluation under Article 4.2(a) of the Agreement 
situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyse distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry....Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards.”

112. In Argentina – Footwear (EC), the Panel addressed the argument that, since the investigation had been conducted on the basis of a division of the product under investigation into five product groups, the investigating authorities were required to prove serious injury in all segments in which safeguard measures were to be imposed:

"We disagree with the European Communities that Argentina was required to conduct its injury and causation analysis on a disaggregated basis. In our view, since in this case the definition of the like or directly competitive product is not challenged, it is this definition that controls the definition of the 'domestic industry' in the sense of Article 4.1(c) as well as the manner in which the data must be analysed in an investigation. While Argentina could have considered the data on a disaggregated basis (and in fact did so in some instances), in our view, it was not required to do so. Rather, given the undisputed definition of the like or directly competitive product as all footwear, Argentina was required at a minimum to consider each injury factor with respect to all footwear. By the same token the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual product segment. Thus, in our review of the injury finding, we will consider the analysis and conclusions pertaining to the footwear industry in its entirety.”

113. The Panel on US – Lamb found that an investigation of the injury factors with respect to particular industry segments is sufficient, provided an adequate explanation of certain issues is furnished:

"An initial issue before us is whether, accepting arguendo the USITC's industry definition, all factors need to be investigated in detail for all identified industry segments (i.e., growers, feeders, packers and breakers) or whether an investigation of certain injury factors with respect to particular segments only would be sufficient to meet the requirements of SG Article 4.2(a). In the light of the general standard of review, as it applies to contingent trade remedy cases, we consider the latter as sufficient if there is an adequate explanation in the report published by the USITC, of..."

158 (footnote original) Or, to the extent that Argentina relied on data for particular product segments as the basis for conclusions pertaining to the entire industry, it was required to explain how its analysis regarding those segments related to or was representative of the industry as a whole.
159 (footnote original) We note that in any case, only if serious injury or a threat thereof exists with respect to the product market segments accounting for the bulk of the industry's output will injury be evident with respect to the industry as a whole. The European Communities appears to acknowledge this, in indicating that the share of a given product category of the total industry is relevant for the injury analysis of the entire industry ...
(i) why conclusive inferences from the data concerning one industry segment can be
drawn for another industry segment, or (ii) why the factual constellation in particular
industry segment in the given case does not permit data collection (i.e., not a 'factor
of a objective and quantifiable nature'), or (iii) renders a certain injury factor not
probative in the circumstances of a particular industry segment (i.e., not a factor 'having a bearing on the situation of that industry' within the meaning of SG
Article 4.2(a).)

114. The Panel on US – Lamb then noted with respect to the investigation at issue:

"[W]here the USITC did not collect data concerning a particular injury factor with
respect to all industry segments, the USITC report provides an adequate explanation
for that. Either the USITC report explains how inferences can be drawn from the data
collected with regard to one segment for another segment for which data were not
collected, or it explains why, in the circumstances of the particular industry segment
at issue, the collection of data of an objective and quantifiable nature was not
possible, or it explains why a specific injury factor is not probative for that
segment."

(x) Consideration of trends

115. The Panel on Argentina – Footwear (EC) considered as inconsistent with the requirement of
an evaluation of "all relevant factors" what it characterized as "the investigation's almost exclusive
reliance on end-point-to-end-point comparisons in its analysis of the changes in the situation of the
industry." The Panel observed in this respect:

"[I]f intervening trends are not systematically considered and factored into the
analysis, the competent authorities are not fulfilling Article 4.2(a)'s requirement to
analyse 'all relevant factors', and in addition, the situation of the domestic industry is
not ascertained in full. For example, the situation of an industry whose production
drops drastically in one year, but then recovers steadily thereafter, although to a level
still somewhat below the starting level, arguably would be quite different from the
situation of an industry whose production drops continuously over an extended
period. An end-point-to-end-point analysis might be quite similar in the two cases,
whereas consideration of the year-to-year changes and trends might lead to entirely
opposite conclusions."

(xi) Allocation methodology

116. In US – Wheat Gluten, the Panel stressed the importance of sound allocation methodologies,
but acknowledged that the Agreement on Safeguards does not provide for one particular methodology
in this context:

"We recognize the fundamental importance of assuring that data gathered in the
course of a safeguards investigation is accurate and that any allocation of costs and
revenues reflects, to the greatest extent possible, the realities of the domestic industry
concerned. However, we note that the Agreement on Safeguards does not set out
precise rules on the collection and analysis of data, nor does it require the use of any
particular allocation methodology with respect to financial data gathered by the
investigating authorities in the course of the investigation.

We note that the USITC paid attention to the allocation methodologies used by all domestic producers and in the questionnaire requested firms that did not maintain separate records for wheat gluten to make allocations and explain the methodology used. We also note that the USITC conducted certain procedures, including internal analysis by its staff as well as an on-site verification by a USITC auditor, in order to verify the accuracy and the adequacy of the financial information provided. We believe that, in support of the USITC statement concerning the 'careful review' and the finding that the methodologies were 'appropriate', the USITC Report could have included a description of such procedures and a more detailed explanation as to how and why the USITC considered the allocations to be 'appropriate', in addition to a characterization of the redacted confidential information."  

(b) Relationship with other Articles

117. With respect to the relationship with Article 4.2(b), see paragraphs 92 above and 145-146 below.

118. The Panel on Argentina – Footwear (EC) considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had previously found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it was not necessary to make a finding concerning a claim under Article 6.  

5. Article 4.2(b)

(a) General approach to the causation analysis

119. The Panel on Korea – Dairy set forth the basic approach for determining "causation":

"In performing its causal link assessment, it is our view that the national authority needs to analyse and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports.

To establish a causal link, Korea has to demonstrate that the injury to its domestic industry results from increased imports. In other words, Korea has to demonstrate that the imports of SMPP cause injury to the domestic industry producing milk powder and raw milk. In addition, having analysed the situation of the domestic industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors."  

120. In Argentina – Footwear (EC), the Panel set forth the following approach to the analysis of causation:

"Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in

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166 Panel Report on Korea – Dairy, paras. 7.89-7.90.
imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.\textsuperscript{167}

121. The Panel on US – Wheat Gluten confirmed and repeated this general causation standard:

"We consider that an appropriate approach for a panel to take in assessing whether a Member has fulfilled the requirements of Article 4.2(a) and (b) SA with respect to causation consists of a consideration of: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition between the imported and domestic product as analysed demonstrate the existence of the causal link between the imports and any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.\textsuperscript{168}

122. While the Appellate Body did not comment on these general findings on causation in Korea – Dairy, US – Wheat Gluten and US – Lamb, in Argentina – Footwear (EC), it stated that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the Agreement on Safeguards.\textsuperscript{169}

(i) Coincidence of trends

123. The Panel on Argentina – Footwear (EC), in a finding upheld by the Appellate Body, recalled that Article 4.2(a) requires national authorities to analyse trends in both injury factors and imports, and related this finding to the context of causation:

"In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the 'rate' (i.e., direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the trends – in both the injury factors and the imports – matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.

In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation (because, \textit{inter alia}, Article 3 requires an explanation – i.e., 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal

\textsuperscript{167} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.229.
\textsuperscript{169} Appellate Body Report on \textit{Argentina – Footwear (EC)}, para. 145.
link, and would require a very compelling analysis of why causation still is present.\textsuperscript{170}

124. As noted above, the Appellate Body in 	extit{Argentina – Footwear (EC)} agreed with the Panel and observed:

"We see no reason to disagree with the Panel's interpretation that the words 'rate and amount' and 'changes' in Article 4.2(a) mean that "the trends -- in both the injury factors and the imports -- matter as much as their absolute levels." We also agree with the Panel that, in an analysis of causation, 'it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.'… Furthermore, with respect to a 'coincidence' between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should 'normally' occur if causation is present.\textsuperscript{171}

125. The Panel Report in 	extit{US – Wheat Gluten} elaborated on the importance of coincidence between movements in imports and movements in injury factors:

"We consider that a coincidence in the movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why causation is still present.\textsuperscript{172}

126. This same Panel considered that in the case before it:

"[I]n light of the overall coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of individual injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury."\textsuperscript{173}

(ii) \textit{Conditions of competition between imported and domestic products}

127. In examining whether in the case at issue conditions of competition had been analysed, the Panel on 	extit{Argentina – Footwear (EC)} observed that a juxtaposition of statistics on imports and injury factors did not constitute an analysis of the conditions of competition between the imports and the domestic product\textsuperscript{174}; that, in the absence of price comparisons between imported and domestic products, there was no factual basis for the statements that imports were cheaper than domestic products\textsuperscript{175}; and that there was no evidence that lower-priced imports had any injurious effects on the domestic industry.\textsuperscript{176} In the latter regard, the Panel stated:

"[T]he report on the investigation contains no evidence to indicate that the effect of the prices of imported footwear on domestic producers' prices, production, etc., was specifically analysed, in spite of the fact that the causation finding was fundamentally based on price considerations. Rather, aggregate trends in broad statistical indicators were compared and conclusory statements made (e.g., that 'the decline in output was

\textsuperscript{170} Panel Report on \textit{Argentina – Footwear (EC)}, paras. 8.237-8.238.  
\textsuperscript{171} Appellate Body Report on \textit{Argentina – Footwear (EC)}, para. 144.  
\textsuperscript{174} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.254.  
\textsuperscript{175} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.259.  
\textsuperscript{176} Panel Report on \textit{Argentina – Footwear (EC)}, para. 8.261.
replaced by imports, essentially cheap imports'. This is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2…" 177

128. In a footnote to this paragraph, the Panel on Argentina – Footwear (EC) addressed the relationship between the determination of like or directly competitive products on the one hand and the parameters of causation analysis on the other:

"We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled 'Conditions of competition between the domestic products and imports'. This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for 'fending off foreign competition', and from importers and domestic producers concerning 'the sales mix' of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the 'conditions of competition' by the authority on the basis of objective evidence." 178

129. With respect to the standards set forth in the preceding excerpt, the Panel on Argentina – Footwear (EC) concluded that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price)." 179 The Appellate Body affirmed this conclusion. 180

130. For the interpretation by the Panels in Argentina – Footwear (EC) and US – Wheat Gluten of the term "under such conditions" in Article 2.1 as referring to the need for an analysis of the conditions of competition between imported products and like or directly competitive products, see paragraphs 28-37 above.

(iii) Factors other than increased imports

131. The Panel on Argentina – Footwear (EC) emphasized the importance of a sufficient consideration of "other factors" in order to satisfy the requirements of Article 4.2(b):

"We recall that Article 4.2(b) requires that '[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.' Thus, as part of the causation analysis, a

179 Panel Report on Argentina – Footwear (EC), para. 8.278.
sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any injury caused by such other factors can be identified and properly attributed.\(^{181}\)

132. The Panel on *Argentina – Footwear (EC)* found that, in the investigation at issue, factors other than imports had not been sufficiently evaluated, in particular the effect of a domestic recession.\(^{182}\) The Appellate Body noted in general that it saw "no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*" and agreed with the Panel's conclusion that the impact of the domestic recession had not been sufficiently evaluated.\(^{183}\)

133. The Panel on *US – Wheat Gluten* interpreted the relationship between increased imports and "other factors" within the context of the causation analysis pursuant to Article 4.2(b) to mean that increased imports "in and of themselves" are causing serious injury. While not demanding that increased imports be the only factor present in a situation of serious injury, the Panel held that the increased imports must be "sufficient in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement.\(^{184}\) The Panel then further clarified its approach to Article 4.2(b) by stating that "where a number of factors, one of which is increased imports, are sufficient collectively to cause a 'significant overall impairment of the position of the domestic industry', but increased imports alone are not causing injury that achieves the threshold of 'serious' within the meaning of Article 4.1(a) of the Agreement,\(^{185}\) the conditions for imposing a safeguard measure are not satisfied.\(^{186}\) Upon appeal, the Appellate Body reversed the interpretation of Article 4.2(b) by the Panel on *US – Wheat Gluten* that increased imports "alone", "in and of themselves", or "per se" must be capable of causing injury that is "serious".\(^{187}\) According to the Appellate Body:

"[T]he Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be distinguished from the effects caused by other factors; third, the effects caused by other factors must, therefore, be excluded totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports alone, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.\(^{188}\)

134. The Appellate Body in *US – Wheat Gluten* first considered that the requirement of a "causal link" under Article 4.2(b) suggests a "clear contribution" and that, furthermore, increased imports need not be the sole cause of serious injury:

"The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second

\(^{181}\) Panel Report on *Argentina – Footwear (EC)*, para. 8.267.

\(^{182}\) Panel Report on *Argentina – Footwear (EC)*, paras. 8.269 and 8.278.

\(^{183}\) Appellate Body Report on *Argentina – Footwear (EC)*, para. 145.


\(^{185}\) (footnote original) Article 4.1(a) … states: "serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."

\(^{186}\) Panel Report on *US – Wheat Gluten*, para. 8.139.

\(^{187}\) Appellate Body on *US – Wheat Gluten*, para. 79.

\(^{188}\) Appellate Body Report on *US – Wheat Gluten*, para. 66.
element.\textsuperscript{189} The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection'\textsuperscript{190} or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does not suggest that increased imports be the sole cause of the serious injury, or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, even though other factors are also contributing, 'at the same time', to the situation of the domestic industry."\textsuperscript{191}

135. With respect to its finding that increased imports need not be the sole cause of the serious injury, the Appellate Body in \textit{US – Wheat Gluten} referred, as support, to the "non-attribution" requirement in the last sentence of Article 4.2(b):

"It is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities 'shall not ... attribute' to increased imports injury caused by other factors. The opening clause of that sentence indicates, to us, that this sentence provides rules that apply when 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time'. The last clause of the sentence stipulates that, in that situation, the injury caused by other factors 'shall not be attributed to increased imports'. ...Synonyms for the word 'attribute' include 'assign' or 'ascribe'. Under the last sentence of Article 4.2(b), we are concerned with the proper 'attribution', in this sense, of 'injury' caused to the domestic industry by 'factors other than increased imports'. Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that must then be properly 'attributed'. What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the 'injury'."\textsuperscript{192}

136. The Appellate Body subsequently set out a three-stage process under Article 4.2(b):

"Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are distinguished from the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was actually caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this


\textsuperscript{190} (footnote original) \textit{Ibid.}, p. 1598.


\textsuperscript{192} Appellate Body Report on \textit{US – Wheat Gluten}, para. 68.
causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the Agreement on Safeguards.

The need to ensure a proper attribution of ‘injury’ under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports as distinguished from the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does not necessarily imply, as the Panel said, that increased imports on their own must be capable of causing serious injury, nor that injury caused by other factors must be excluded from the determination of serious injury."

137. The Appellate Body reiterated its above-quoted approach to the causation analysis under Article 4.2(b) in US – Lamb:

"As we held in United States – Wheat Gluten Safeguard, the Agreement on Safeguards does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."

138. Also in US – Lamb, the Appellate Body again stressed the importance of the separation of injurious effects by increased imports on the one hand and other factors on the other hand:

"Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports 'shall not be attributed to increased imports.' In a situation where several factors are causing injury 'at the same time', a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.

As we said in our Report in United States – Wheat Gluten Safeguard, the non-attribution language in Article 4.2(b) indicates that, logically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made after the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors." 195

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139. The Appellate Body acknowledged in *US – Lamb* that its methodology for complying with the non-attribution requirement was not expressly provided for in Article 4.2(b), emphasizing that these three steps:

"[S]imply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal 'tests' mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Indeed, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).

We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards. What the Agreement requires is simply that the obligations in Article 4.2 must be respected when a safeguard measure is applied."  

140. In *US – Lamb*, the Appellate Body applied its standard under Article 4.2(b) to the findings of USITC and found that the latter's causation analysis incorrectly considered, whether increased imports were "an important cause, and a cause no less important than any other cause, of the threat of serious injury". The Appellate Body considered this approach insufficient in the light of Article 4.2(b) because the USITC had not ascertained that the injury caused by other factors, whatever the magnitude of the injury, was not attributed to increased imports. The Appellate Body specifically held that it was "impossible to determine whether the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports. It is, therefore, also impossible to determine whether injury caused by these other factors has been attributed to increased imports as it had not assessed the injurious effects of these other factors."  

141. In *US – Wheat Gluten*, the Appellate Body considered that the text of Article 4.2(a), the relationship between Articles 4.2(a) and 4.2(b) and the phrase "significant overall impairment" in Article 4.1(a) indicated that both factors specifically relating to imports and factors relating to the overall situation of the domestic industry must be included in a determination of serious injury. See paragraphs 91-92 above.

142. The Appellate Body found support in the phrase "under such conditions" in Article 2.1 for its interpretation that under Articles 4.2(a) and 4.2(b) "the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury." See paragraphs 28-37 above.

143. While it reversed the Panel's legal interpretation of Article 4.2(b), the Appellate Body in *US – Wheat Gluten* found that in the investigation at issue, the competent authorities had acted inconsistently with Article 4.2(b) as a consequence of an inadequate examination of the role of increases in average capacity. The Appellate Body noted that under Article 4.2(b), it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury: "If the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not 'attributed' to increased imports." The Appellate Body then concluded that, in the case at hand, the competent authority had "not demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average imports was not caused by other factors."
capacity has not been 'attributed' to increased imports and, in consequence, the USITC could not establish the existence of 'the causal link' Article 4.2(b) requires between increased imports and serious injury.\(^{199}\)

(b) Relationship with other Articles

144. The Panel on \textit{US – Lamb}, after making findings of inconsistency with Article XIX:1(a) of \textit{GATT 1994} and with Articles 2.1, 4.1(c), and 4.2(b) of the \textit{Agreement on Safeguards}, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the \textit{Agreement on Safeguards}.\(^{200}\)

145. The Panel on \textit{Korea – Dairy}, after finding that the determination of the existence of serious injury at issue in that dispute was inconsistent with Article 4.2, noted that, as a consequence, it was not necessary for the Panel to reach any findings as to whether Korea had demonstrated that increased imports were causing serious injury to the domestic industry. However, referring to the Appellate Body findings in \textit{Australia – Salmon}, the Panel opted for offering "some general comments relevant to an analysis of a causal link between increased imports and injury, in the context of the Korean investigation."\(^{201}\)

146. In \textit{Argentina – Footwear (EC)}, the Appellate Body expressed its surprise that the Panel "having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation." The Appellate Body found difficulty in understanding a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist.\(^{202}\)

6. Article 4.2 (c)

(a) Relationship with other Articles

147. In \textit{Argentina – Footwear(EC)}, the Appellate Body rejected an argument that, in referring to Article 3, the Panel had exceeded its terms of reference:\(^{203}\)

"We have examined the specific paragraphs in the Panel Report cited by Argentina, and we see no finding by the Panel that Argentina acted inconsistently with Article 3 of the Agreement on Safeguards. In one instance, the Panel referred to Article 3 parenthetically in support of its reasoning on Article 4.2(a) of the Agreement on Safeguards. Every other reference to Article 3 cited by Argentina was made by the Panel in conjunction with the Panel's reasoning and findings relating to Article 4.2(c) of the Agreement on Safeguards. None of these references constitutes a legal finding or conclusion by the Panel regarding Article 3 itself.

We note that the very terms of Article 4.2(c) of the Agreement on Safeguards expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the Agreement on Safeguards. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the Agreement on Safeguards. And,

\(^{201}\) Panel Report on \textit{Korea – Dairy}, paras. 7.87. The Panel's "general comments" can be found in paras. 7.89-7.96.
\(^{202}\) Appellate Body Report on \textit{Argentina – Footwear (EC)}, para. 145.
\(^{203}\) With respect to terms of reference in general, see Chapter on \textit{DSU}, paras. 114-123.
generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) without taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.

Consequently, we conclude that the Panel did not exceed its terms of reference by referring in its reasoning to the provisions of Article 3 of the Agreement on Safeguards. On the contrary, we find that the Panel was obliged by the terms of Article 4.2(c) to take the provisions of Article 3 into account. Thus, we do not believe that the Panel erred in its reasoning relating to the provisions of Article 3 of the Agreement on Safeguards in making its findings under Article 4.2(c) of that Agreement.  

148. The Panel on US – Wheat Gluten considered the relationship between Article 4.2(c) and the confidentiality requirements of Article 3.2.

"Given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a 'detailed analysis of the case under investigation' and 'demonstration of the relevance of the factors examined' cannot entail the publication of 'information which is by nature confidential or which is provided on a confidential basis' within the meaning of Article 3.2 SA."

149. With respect to this issue, see also paragraphs 57-58 above.

VI. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members 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.

204 Appellate Body Report on Argentina – Footwear (EC), paras. 73-75.
205 With respect to confidentiality in general, see Chapter on DSU, Article 14, paras. 58-60 and paras. 242-244.
(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

1. Article 5.1

(a) Scope of requirement to explain the necessity of a safeguard measure

150. In Korea – Dairy, the Appellate Body upheld the finding by the Panel in that dispute that the first sentence of Article 5.1 imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remediying serious injury and facilitating adjustment of the domestic industry, and that this obligation applies irrespective of the particular from of the safeguard measure. However, the Appellate Body reversed the Panel's finding regarding the scope of the requirement to explain the necessity of a safeguard measure. In this respect, the Appellate Body stated:

"[T]he second sentence of Article 5.1] requires a 'clear justification' if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this 'clear justification' has to be given by a Member applying a safeguard measure at the time of the decision, in its recommendations or determinations on the application of the safeguard measure.

However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available'.

For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:

'Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.'

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207 Appellate Body Report on Korea – Dairy, paras. 96 and 103.
208 Appellate Body Report on Korea – Dairy, para. 103.
(b) Adjustment plans

151. The Panel on Korea – Dairy rejected the view that Article 5.1 imposes an obligation to consider adjustment plans:

"We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities… The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the Agreement on Safeguards. Although there are references to industry adjustment in two of its provisions, nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remediying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remediying serious injury and facilitating adjustment." 210

(c) Relationship with other Articles

152. The Panel on Argentina – Footwear (EC), after finding that the safeguard investigation and determination leading to the imposition of the definitive safeguard measure at issue were inconsistent with Articles 2 and 4, exercised judicial economy with respect to claims under Article 5. 211

153. The Panel on US – Wheat Gluten, after finding the measure at issue to be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, exercised judicial economy with respect to claims under Article 5 of the Agreement on Safeguards (and under Articles I and XIX of GATT 1994). 212 The Appellate Body upheld this exercise of judicial economy by the Panel. In so doing, the Appellate Body referred to its statements on judicial economy in US – Wool Shirts and Blouses and in Australia – Salmon, and recalled that in Argentina – Footwear (EC) it had found that, since inconsistency with Articles 2 and 4 deprived the measure at issue in that case of its legal basis, it was not necessary to complete the analysis of the Panel relating to Article XIX:1 of GATT 1994. 213 Similarly, the Appellate Body also upheld the Panel's exercise of judicial economy with respect to the claims under Article I of GATT 1994 and Article 5 of the Agreement on Safeguards. 214

154. The Panel on US – Lamb, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of GATT 1994), exercised judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11 and 12) of the Agreement on Safeguards. 215 The Appellate Body upheld this exercise of judicial economy. 216

(d) Relationship with other WTO Agreements

155. The Panel on US – Lamb, after making findings of inconsistency with Article XIX:1(a) of GATT 1994 (and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards), exercised
judicial economy with respect to claims raised under Article 5.1 (and Articles 2.2, 3.1, 8, 11 and 12) of the Agreement on Safeguards. The Appellate Body upheld this exercise of judicial economy.

VII. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Relationship with other Articles

The Panel on Argentina – Footwear (EC) considered that, in light of its findings "concerning the investigation and the definitive measure" (the Panel had found a violation of Articles 2.1, 4.2(a), 4.2(b) and 4.2(c)), it was not necessary to make a finding concerning a claim under Article 6.

VIII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member

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applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Article 7.4

157. In dismissing a claim under Article 12 regarding an alleged failure to notify modifications of a definitive safeguard measure which increased the restrictiveness of that measure, the Panel Report in Argentina – Footwear (EC) observed:

"[T]he only modifications of safeguard measures that Article 7.4 contemplates are those that reduce its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that increase the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any substantive issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim."220

158. With respect to a failure to notify a modification of a safeguard measure that increased the restrictiveness of that measure, see paragraph 198 below.

IX. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by

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such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Article 8.1

(a) "in accordance with the provisions of paragraph 3 of Article 12"

159. In US – Wheat Gluten, the Appellate Body upheld a finding by the Panel in that dispute that the United States had failed to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3:

"Article 8.1 imposes an obligation on Members to 'endeavour to maintain' equivalent concessions with affected exporting Members. The efforts made by a Member to this end must be 'in accordance with the provisions of' Article 12.3 of the Agreement on Safeguards.

In view of this explicit link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot, in our view, 'endeavour to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure. We have upheld the Panel's findings that the United States did not provide an adequate opportunity for consultations, as required by Article 12.3 of the Agreement on Safeguards. For the same reasons, we also uphold the Panel's finding, in paragraph 8.219 of its Report, that the United States acted inconsistently with its obligations under Article 8.1 of the Agreement on Safeguards."

(b) Relationship with other Articles

160. With respect to the relationship with Article 12.3, see also paragraphs 193-194 below.

161. The Panel on US – Lamb, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of GATT 1994), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the Agreement on Safeguards.


(c) Relationship with other WTO Agreements

162. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the *Agreement on Safeguards*. 223

X. **ARTICLE 9**

A. **TEXT OF ARTICLE 9**

**Article 9**

**Developing Country Members**

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. 2

(footnote original) 2 A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 9**

No jurisprudence or decision by a competent WTO body to date.

XI. **ARTICLE 10**

A. **TEXT OF ARTICLE 10**

**Article 10**

**Pre-existing Article XIX Measures**

Members shall terminate all safeguard measures taken pursuant to Article XIX of *GATT 1947* that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 10**

No jurisprudence or decision by a competent WTO body.

XII. ARTICLE 11

A. TEXT OF ARTICLE 11

**Article 11**

Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

   (b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

   (footnote original) An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

   (footnote original) Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

   (c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member, the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

   (footnote original) The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. Article 11.1(a)

   (a) Relationship between the Agreement on Safeguards and Article XIX of *GATT 1994*

163. With respect to the relationship with Article XIX of *GATT 1994*, see paragraphs 4-9 above.
(b) Relationship with other Articles

164. The Panel on US – Lamb, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of GATT 1994), exercised judicial economy with respect to claims raised under Article 11 (and Articles 2.2, 3.1, 5.1, 8 and 12) of the Agreement on Safeguards. 224

(c) Relationship with other WTO Agreements

165. The Panel on US – Lamb, after making findings of inconsistency with Article XIX:1(a) of GATT 1994 (and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards), exercised judicial economy with respect to claims raised under Article 11 (and Articles 2.2, 3.1, 5.1, 8 and 12) of the Agreement on Safeguards. 225

2. Article 11.2

166. At its meeting on 24 February 1995, the Committee on Safeguards decided that the information required in the notifications of the exception under Article 11.2 of the Agreement on Safeguards should also be provided by signatories that were eligible to become original Members of the WTO within the same time-limits as those which apply to WTO Members. 226 The Committee also adopted a format for notifications of the exception under Article 11.2 of the Agreement on Safeguards 227 as well as a format for notifications on timetables for phasing out measures referred to in Article 11.1(b) or for bringing them into conformity with the Agreement on Safeguards. 228

XIII. ARTICLE 12

A. Text of Article 12

Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:

   (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
   (b) making a finding of serious injury or threat thereof caused by increased imports; and
   (c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

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226 G/SG/M/1, Section E. With respect to the clarification made by the Chairman concerning the implication of the decision, see G/SG/M/1, para. 28.
227 G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/4.
228 G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/5.
3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential 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 12

1. Notification formats adopted by the Committee on Safeguards

167. Formats for certain notifications under the *Agreement on Safeguards*, including notifications under Article 12, were approved by the Committee on Safeguards on 24 February 1995. The Panel on Korea – Dairy noted that it was clear that the provisions of Article 12 prevailed over the notification formats adopted by the Committee:

"It is clear that the provisions of Article 12 of the *Agreement on Safeguards* prevail over the Guidance issued by the Committee on Safeguards (which contains a disclaimer to that effect) and the Technical Cooperation Handbook on Notification Requirements (prepared by the Secretariat but which explicitly states that it 'does not constitute a legal interpretation of the notification obligations under the respective

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229 G/SG/1.
agreement(s)'). At issue in this case are the notifications required under Articles 12.1(a), (b) and (c).n\textsuperscript{230}

2. Article 12.1

(a) "shall immediately notify"

168. The Panel on Korea – Dairy read a notion of "urgency" into the phrase "shall immediately notify ..." in Article 12.1, but acknowledged that there is a need under this provision to balance the requirement for some minimum level of information in a notification against the requirement for "immediate" notification:

"The ordinary meaning of the term 'immediately' \textsuperscript{231} introduces a certain notion of urgency. As discussed above, we believe that the text of Article 12.1, 12.2 and 12.3 makes clear that the notifications on the finding of serious injury and on the proposed measure shall in all cases precede the consultations referred to in Article 12.3. We note finally that no specific number of days is mentioned in Article 12. For us this implies that there is a need under the agreement to balance the requirement for some minimum level of information in a notification against the requirement for 'immediate' notification. The more detail that is required, the less 'instantly' Members will be able to notify. In this context we are also aware that Members whose official language is not a WTO working language, may encounter further delay in preparing their notifications."n\textsuperscript{232}

169. The same Panel also notes that:

"There is no basis in the wording of Article 12.1 to interpret the term 'immediately' to mean 'as soon as practically possible'."n\textsuperscript{233}

170. The Panel on US – Wheat Gluten quotes the above passage from the Panel Report in Korea – Dairy and emphasized the need of all Members to be kept informed, in a timely manner, of the different steps in a safeguard investigation:

"We consider that the text of Article 12.1 SA is clear and requires no further interpretation. The ordinary meaning of the requirement for a Member to notify immediately its decisions or findings prohibits a Member from unduly delaying the notification of the decisions or findings mentioned in Article 12.1 (a) through (c) SA. Observance of this requirement is all the more important considering the nature of a safeguards investigation. A safeguard measure is imposed on imports of a product irrespective of its source and potentially affects all Members. All Members are therefore entitled to be kept informed, without delay, of the various steps of the investigation."n\textsuperscript{234}

171. The Appellate Body in US – Wheat Gluten confirmed the above approach by the Panels and added that "immediate notification" is such notification which allows the Committee on Safeguards and Members the "fullest possible period" to consider and react to a safeguard investigation:

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\textsuperscript{230} Panel Report on Korea – Dairy, para. 7.116.

\textsuperscript{231} (footnote original) The New Webster Encyclopedic Dictionary defines immediately as "without delay, straightaway"; the New Shorter Oxford Dictionary defines it as "without delay, at once, instantly".

\textsuperscript{232} Panel Report on Korea – Dairy, para. 7.128.

\textsuperscript{233} Panel Report on Korea – Dairy, para. 7.134.

"As regards the meaning of the word 'immediately' in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word 'implies a certain urgency'. The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify 'immediately'.

'Immediate' notification is that which allows the Committee on Safeguards, and Members, the fullest possible period to reflect upon and react to an ongoing safeguard investigation. Anything less than 'immediate' notification curtails this period. We do not, therefore, agree … that the requirement of 'immediate' notification is satisfied as long as the Committee on Safeguards and Members of the WTO have sufficient time to review that notification. In our view, whether a Member has made an 'immediate' notification does not depend on evidence as to how the Committee on Safeguards and individual Members of the WTO actually use that notification. Nor can the requirement of 'immediate' notification depend on an ex post facto assessment of whether individual Members suffered actual prejudice through an insufficiency in the notification period."

A. "Immediate" notification under Article 12.1(a)

172. Two Panels have had the opportunity to make findings whether notifications within certain periods of specific length amounted to "immediate" notifications under Article 12.1(a). In Korea – Dairy, the Panel found that:

"[T]he 14-day period between Korea's initiation of the investigation and its presentation of the notification related thereto, does not respect the requirements for 'immediate' notification and is in violation of Article 12.1 of the Agreement on Safeguards."  

173. Similarly, the Panel on US – Wheat Gluten determined that:

"[T]he delay of 16 days between the initiation of the investigation and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(a) SA."  


B. "Immediate" notification under Article 12.1(b)

175. In respect of a notification of a determination of serious injury, the Panel Report in Korea – Dairy states:

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"[A] delay of 40 days … between the domestic publication of the injury finding and the date of that notification to the Committee on Safeguards … does not satisfy the requirements for an immediate notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards."\(^{239}\)

176. The Panel on \textit{US – Wheat Gluten} found that:

"[T]he delay of 26 days between the finding of serious injury and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(b) SA."\(^{240}\)

177. The Appellate Body upheld the finding of the Panel on \textit{US – Wheat Gluten}, but did not pronounce itself on the Panel's determination in \textit{Korea – Dairy}.\(^{241}\)

C. "Immediate" notification under Article 12.1(c)

178. As regards a notification of a proposed safeguard measure, the Panel Report in \textit{Korea – Dairy} stated:

"[W]e note that this notification took place more than 6 weeks after the decision on the proposed measure was taken … We consider that this delay does not meet the requirements for an 'immediate' notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards."\(^{242}\)

179. In respect of a notification of a final decision to take a safeguard measure, the Panel Report in \textit{Korea – Dairy} stated:

"[W]e note that Korea notified on 24 March 1997 that on 1 March 1997 a final decision had been taken to impose a quota as a safeguard measure. We fail to see how this can be viewed as an immediate notification. As far as it covers Korea's final decision to take a safeguard measure, we find that the timing of the Korean notification of 24 March 1997 does not meet the requirements of Article 12.1 of the Agreement on Safeguards."\(^{243}\)

180. In \textit{US – Wheat Gluten}, the Appellate Body reversed a finding by the Panel in that dispute that a notification of a decision to apply a safeguard measure after the implementation of that decision was inconsistent with Article 12.1(c) of the \textit{Agreement on Safeguards}.\(^{244}\) The Panel had considered that Article 12.2, since it specifically refers to notifications made under Articles 12.1(b) and 12.1(c), provides relevant context in determining the timeliness of notifications under Article 12.1(c). Furthermore, the Panel reasoned that a notification under Article 12.1(c) must be of a "proposed measure" and its "proposed date of introduction". On this basis, the Panel concluded that a notification under Article 12.1(c) must be made before the implementation of the "proposed" safeguard measure. The Appellate Body reasoned as follows:

"In examining the ordinary meaning of Article 12.1(c), we observe that the relevant triggering event is the 'taking' of a decision. To us, Article 12.1(c) is focused upon whether a 'decision' has occurred, or has been 'taken', and not on whether that

\(^{239}\) Panel Report on \textit{Korea – Dairy}, para. 7.137.


\(^{242}\) Panel Report on \textit{Korea – Dairy}, para. 7.140.


decision has been *given effect*. On the face of the text, the timeliness of a notification under Article 12.1(c) depends only on whether the notification was immediate."  

245. The Appellate Body in *US – Wheat Gluten* went on to state:

"Article 12.2 is related to, and complements, Article 12.1 of the Agreement on Safeguards. Whereas Article 12.1 sets forth *when* notifications must be made during an investigation, Article 12.2 clarifies *what* detailed information must be contained in the notifications under Articles 12.1(b) and 12.1(c). We do not, however, see the content requirements of Article 12.2 as prescribing *when* the notification under 12.1(c) must take place. Rather, in our view, timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified 'immediately'. A separate question arises as to whether notifications made by the Member satisfy the content requirements of Article 12.2. Answering this separate question requires examination of whether, in its notifications under *either* Article 12.1(b) or Article 12.1(c), the Member proposing to apply a safeguard measure has notified 'all pertinent information', including the 'mandatory components' specifically enumerated in Article 12.2."  

246. The Appellate Body then found that although the obligations under Article 12.1(b), 12.1(c) and 12.2 were "related", they constituted "discrete obligations":

"Thus, the obligations set forth under Articles 12.1(b), 12.1(c) and 12.2 relate to different aspects of the notification process. Although related, these obligations are discrete. A Member could notify 'all pertinent information' in its Articles 12.1(b) and 12.1(c) notifications, and thereby satisfy Article 12.2, but still act inconsistently with Article 12.1 because the relevant notifications were not made 'immediately'. Similarly, a Member could satisfy the Article 12.1 requirement of 'immediate' notification, but act inconsistently with Article 12.2 if the content of its notifications was deficient.

In our view, in finding that the United States acted inconsistently with Article 12.1(c) solely because the decision to apply a safeguard measure was notified after that decision had been implemented, the Panel confused the separate obligations imposed on Members pursuant to Article 12.1(c) and Article 12.2 and, thereby, added another layer to the timeliness requirements in Article 12.1(c). Instead of insisting on 'immediate' notification, as stipulated by Article 12.1(c), the Panel required notification to be made *both* 'immediately' *and* before implementation of the safeguard measure. We see no basis in Article 12.1(c) for this conclusion."  

247. The Appellate Body then found that notification at issue was consistent with the requirement of immediate notification under Article 12.1(c). The United States had made the notification only five days after the President of the United States had "taken the decision" to apply the safeguard measure, a period which the Appellate Body considered sufficient, also in the light of the fact that the notification was made the day after the decision of the President of the United States had been published in the United States Federal Register."  

248.  

245. Appellate Body Report on *US – Wheat Gluten*, para. 120.  
Content of notifications under Article 12.1(a)

184. At its meeting on 24 February 1995, the Committee on Safeguards adopted a format for notifications under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it. The Committee also adopted formats for notifications required under Articles 12.1(b) and (c).

185. At its meeting on 6 May 1996, the Committee on Safeguards adopted a format for notification of termination of a safeguards investigation where no safeguard measure is imposed.

186. The Panel on Korea – Dairy noted the limited explicit requirements of Article 12.1(a) with respect to the content of notifications:

   "Regarding the 'content' of notifications under Article 12.1, we note that with regard to the notification of the initiation of an investigation, the terms of Article 12.1(a) only refer to the obligation to notify 'initiating an investigatory process relating to serious injury or threat thereof and the reasons for it.'

187. In examining the conformity with Article 12.1(a) of the notification at issue, the Panel on Korea – Dairy rejected an argument "… that such notification should necessarily include a discussion of all of the legal requirements for a safeguard action to be taken such as a discussion of the conditions of the markets, etc."

   "We note that initiation is the beginning of the process, and the Agreement on Safeguards does not establish specific standards for the decision to initiate, as do Article 5 of the Agreement on the Implementation of Article VI of GATT 1994 and Article 11 of the Agreement on Subsidies and Countervailing Measures. Thus, to require a discussion in the notification of initiation of evidence regarding the elements that must be found to exist to impose a measure at the end of the investigation would impose a requirement at the initiation stage that is not required by the Agreement on Safeguards itself. We note in the first instance that whatever the relationship between the requirements of Article 12.2 regarding the contents of notifications and the contents of the investigation reports published pursuant to Articles 3.1 and 4.2, this question is not relevant to Article 12.1(a) notifications, as Article 12.2 specifically and exclusively addresses 'notifications referred to in paragraphs [12.]1(b) and [12.]1(c)'.

The format agreed by the Committee for notifications under Article 12.1(a) is not legally binding, although helpful. The guidance in the format is general as to the kind of information to be provided, referring simply to examples of information on the reasons for initiation, and saying nothing about the level of detail of that information.

Although Korea's notification could usefully have included a reference to allegations of serious injury and a cross-reference to any domestic publication(s) in Korea, we think that this notification was sufficient to inform WTO Members adequately of Korea's initiation of an investigation concerning a particular product, so that

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249 G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/6.
250 G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/W/1, Annex, Item VI.
251 G/SG/M/6, Section C. The text of the adopted format can be found in G/SG/2.
Members having an interest in the product could avail themselves of their right to participate in the domestic investigation process.\footnote{Panel Report on Korea – Dairy, paras. 7.131-7.133.}

3. Article 12.2

(a) "all pertinent information"

The Panel on Korea – Dairy analysed the meaning of the expression "all pertinent information" in Article 12.2 of the Agreement on Safeguards, in which connection the Panel observed \textit{inter alia} that the standard of what must be notified to the Committee under Article 12 of the Agreement on Safeguards differed from what must be published domestically pursuant to Articles 3 and 4.\footnote{Panel Report on Korea – Dairy, paras. 7.125-7.127.} The Panel found that the information contained in the notifications at issue in the dispute before it was in conformity with Article 12.2.\footnote{Panel Report on Korea – Dairy, paras. 7.136, 7.139 and 7.144.} In respect of one of these notifications, the Panel noted that "this notification contains sufficient information on what Korea considered to be evidence of injury caused by increased imports … ."\footnote{Panel Report on Korea – Dairy, para. 7.136.} The Appellate Body, however, reversed the finding by the Panel that a notification provided by Korea under Article 12.1(b) of a determination of serious injury met the requirements of Article 12.2.\footnote{Appellate Body Report on Korea – Dairy, para. 113.} In this context, the Appellate Body interpreted Article 12.2 as follows:

"[I]tems listed … as mandatory components of 'all pertinent information', constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.

We do not agree with the Panel that 'evidence of serious injury' in Article 12.2 is determined by what the notifying Member considers to be sufficient information. What constitutes 'evidence of serious injury' is spelled out in Article 4.2(a) of the Agreement on Safeguards …

We believe that 'evidence of serious injury' in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a). In other words, according to the text and the context of Article 12.2, a Member must, \textit{at a minimum}, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. We believe that the standard set by Article 12 with respect to the content of 'all pertinent information' to be notified to the Committee on Safeguards is an objective standard independent of the subjective assessment of the notifying Member.\footnote{Appellate Body Report on Korea – Dairy, paras. 107-108.}

While it had found that the standard for determining "all pertinent information" could not be a subjective assessment by the notifying Member, the Appellate Body in Korea – Dairy emphasized at the same time that "evidence of serious injury" should not include all details contained in the report of the national authorities:

"In concluding that there is a minimum objective standard, we do not mean to suggest that 'evidence of serious injury' should include all the details of the recommendations
and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the Agreement on Safeguards, they would have simply referred back to Articles 3 and 4 when requiring 'evidence of serious injury' in Article 12.2. There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, at a minimum, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.

We are aware that the last sentence of Article 12.2 provides that the Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply a safeguard measure. …Contrary to what Korea argued and the Panel reasoned, such a request is not meant to fill in gaps created by omitting elements required under 'all relevant information' or 'evidence of serious injury'²⁵⁹.

190. The Appellate Body in Korea – Dairy accordingly reversed the Panel on this point and made the following concluding general statement regarding the object and purpose of the notification requirements at issue:

"We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the Agreement on Safeguards. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it."²⁶⁰

(b) Notification of a proposed safeguard measure

191. The Panel Report in Korea – Dairy found that Article 12.1, 12.2 and 12.3, taken together, impose the obligation upon a Member to notify the details of a proposed safeguard measure before it is applied, so that affected Members may consult about it before it takes effect:

"Although not explicitly listed in Article 12.1, the wording of Article 12.2 and 12.3 make it clear that any proposed measure must also be notified to the Committee on Safeguards. Article 12.2 provides that the notifications under Article 12.1(b) and 12.1(c) must contain information as to the basis for the serious injury finding, as well as information as to the 'proposed' measure to be applied. Article 12.3 requires that the notifying Member provide an adequate opportunity for 'prior consultations' with interested Members, that is, consultations prior to the actual application of the measure. Article 12.3 further requires that among the information to be discussed in the consultations is the information already notified under Article 12.1(b) and 12.1(c), i.e., the basis for the serious injury finding, and the details of the measure that the notifying Member proposes to apply. Thus, Article 12.1, 12.2 and 12.3 taken

together makes it clear that before a definitive safeguard measure may be applied, the Member proposing to apply it must notify all the pertinent information regarding the proposed measure and the factual basis (the injury finding) for applying it, and must provide an opportunity for consultations with Members whose trade will be affected by the proposed measure. In other words, details of the measure proposed must be notified before it is applied, so that affected Members may consult about it before it takes effect." 261

192. With respect to a notification of a decision to apply a safeguard measure after the implementation of that decision, see paragraphs 180-183 above.

4. Article 12.3

(a) "adequate opportunity for prior consultations"

193. The Panel on Korea – Dairy rejected a claim that, by not providing "all pertinent information" in its notifications in advance of consultations, a Member had failed to provide "adequate opportunity for prior consultations" within the meaning of Article 12.3. The Panel had found the content of Korea's notifications in conformity with Article 12 (the Appellate Body subsequently reversed this latter finding, but did not address any of the following issues). The Panel then opined that consultations may be "adequate" even if prior notifications are incomplete, since it considered that one of the purposes of consultations is to review the content of the relevant notifications. The Panel further noted that whether parties eventually reach a mutually agreed solution is no indication of the adequacy of consultations. With respect to the dispute at hand, the Panel stated:

"In the present case we note that parties exchanged questions and answers. The European Communities claims that it has always been unsatisfied with the Korean's answers and notifications (together with Korea's determination). This may be the case and would explain why it decided to pursue dispute settlement proceedings, but it does not prove that Korea did not consult in good faith for the purpose of informing interested Members of its investigation, its conclusion and its proposed actions. We note also that Korea did impose a measure at a level and for a duration different, and less restrictive, than initially proposed. Consultations were certainly fruitful in this respect, albeit not sufficient to satisfy the European Communities.

We reject therefore the EC claim that Korea failed to provide adequate opportunity to consult. Moreover, it seems to us that such consultations have led to an important revision of the initial notification and that parties, at some point, entered into very serious negotiations and considered serious elements of a mutually agreed solution. The fact that this proposed settlement was not formalized through the acceptance by the relevant internal authorities of the European Communities is immaterial. What is relevant for the purpose of this EC claim, is the fact that the parties to these consultations were able to negotiate quite effectively, which, in our view, demonstrates that the consultations were adequate. For us, this is the purpose of any consultation process and the scope of the obligation contained in Article 12.3 of the Agreement on Safeguards, i.e. to favour efforts by the parties to reach a mutually agreed solution of their disagreement."

194. In US – Wheat Gluten, the Appellate Body held that the Panel had erred in concluding that the United States had acted inconsistently with Article 12.3 insofar as the Panel had based this conclusion

261 Panel Report on Korea – Dairy, para. 7.120.
on an erroneous interpretation of Article 12.1(c), but upheld this finding on the basis that there had been no opportunity for consultations on the final proposed measure. In this connection, the Appellate Body first held that Article 12.3 provides that information on a proposed measure must be provided in advance of the consultation:

"We note, first, that Article 12.3 requires a Member proposing to apply a safeguard measure to provide an 'adequate opportunity for prior consultations' with Members with a substantial interest in exporting the product concerned. Article 12.3 states that an 'adequate opportunity' for consultations is to be provided 'with a view to': reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the proposed measure must be provided in advance of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to 'the information provided under' Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3. Among the list of 'mandatory components' regarding information identified in Article 12.2 are: a precise description of the proposed measure, and its proposed date of introduction.

Thus, in our view, an exporting Member will not have an 'adequate opportunity' under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, inter alia, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy."

The Panel on US – Wheat Gluten had found that no consultations had been held between the United States and the European Communities on the final measure that was approved by the United States President. The Appellate Body noted in this context that:

"[T]he USITC Report set out a number of 'recommendations' to the President of the United States …

We note that the recommendations made by the USITC did not include specific numerical quota shares for the individual exporting Members concerned, and the recommendations imply, without providing details, that the individual quota shares could be less favourable to imports from the European Communities. We consider that these 'recommendations' did not allow the European Communities to assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States.

Accordingly, we see no error in the Panel's conclusion that the United States notifications under Article 12.1(b) did not provide a description of the measure under consideration sufficiently precise as to allow the European Communities to conduct

meaningful consultations with the United States, as required by Article 12.3 of the Agreement on Safeguards.\textsuperscript{266}\textsuperscript{a}\textsuperscript{267}

5. Relationship with other Articles

(a) Articles 2 and 4

196. The Panel on Argentina – Footwear (EC) rejected the view that non-compliance with Article 12 \textit{ipso facto} constitutes a basis for finding a violation of the substantive requirements of Articles 2 and 4, and \textit{vice versa}:

"In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4. Similarly, we consider that the substantive requirements of Articles 2 and 4 do not have implications for the question of compliance with Article 12. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, \textit{inter alia}, requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3). In this regard, the important point is that the notifications be sufficiently descriptive of the actions that have been taken or are proposed to be taken, and of the basis for those actions, that Members with an interest in the matter can decide whether and how to pursue it further.

\dots

Articles 12.2 and 12.3 in our view confirm that Members are not required to notify the full detail of their investigations and findings. Article 12.2 specifically provides for the possibility of requests for further information by the Council for Trade in Goods or the Committee on Safeguards. Article 12.3 provides, \textit{inter alia}, for consultations, upon request, with other Members, to review the information contained in the notifications. Thus, these provisions specifically create opportunities for further information to be provided, upon request, concerning the details of the actions summarised in the notifications. Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation."\textsuperscript{268}

197. In Korea – Dairy, the Appellate Body interpreted Article 12.2 to mean that notifications under Articles 12.1(b) and (c) must include the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. See paragraph 188.

\textsuperscript{266} (footnote original) We note that, in so finding, we do not consider it necessary to determine whether the United States notified a "proposed measure" to the European Communities as required by Article 12.2 of the Agreement on Safeguards, as the European Communities did not argue specifically that the United States had acted inconsistently with Article 12.2.


\textsuperscript{268} Panel Report on Argentina – Footwear (EC), paras. 8.298 and 8.300.
AGREEMENT ON SAFEGUARDS

(b) Article 7

198. The Panel on *Argentina – Footwear (EC)* concluded that it could not examine under Article 12 a claim regarding a failure to notify a modification of a safeguard measure that increased the restrictiveness of that measure:

"We note that the modifications of definitive safeguard measures foreseen in the Agreement (namely early elimination or faster liberalization potentially resulting from mid-term reviews under Article 7.4, and extension of measures beyond the initial period of application under Article 7. [sic] and 7.4), all are subject to notification requirements under Articles 12.5 and 12.1(c)/12.2, respectively.

In this context, we note that the only modifications of safeguard measures that Article 7.4 contemplates are those that reduce its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that increase the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any substantive issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim. Where the situation at issue is primarily one of substance, i.e., modification of a measure in a way not foreseen by the Safeguards Agreement, we believe that we cannot address the alleged procedural violation concerning notification arising therefrom, as no explicit procedural obligation is foreseen. Therefore, we see no possibility for a ruling on this aspect of the European Communities' claim under Article 12."  

199. The Panel on *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards* (and with Article XIX:1(a) of *GATT 1994*), exercised judicial economy with respect to claims raised under Article 12 (and Articles 2.2, 3.1, 5.1, 8, and 11) of the *Agreement on Safeguards*.  

6. **Relationship with other WTO Agreements**

200. The Panel on *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of *GATT 1994* (and with Articles 2.1, 4.1(c), and 4.2(b) of the *Agreement on Safeguards*), exercised judicial economy with respect to claims raised under Article 12 (and Articles 2.2, 3.1, 5.1, 8, and 11) of the *Agreement on Safeguards*.

7. **Article 12.6**

201. At its meeting of 24 February 1995, the Committee adopted a format for notifications of laws, regulations and administrative procedures relating to safeguard measures. Further, the Committee
decided that all Members that had available relevant legislation and/or regulations which apply to safeguard measures covered by the Agreement should notify the full and integrated text of that legislation and/or regulations to the Committee by 15 March 1995, with the understanding that if such legislation and/or regulations did not exist or was not yet available, the Member would inform the Committee of this fact, would explain the reasons therefore, and would provide an indicative date by which time a notification was expected.\footnote{G/SG/M/1, Section I, paras. 64-65.} Also, the Committee decided that notification of modifications to legislation should be submitted within 30 days after domestic publication of the modifications, with the understanding the deadline could not be met, the reason would be notified by the deadline, with an indication of when the modification would be notified.\footnote{G/SG/M/1, Section I, paras. 64-65.} 

202. At its meeting on 6 May 1996, the Committee on Safeguards adopted procedures for future reviews of legislative notifications.\footnote{G/SG/M/6, Section G. The text of the adopted format can be found in G/SG/W/116.}

8. \textbf{Article 12.7}

203. At its meeting on 24 February 1995, the Committee on Safeguards decided that the information required in the notifications under Article 12.7 of the \textit{Agreement on Safeguards} should also be provided by signatories that were eligible to become original Members of the WTO within the same time-limits as those which apply to WTO Members.\footnote{G/SG/M/1, Section E. With respect to the clarification made by the Chairman concerning the implication of the decision, see G/SG/M/1, para. 28.}

204. At its meeting on 24 February 1995, the Committee on Safeguards adopted a format for notifications of pre-existing Article XIX measures described in Article 10.\footnote{G/SG/M/1. Section H. The text of the adopted format can be found in G/SG/N/2.} At the same meeting, the Committee also adopted a format for notifications of measures subject to the prohibition and elimination of certain measures under Article 11.1 of the \textit{Agreement on Safeguards}.\footnote{G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/3.}

With respect to reporting by Members regarding their progress in phasing out the pre-existing Article XIX measures and measures prohibited under Article 11, see paragraph 207 below.

\section*{XIV. \textbf{ARTICLE 13}}

\subsection*{A. \textbf{TEXT OF ARTICLE 13}}

\textit{Article 13}

\textit{Surveillance}

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

\footnote{G/SG/M/1, Section I, paras. 64-65.}
\footnote{G/SG/M/1, Section I, paras. 64-65.}
\footnote{G/SG/M/6, Section G. The text of the adopted format can be found in G/SG/W/116.}
\footnote{G/SG/M/1, Section E. With respect to the clarification made by the Chairman concerning the implication of the decision, see G/SG/M/1, para. 28.}
\footnote{G/SG/M/1. Section H. The text of the adopted format can be found in G/SG/N/2.}
\footnote{G/SG/M/1, Section H. The text of the adopted format can be found in G/SG/N/3.}
(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. General

(a) Rules of procedure

205. At its meeting on 6 May 1996, the Committee on Safeguards adopted rules of procedure for its meetings, based on the rules of the General Council and the Council for Trade in Goods, and incorporating relevant changes to make them applicable to the Committee.\(^{279}\) The Council for Trade in Goods subsequently approved the Committee's rules of procedure at its meeting of 22 May 1996.\(^{280}\)

(b) Observers

206. At its meeting on 24 February 1995, the Committee on Safeguards decided that observer governments should provide the Committee with any information the Observer government considers relevant to matters within the purview of the Agreement, including the text of laws and regulations regarding safeguard measures, and information regarding any safeguard measures taken by the observer government.\(^{281}\)

2. Article 13.1

207. At its meeting on 24 February 1995, the Committee on Safeguards agreed that, in order to perform the task under Article 13.1(d), Members be asked to report at the end of each year on their progress in phasing out pre-existing Article XIX measures and measures subject to prohibition and elimination under Article 11.1 of the Agreement.\(^{282}\)

208. At its meeting on 6 November 1995, the Committee on Safeguards decided that, in order to perform the provisions of Articles 13.1 (b), (c) and (e), under which the Committee has to provide assistance to Members upon request, the Committee would address these matters on an \textit{ad hoc} basis,

\(^{279}\) G/SG/M/6, Section I. The text of the adopted document can be found in G/SG/4.

\(^{280}\) G/C/M/10, Section I.

\(^{281}\) G/SG/M/1, Section F.

\(^{282}\) G/SG/M/1, Section J.
if and when a request in these matters is received, rather than attempt to establish a procedure in advance of any requests for assistance.283

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14

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 arising under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

209. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the Agreement on Safeguards were invoked:

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<th>Case Number</th>
<th>Invoked Articles</th>
</tr>
</thead>
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<td>WT/DS177, WT/DS178</td>
<td>Articles 2.2, 3.1, 4.1, 4.1(a), 4.1(b), 4.2, 4.2(a), 8.1, 11.1(a), 12.2 and 12.6</td>
</tr>
<tr>
<td>US – Wheat Gluten</td>
<td>WT/DS166</td>
<td>Articles 2.1, 4.2(a), 4.2(b), 8.1, 12.1(a), 12.1(b), 12.1(c), 12.2 and 12.3</td>
</tr>
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<td>WT/DS121</td>
<td>Articles 2.1, 4.2(a), 4.2(b), 5.1, 6, 12.1 and 12.2</td>
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<tr>
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<th>Product</th>
<th>Termination</th>
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<td>EC/Japan</td>
<td>Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).</td>
<td>31 December 1999</td>
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283 G/SG/M/3, Section E.
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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing
with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREamble

No jurisprudence or decision of a competent WTO body.

PART I

SCOPE AND DEFINITION

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I

Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

   (a) from the territory of one Member into the territory of any other Member;
   (b) in the territory of one Member to the service consumer of any other Member;
   (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
   (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

   (a) "measures by Members" means measures taken by:

      (i) central, regional or local governments and authorities; and
      (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.
B. **INTERPRETATION AND APPLICATION OF ARTICLE I**

1. **Scope of GATS**

   (a) Measures relating to judicial and administrative assistance

   1. With respect to measures relating to judicial and administrative assistance in the context of Article II of *GATS*, as referenced in paragraph 13 below, at its meeting of 1 March 1995, the Council for Trade in Services agreed to adopt the conclusion of the Sub-Committee on Services concerning measures relating to judicial and administrative assistance.\(^1\) The adopted conclusion, *inter alia*, states that none of the provisions of the *GATS* would apply to such measures.\(^2\)

   (b) Measures relating to the entry and stay of natural persons

   2. With respect to the basis for drawing the distinction between "temporary" and "permanent" residency in the context of *GATS*, see paragraph 95 below.

   (c) Electronic commerce

   3. At its meeting of 25 September 1998, the General Council adopted the Work Programme on Electronic Commerce, which mandated the Council for Trade in Services to examine and report on the treatment of electronic commerce in the *GATS* legal framework.\(^3\)

2. **Paragraph 1**

   (a) "measures affecting trade in services"

   4. The Panel on *EC – Bananas III* defined the scope of application of the *GATS* in the following terms:

   "[N]o measures are excluded *a priori* from the scope of the *GATS* as defined by its provisions. The scope of the *GATS* encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."\(^4\)

   5. Based on its interpretation of the scope of the *GATS* set out in paragraph 4 above, the Panel on *EC – Bananas III* concluded that there was "no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the *GATS*".\(^5\) The Appellate Body upheld this finding and held that no provision of the Agreement "suggest[s] a limited scope of application for the *GATS*":

   "In addressing this issue, we note that Article I:1 of the *GATS* provides that '[t]his Agreement applies to measures by Members affecting trade in services'. In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the *GATS*. The ordinary meaning of the word 'affecting' implies a measure that has

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\(^1\) S/C/M/1, paras. 14-15.
\(^2\) S/C/1, para. 6.
\(^3\) WT/GC/M/30, section 4. The adopted Work Programme can be found in WT/L/274. With respect to the 1999 the Interim Report to the General Council, see S/C/M/34, Section A. With respect to the 1999 Progress Report, which discusses, *inter alia*, the issue of public telecommunications transport networks and services within the context of the Work Programme on Electronic Commerce, see S/L/74.
\(^5\) Panel Report on *EC – Bananas III*, para. 7.286.
'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'. … We also note that Article I:3(b) of the GATS provides that 'services' includes any service in any sector except services supplied in the exercise of governmental authority' (emphasis added), and that Article XXVIII(b) of the GATS provides that the 'supply of a service' includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application for the GATS. … For these reasons, we uphold the Panel's finding that there is no legal basis for an a priori exclusion of measures within the EC banana import licensing regime from the scope of the GATS. 6

6. In Canada – Autos, the Panel reiterated the statement of the Panel on EC – Bananas III that Article I of the GATS does not a priori exclude any measure from the scope of application of the Agreement. The Panel on Canada – Autos then went on to state that a determination of whether the measures at issue in the case before it were measures "affecting trade in services" within the meaning of Article I of GATS, "should be done on the basis of the determination of whether these measures constitute less favourable treatment for the services and service suppliers of some Members as compared to those of others (Article II) and/or for services and service suppliers of other Members as compared to domestic ones (Article XVII)." 7 The Appellate Body reversed this finding, holding that whether a measure "affects" trade in services must be assessed before any further consistency of this measure with other GATS provision is considered:

"[T]he fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS can be assessed.

Article II:1 of the GATS states expressly that it applies only to "any measure covered by this Agreement". This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure "affecting trade in services" within the meaning of Article I:1, and thus covered by the GATS, before any further examination of consistency with Article II can logically be made. We find, therefore, that the Panel should have inquired, as a threshold question, into whether the measure is within the scope of the GATS by examining whether the import duty exemption is a measure "affecting trade in services" within the meaning of Article I. In failing to do so, the Panel erred in its interpretative approach.

…

[W]e believe that at least two key legal issues must be examined to determine whether a measure is one "affecting trade in services": first, whether there is "trade in services" in the sense of Article I:2; and, second, whether the measure in issue "affects" such trade in services within the meaning of Article I:1." 8

7. After rejecting the notion that the question whether a measure "affected" trade in services could be ascertained by examining whether such a measure violated Article II or Article XVII of GATS, the Appellate Body in Canada – Autos then indicated the criteria which it considered relevant for determining whether a measure "affected" trade in services:

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7 Panel Report on Canada – Autos, para. 10.234.
8 Appellate Body Report on Canada – Autos, paras. 151-152 and 155.
"[T]he Panel ... never examined whether or how the import duty exemption affects wholesale trade service suppliers in their capacity as service suppliers. Rather, the Panel simply stated:

'Like the measures at issue in the EC – Bananas III case, the import duty exemption granted only to manufacturer beneficiaries bears upon conditions of competition in the supply of distribution services, regardless of whether it directly governs or indirectly affects the supply of such services.' (emphasis added)

We do not consider this statement of the Panel to be a sufficient basis for a legal finding that the import duty exemption 'affects' wholesale trade services of motor vehicles as services, or wholesale trade service suppliers in their capacity as service suppliers. The Panel failed to analyze the evidence on the record relating to the provision of wholesale trade services of motor vehicles in the Canadian market. It also failed to articulate what it understood Article I:1 to require by the use of the term 'affecting'. Having interpreted Article I:1, the Panel should then have examined all the relevant facts, including who supplies wholesale trade services of motor vehicles through commercial presence in Canada, and how such services are supplied. It is not enough to make assumptions. Finally, the Panel should have applied its interpretation of 'affecting trade in services' to the facts it should have found.

The European Communities and Japan may well be correct in their assertions that the availability of the import duty exemption to certain manufacturer beneficiaries of the United States established in Canada, and the corresponding unavailability of this exemption to manufacturer beneficiaries of Europe and of Japan established in Canada, has an effect on the operations in Canada of wholesale trade service suppliers of motor vehicles and, therefore, 'affects' those wholesale trade service suppliers in their capacity as service suppliers. However, the Panel did not examine this issue. The Panel merely asserted its conclusion, without explaining how or why it came to its conclusion. This is not good enough."

3. Relationship between GATT and GATS

8. In Canada – Periodicals, the Panel, in a finding subsequently not addressed by the Appellate Body, rejected the argument by Canada that Article III of GATT 1994 does not apply to a measure which is within the purview of the GATS:

"Canada's argument is essentially that since Canada has made no specific commitments for advertising services under GATS, the United States should not be allowed to 'obtain benefits under a covered agreement that have been expressly precluded under another covered agreement'. ... Put another way, Canada seems to argue that if a Member has not undertaken market-access commitments in a specific service sector, that non-commitment should preclude all the obligations or commitments undertaken in the goods sector to the extent that there is an overlap between the non-commitment in services and the obligations or commitments in the goods sector. Canada claims that because of the existence of the two instruments - GATT 1994 and GATS - both of which may apply to a given measure, 'it is necessary to interpret the scope of application of each such as to avoid any overlap'.

9 (footnote original) Panel Report, para. 10.239.
10 Appellate Body Report on Canada – Autos, paras. 164-166.
We are not fully convinced by Canada’s characterization of the Excise Tax as a measure intended to regulate trade in advertising services, in view of the fact that there is no comparable regulation on advertisements through other media and the fact that the tax is imposed on a "per issue" basis. However, assuming that Canada intended to carve out Part V.1 of the Excise Tax Act from the coverage of its GATS commitments by not inscribing advertising services in its Schedule…, does that exonerate Canada from the Panel’s scrutiny regarding the alleged violation of its obligations and commitments under GATT 1994?

In order to answer this question, we need to examine the structure of the WTO Agreement including its annexes. Article II:2 of the WTO Agreement is the relevant provision, which reads as follows:

‘The agreements and associated legal instruments included in Annexes 1, 2 and 3 … are integral parts of this Agreement, binding on all Members’ …’\textsuperscript{11}

9. Recalling the principle of effective treaty interpretation, the Panel then found that "obligations under \textit{GATT 1994} and \textit{GATS} can co-exist and that one does not override the other":

"According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (‘Vienna Convention’), a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Furthermore, as the Appellate Body has repeatedly pointed out, ‘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.’…\textsuperscript{12} 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. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two.”\textsuperscript{13}

10. The Panel on \textit{Canada – Periodicals} finally rejected the notion that overlaps between the subject-matter of \textit{GATT 1994} and \textit{GATS} should be avoided. Rather, it noted that certain types of services have long been associated with GATT disciplines, as evidenced, \textit{inter alia}, by certain GATT Panel Reports:

"In this connection, Canada also argues that overlaps between GATT 1994 and GATS should be avoided. … We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In

\textsuperscript{11} Panel Report on \textit{Canada – Periodicals}, paras. 5.14-5.16.


\textsuperscript{13} Panel Report on \textit{Canada – Periodicals}, para. 5.17.
fact, certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4 of GATT 1994. It is also noteworthy in this respect that advertising services have long been associated with the disciplines under GATT Article III. As early as 1970, the Working Party on Border Tax Adjustment made the following observation:

'The Working Party noted that there was a divergence of views with regard to the eligibility for adjustment of certain categories of tax and that these could be subdivided into

(a) 'Taxes occultes' which the OECD defined as consumption taxes on capital equipment, auxiliary materials and services used in the transportation and production of other taxable goods. Taxes on advertising, energy, machinery and transport were among the more important taxes which might be involved. …;

(b) Certain other taxes, …'…

We also note that there are several adopted panel reports that examined the issue of services in the context of GATT Article III. For instance, the panel on Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies addressed the issues of access to points of sale and restrictions on private delivery of beer. … The panel on United States - Measures Affecting Alcoholic and Malt Beverages also dealt with the issues of distribution of wine and beer. … More to the point, the panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes specifically addressed the question of advertising …

In any event, since Canada admits that in the present case there is no conflict between its obligations under GATS and under GATT 1994…, there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act. Thus, we conclude that Article III of GATT 1994 is applicable to Part V.1 of the Excise Tax Act.”

11. On appeal, the Appellate Body in Canada – Periodicals did not find it necessary "to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS, as both participants agreed that it is not relevant in this appeal." The Appellate Body then held that the Canadian measure at issue, as an excise tax on certain periodicals, clearly applied to goods. The Appellate Body subsequently examined the measure under Article III:2 of GATT 1994. 16

12. While in Canada – Periodicals the Appellate Body did not find it necessary to pronounce on the question whether there could be overlaps between the scope of application of GATT 1994 and GATS, in EC – Bananas III the Appellate Body confirmed the approach of the Panel on Canada – Periodicals. The Appellate Body rejected the notion that the GATT 1994 and GATS are "mutually exclusive agreements" and held that there was a "category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS":

"The second issue is whether the GATS and the GATT 1994 are mutually exclusive agreements. 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

15 Panel Report on Canada – Periodicals, paras. 5.18-5.19.
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*.

**PART II**

GENERAL OBLIGATIONS AND DISCIPLINES

**III. ARTICLE II**

**A. TEXT OF ARTICLE II**

*Article II*

*Most-Favoured-Nation Treatment*

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

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17 Appellate Body Report on *EC – Bananas III*, para. 221.
B. INTERPRETATION AND APPLICATION OF ARTICLE II

1. Scope

(a) Measures relating to judicial and administrative assistance

13. At its meeting of 1 March 1995, the Council for Trade in Services agreed to adopt the following conclusion of the Sub-Committee on Services concerning measures relating to judicial and administrative assistance:18

"At the end of the Uruguay Round it had been agreed by participants that Article II of the GATS (MFN) would not apply to measures relating to judicial and administrative assistance. This agreement was reflected in document MTN.GNS/W/177/Rev.1/Add.1 which states:

'It is agreed by participants that the provisions of Article II (Most-Favoured National Treatment) do not apply to measures relating to judicial and administrative assistance. In the light of this agreement, the former footnote to Article II has been deleted.'

The agreement was based on the view that discrimination between service suppliers of different Members arising from judicial and administrative assistance measures, apart from what is already stipulated by the provisions of the GATS, would not have any significant effect on conditions of competition between service suppliers. In the subsequent consultations it was agreed that the same logic could be applied to the whole of the GATS and that therefore none of the provisions of the GATS would apply to such measures."19

(b) Electronic commerce

14. With respect to the application of Article III to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.20

2. Interpretation

15. In Canada – Autos, the Appellate Body explained how a Panel should proceed when examining the consistency of a measure with Article II:1 of the GATS. After determining whether the measure under examination affects trade in services, the examiner should make "factual findings as to treatment of wholesale trade services and service suppliers of motor vehicles of different Members commercially present" and, as the last step, apply Article II:1 to these facts:

"The wording of this provision suggests that analysis of the consistency of a measure with Article II:1 should proceed in several steps. First, as we have seen, a threshold determination must be made under Article I:1 that the measure is covered by the GATS. This determination requires that there be 'trade in services' in one of the four modes of supply, and that there be also a measure which "affects" this trade in services. We have already held that the Panel failed to undertake this analysis.

18 S/C/M/1, para. 14.
19 S/C/1, para. 6.
20 S/L/74, para. 9.
If the threshold determination is that the measure is covered by the GATS, appraisal of the consistency of the measure with the requirements of Article II:1 is the next step. The text of Article II:1 requires, in essence, that treatment by one Member of 'services and services suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'. Based on these core legal elements, the Panel should first have rendered its interpretation of Article II:1. It should then have made factual findings as to treatment of wholesale trade services and service suppliers of motor vehicles of different Members commercially present in Canada. Finally, the Panel should have applied its interpretation of Article II:1 to the facts as it found them.\footnote{21}

16. The Appellate Body in \textit{Canada – Autos} subsequently disapproved of the Panel's application of Article II of GATS to the facts in the case before it. Specifically, the Appellate Body objected to what it considered to be the Panel's assumption that the application of an import duty exemption to manufacturers automatically affected "competition among wholesalers in their capacity as service suppliers":

"Clearly, here the Panel is confusing the application of the import duty exemption to manufacturers with its possible effect on wholesalers. In our view, the Panel has conducted a 'goods' analysis of this measure, and has simply extrapolated its analysis of how the import duty exemption affects manufacturers to wholesale trade service suppliers of motor vehicles. The Panel surmised, without analyzing the effect of the measure on wholesalers as service suppliers, that the import duty exemption, granted to a limited number of manufacturers, ipso facto affects conditions of competition among wholesalers in their capacity as service suppliers. As we stated earlier in respect of whether the measure at issue 'affects trade in services', the Panel failed to demonstrate how the import duty exemption granted to certain manufacturers, but not to other manufacturers, affects the supply of wholesale trade services and the suppliers of wholesale trade services of motor vehicles. In reaching its conclusions under Article II:1 of the GATS, the Panel has neither assessed the relevant facts – we see no analysis of any evidence relating to the supply of wholesale trade services of motor vehicles – nor has it interpreted Article II of the GATS and applied that interpretation to the facts it found."\footnote{22}

3. Paragraph 1

(a) "no less favourable treatment"

17. In \textit{EC – Bananas III}, the European Communities argued that Article II of GATS did not cover de facto discrimination; the European Communities claimed that if the drafters of the GATS had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly. The Panel rejected this argument, noting that Article XVII "is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures ... The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words 'treatment no less favourable', which are identical in both Articles II:1 and XVII:1.

\footnote{23}{Panel Report on \textit{EC – Bananas III}, para. 7.301.} The Panel also opined that "if the standard of 'no less favourable treatment' in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to..."
prohibit discrimination between like services and service suppliers of other Members.” The Appellate Body did not agree with this reasoning of the Panel, but reached the same conclusion as regards the applicability of Article II of GATS to de facto discrimination:

"We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.

Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving de facto discrimination. …

The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide 'treatment no less favourable'. The question naturally arises: if the GATS negotiators intended that 'treatment no less favourable' should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of 'treatment no less favourable' with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a de facto non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the WTO Agreement that require the obligation of providing 'treatment no less favourable'. The possibility that the two Articles may not have exactly the same meaning does not imply that the intention of the drafters of the GATS was that a de jure, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

For these reasons, we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied 'in casu'.”

18. In Canada – Autos, Canada argued that it was not possible to establish whether treatment no less favourable had been granted or not, due to vertical integration and exclusive distribution arrangements existing in the motor vehicle industry between manufacturers and wholesale trade service suppliers; Canada argued that these circumstances excluded any actual or potential competition at the wholesale trade level. The Panel found that these factual elements did not rule out the possibility of less favourable treatment:

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"We therefore find that vertical integration and exclusive distribution arrangements between manufacturers and wholesalers in the motor vehicle industry do not rule out the possibility that treatment less favourable may be granted to suppliers of wholesale trade services for motor vehicles. We also find that vertical integration and exclusive distribution arrangements do not preclude potential competition among wholesalers for the procurement of vehicles from manufacturers and actual inter-brand competition for sales to retailers.\(^{26}\)

(b) "like services and service suppliers"

19. The Panel on \textit{EC – Bananas III}, in a finding subsequently not reviewed by the Appellate Body, addressed the issue of likeness under Article II:

"[I]n our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."\(^{27}\)

20. The Panel on \textit{Canada – Autos} reiterated this approach:

"We agree that to the extent that the service suppliers concerned supply the same services, they should be considered 'like' for the purpose of this case.\(^{28}\)

(c) "aims and effects" test

21. In \textit{EC – Bananas III}, the Appellate Body rejected the application of the so-called "aims and effects" test which had been previously adopted by several GATT panels in interpreting GATT Article III, to the national treatment requirement contained in Article II or Article VII of \textit{GATS}. See paragraph 63 below.

22. With respect to the "aims and effects" test under GATT Article III, see Chapter on \textit{GATT}, paragraphs 98-103.

4. Exemptions from Article II

(a) Annex on Article II Exemptions

(i) \textit{Paragraph 7}

23. With respect to the format for notifications required under paragraph 7 of the Annex on Article II Exemptions, see the Guidelines for Notifications under the \textit{General Agreement on Trade in Services}.\(^{29}\)

\(^{26}\) Panel Report on \textit{Canada – Autos}, para. 10.254.
\(^{27}\) Panel Report on \textit{EC – Bananas III}, para. 7.322.
\(^{29}\) S/C/M/1, paras. 10-11. The approved Guidelines can be found in S/L/5.
(b) Exemptions in financial services

24. With respect to exemptions from Article II of GATS concerning financial services, see the Fifth Protocol to the GATS, adopted by the Committee on Trade in Financial Services on 14 November 1997.\(^\text{31}\)

(c) Exemptions in maritime transport services

25. With respect to this issue, see the Decision on Maritime Transport Services adopted by the Council for Trade in Services at its meeting of 28 June 1996, which suspends negotiations on maritime transport services; the Decision further states that such negotiations will resume with "the commencement of comprehensive negotiations on Services" and that Article II of GATS will enter into force with respect to "international shipping, auxiliary services and access to and use of port facilities" when these negotiations have been concluded.\(^\text{32}\) A Special Session of the Council for Trade in Services formally launched the new negotiations on services on Friday 25 February 2000.\(^\text{33}\)

(d) Exemptions in basic telecommunications

26. With respect to this issue, see the Fourth Protocol to the GATS, adopted by the Council for Trade in Services at its meeting of 30 April 1996.\(^\text{34}\)

IV. ARTICLE III

A. TEXT OF ARTICLE III

\textit{Article III}

\textit{Transparency}

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

\(^\text{30}\) S/L/45.
\(^\text{31}\) S/L/44.
\(^\text{32}\) S/L/24, para. 4.
\(^\text{33}\) S/CSS/M/1, paras. 4-35.
\(^\text{34}\) S/L/19, para. 3.
5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.\textsuperscript{35}

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. General

(a) Electronic commerce

27. With respect to the applicability of Article III to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\textsuperscript{36}

(b) Accountancy services

28. With respect to transparency in domestic regulations in the field of accountancy services, see the Disciplines on Domestic Regulation in the Accountancy Sector, adopted by the Council for Trade in Services at its meeting of 14 December 1998.\textsuperscript{37}

2. Paragraph 3

(a) Format for notifications

29. On 1 March 1995, the Council for Trade in Services approved the "Guidelines for Notifications under the General Agreement on Trade in Services".\textsuperscript{38}

3. Paragraph 4

(a) Enquiry points

30. On 28 May 1996, the Council for Trade in Services adopted the "Decision on the Notification of the Establishment of Enquiry and Contact Points", which calls upon Members to notify the establishment of enquiry points pursuant to Paragraph 4 of Article III.\textsuperscript{39}

V. ARTICLE III BIS

A. TEXT OF ARTICLE III BIS

\textit{Article III bis}

\textit{Disclosure of Confidential Information}

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

B. INTERPRETATION AND APPLICATION OF ARTICLE III BIS

\textit{No jurisprudence or decision of a competent WTO body.}

\textsuperscript{35} Paragraph 4 of the Annex on Telecommunications sets forth special provisions with regard to the application of Article III with respect to telecommunication services.

\textsuperscript{36} S/L/74, para. 9.

\textsuperscript{37} S/L/64.

\textsuperscript{38} S/C/M/1, paras. 10-11. The approved Guidelines can be found in S/L/5.

\textsuperscript{39} S/C/M/10, paras. 9-10. The decision can be found in S/L/23.
VI. **ARTICLE IV**

A. **TEXT OF ARTICLE IV**

*Article IV*

*Increasing Participation of Developing Countries*

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

   (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;
   (b) the improvement of their access to distribution channels and information networks; and
   (c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

   (a) commercial and technical aspects of the supply of services;
   (b) registration, recognition and obtaining of professional qualifications; and
   (c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

B. **INTERPRETATION AND APPLICATION OF ARTICLE IV**

1. **General**

31. With respect to application of Article IV to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.40

2. **Paragraph 3**

(a) Contact points

(i) **General**

32. With respect to the contact points provided for in paragraph 2, see the "Decision on the Notification of the Establishment of Enquiry and Contact Points" referenced in paragraph 30 above.

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40 S/L/74, para. 10.
(ii) Accountancy services

33. With respect to contact points in accountancy services, see the Disciplines on Domestic Regulation in the Accountancy Sector, adopted by the Council for Trade in Services on 14 December 1998.  

VII. ARTICLE V

A. TEXT OF ARTICLE V

Article V

Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage, and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

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41 S/L/64, paras. 3-4.
6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. Paragraph 1

34. The Panel on Canada – Autos, in a finding subsequently not addressed by the Appellate Body, considered that, with respect to an import duty exemption available to only a limited number of firms, Canada could not claim an exemption from its MFN obligation under Article II by invoking Article V:1. The Panel noted that the Canadian measures at issue did not grant more favourable treatment to all services and service suppliers of members of NAFTA:

"Even assuming that the [Canadian measures at issue] could be brought within the scope of the services liberalization provisions of NAFTA, we note that the import duty exemption under the [measures at issue] is accorded to a small number of manufacturers/wholesalers of the United States to the exclusion of all other manufacturers/wholesalers of the United States and of Mexico. The [measures at issue], therefore, provide more favourable treatment to only some and not all services and service suppliers of Members of NAFTA, while, according to Article V:1(b), an economic integration agreement has to provide for 'the absence or elimination of substantially all discrimination, in the sense of Article XVII', in order to be eligible for the exemption from Article II of the GATS.

Although the requirement of Article V:1(b) is to provide non-discrimination in the sense of Article XVII (National Treatment), we consider that once it is fulfilled it would also ensure non-discrimination between all service suppliers of other parties to the economic integration agreement. It is our view that the object and purpose of this provision is to eliminate all discrimination among services and service suppliers of parties to an economic integration agreement, including discrimination between suppliers of other parties to an economic integration agreement. In other words, it would be inconsistent with this provision if a party to an economic integration agreement were to extend more favourable treatment to service suppliers of one party than that which it extended to service suppliers of another party to that agreement."
Moreover, it is worth recalling that Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II. Paragraph 1 of Article V refers to 'an agreement liberalizing trade in services'. Such economic integration agreements typically aim at achieving higher levels of liberalization between or among their parties than that achieved among WTO Members. Article V:1 further prescribes a certain minimum level of liberalization which such agreements must attain in order to qualify for the exemption from the general MFN obligation of Article II. In this respect, the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements. However, in our view, it is not within the object and purpose of Article V to provide legal coverage for the extension of more favourable treatment only to a few service suppliers of parties to an economic integration agreement on a selective basis, even in situations where the maintenance of such measures may explicitly be provided for in the agreement itself.\(^{42}\)

2. **Paragraph 7**

(a) Format for notifications

35. With respect to the format for notifications under paragraph 7, see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^{43}\)

(b) Reporting on the operation of regional trade agreements

36. On 20 February 1998, the Committee on Regional Trade Agreements made recommendations to the Council for Trade in Services with respect to the reporting on the operation of regional trade agreements to the Committee\(^{44}\). On 23 and 24 November 1998, the Council for Trade in Service took note of these recommendations.\(^{45}\)

(c) Examination of specific agreements

(i) General

37. With respect to the procedures for the examination of specific agreements, see the Chapter on *WTO Agreement*, paragraph 92.

(ii) European Union

38. With respect to the enlargement of the European Union as a result of the accession of Austria, Finland and Sweden on 1 January 1995\(^{46}\), the Council for Trade in Services agreed that two issues, namely the Treaty of Accession of Austria, Finland and Sweden to the European Union and the Treaties establishing the European Union should be discussed separately. With respect to the first issue, the Council for Trade in Services on 30 March 1995 agreed to establish the Working Party on the Enlargement of the European Union.\(^{47}\) With respect to the second issue, the Council for Trade in Services, at its meeting of 23 September 1996, decided to refer the Treaties establishing the European Union.

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\(^{42}\) Panel Report on *Canada – Autos*, paras. 10.269-10.272.

\(^{43}\) S/L/5.

\(^{44}\) WT/REG/M/16, section B, in particular, paras. 4-39. The adopted recommendations can be found in WT/REG/5.

\(^{45}\) S/C/M/31, section E.

\(^{46}\) WTO/L/7.

\(^{47}\) S/C/M/2, paras. 9-10.
Union to the Committee on Regional Trade Agreements for examination pursuant to paragraph 7 of Article V of the GATS.\(^{48}\)

\((iii)\) **NAFTA**

39. On 30 March 1995, Canada, Mexico and the United States jointly notified the North American Free Trade Agreement (NAFTA) to the Council for Trade in Services pursuant to paragraph 7(a) of Article V of the GATS.\(^{49}\) On the same date, the Council for Trade in Services agreed to establish a Working Party\(^{50}\)

\((iv)\) **Other agreements**

40. Between 1 January 1995 and 30 June 2001, the Council for Trade in Services adopted terms of reference for examination by the Committee on Regional Trade Agreements pursuant to paragraph 7(a) of Article V of the GATS of the following agreements:

- (a) Establishment of the European Union, EC Treaty of Rome\(^{51}\);
- (b) Australia-New Zealand Closer Economic Relations Trade Agreement\(^{52}\);
- (c) Europe Agreement establishing an association between the European Communities and their Member States and the Republic of Slovakia\(^{53}\);
- (d) Europe Agreement establishing an association between the European Communities and their Member States and Republic of Hungary\(^{54}\);
- (e) Europe Agreement establishing an association between the European Communities and their Member States and Republic of Poland\(^{55}\);
- (f) Europe Agreement establishing an association between the European Communities and their Member States and the Czech Republic\(^{56}\);
- (g) Europe Agreement establishing an association between the European Communities and their Member States and Romania\(^{57}\);

\(^{48}\) S/C/M/13, paras. 29-30.
\(^{49}\) S/C/N/4.
\(^{50}\) S/C/M/3, paras. 27-28.
\(^{51}\) Notified in S/C/N/6. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/14, Section E. This Agreement was also notified in S/C/N/66. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.
\(^{52}\) Notified in S/C/N/7. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/14, Section E.
\(^{53}\) Notified in S/C/N/23. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/14, Section E.
\(^{54}\) Notified in S/C/N/24. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/14, Section E.
\(^{55}\) Notified in S/C/N/25. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/14, Section E.
\(^{56}\) Notified in S/C/N/26. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.
\(^{57}\) Notified in S/C/N/27. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.
(h) European Economic Area ("EEA") concluded between the European Communities and their Member States, and the Kingdom of Norway, the Republic of Iceland and the Principality of Liechtenstein\(^58\);

(i) Europe Agreement establishing an association between the European Communities and their Member States and Bulgaria\(^59\); and

(j) Free Trade Agreement between Chile and Mexico.\(^60\)

VIII. ARTICLE V BIS

A. TEXT OF ARTICLE V BIS

*Article V bis*

*Labour Markets Integration Agreements*

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement, provided that such an agreement:

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\(^2\) Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

B. INTERPRETATION AND APPLICATION OF ARTICLE V BIS

1. Paragraph (b)

(a) Format for notifications

41. With respect to the format for notifications under subparagraph (b), see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^61\)

IX. ARTICLE VI

A. TEXT OF ARTICLE VI

*Article VI*

*Domestic Regulation*

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

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\(^58\) Notified in S/C/N/28. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.

\(^59\) Notified in S/C/N/55. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.

\(^60\) Notified in S/C/N/142. The terms of reference adopted by the Council for Trade in Services can be found in S/C/M/52, Section C.

\(^61\) S/L/5.
2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) not more burdensome than necessary to ensure the quality of the service;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.

(footnote original) The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.
B. **INTERPRETATION AND APPLICATION OF ARTICLE VI**

1. **General**

(a) **Electronic commerce**

42. With respect to application of Article VI to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\(^62\)

2. **Paragraph 4**

(a) **Professional services/domestic regulation**

43. With respect to the Working Party on Professional Services and its successor, the Working Party on Domestic Regulation, see paragraphs 83-85 below.

(b) **Disciplines in accountancy services**

44. On 14 December 1998, with a view to ensuring that domestic regulations affecting trade in accountancy services met the requirements of Article VI:4, the Council for Trade in Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector\(^63\), which had been recommended by the Working Party on Professional Services. These Disciplines contain, *inter alia*, the following provision under the heading "General Provisions":

"Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."\(^64\)

(c) **Relationship with Articles XVI and XVII**

45. On 10 December 1998, the Working Party on Professional Services submitted a report to the Council for Trade in Services on the development of Disciplines on Domestic Regulation in the Accountancy Sector, including the informal note by the Chairman entitled "Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector."\(^65\)

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\(^62\) S/L/74, para. 11.
\(^63\) S/C/M/32, section A. The adopted Disciplines can be found in S/L/64.
\(^64\) S/WPPS/W/21, para. 2.
\(^65\) S/WPPS/4.
X. **ARTICLE VII**

A. **TEXT OF ARTICLE VII**

**Article VII**

*Recognition*

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:
   (a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
   (b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;
   (c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.  

B. **INTERPRETATION AND APPLICATION OF ARTICLE VII**

1. **General**


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66 Paragraph 3 of the Annex on Financial Services relates to recognition in financial services.

67 S/L/74, para. 11.
2. Paragraph 4
(a) Format for notifications

47. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services. 68

3. Paragraph 5
(a) Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector

48. On 29 May 1997, the Council for Trade in Services approved the voluntary Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector. 69

XI. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII

Monopolies and Exclusive Services Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory. 70

68 S/L/5.
69 S/C/M/19, paras. 4-7. The text of the approved Guidelines can be found in S/L/38.
70 Paragraph 5 of Annex on Telecommunications relates to the access to and use of public telecommunications transport networks and services.
B. **INTERPRETATION AND APPLICATION OF ARTICLE VIII**

1. **General**

(a) **Electronic commerce**

49. With respect to application of Article VIII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\(^{71}\)

2. **Paragraph 4**

(a) **Format for notifications**

50. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^{72}\)

XII. **ARTICLE IX**

A. **TEXT OF ARTICLE IX**

*Article IX*

*Business Practices*

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

B. **INTERPRETATION AND APPLICATION OF ARTICLE IX**

1. **General**

(a) **Electronic commerce**

51. With respect to application of Article IX to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\(^{73}\)

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\(^{71}\) S/L/74, paras. 12-13.  
\(^{72}\) S/L/5.  
\(^{73}\) S/L/74, para. 12-13.
XIII. ARTICLE X

A. TEXT OF ARTICLE X

Article X

Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

1. Working Party on GATS Rules

52. Negotiations on the question of emergency safeguard measures have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services. Members have postponed four times the deadline referred to in Article X:1. In the Fourth Decision on Negotiations on Emergency Safeguard Measures, Members decided that the first sentence of paragraph 1 of Article X should continue to apply until 15 March 2004.

XIV. ARTICLE XI

A. TEXT OF ARTICLE XI

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

No jurisprudence or decision of a competent WTO body.

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74 S/C/M/2, paras. 23-25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1-6.

75 S/L/102.
XV. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII

Restrictions to Safeguard the Balance-of-Payment

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:
   (a) shall not discriminate among Members;
   (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
   (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
   (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
   (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.
   (b) The Ministerial Conference shall establish procedures for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

   (footnote original) It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

   (c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, inter alia, such factors as:
      (i) the nature and extent of the balance-of-payments and the external financial difficulties;
      (ii) the external economic and trading environment of the consulting Member;
      (iii) alternative corrective measures which may be available.

   (d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phase-out of restrictions in accordance with paragraph 2(e).
   (e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.
6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

1. Paragraph 4

(a) Format for notifications

53. With respect to the format for notifications under paragraph 4, see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^\text{76}\)

XVI. ARTICLE XIII

A. TEXT OF ARTICLE XIII

*Article XIII*

*Government Procurement*

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

1. Working Party on GATS Rules

54. Negotiations on government procurement in services have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services.\(^\text{77}\)

XVII. ARTICLE XIV

A. TEXT OF ARTICLE XIV

*Article XIV*

*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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;\(^\text{5}\)

\(^\text{footnote original}^5\) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

\(^{\text{76}}\) S/L/5.

\(^{\text{77}}\) S/C/M/2, paras. 23-25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1-6.
(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   (iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;

\[\text{(footnote original) 6} \] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:
   (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
   (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
   (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
   (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
   (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
   (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

1. General

(a) Electronic commerce

With respect to application of Article XIV to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\[78\]

(b) Trade in services and the environment

On 1 March 1995, the Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, adopted the Decision on Trade in Services and the Environment.\[79\] The Decision stipulates, \textit{inter alia}:

\[78\] S/L/74, para. 14.
"In order to determine whether any modification of Article XIV of the Agreement is required to take account of such measures, [Ministers] request the Committee on Trade and Environment to examine and report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development. The Committee shall also examine the relevance of inter-governmental agreements on the environment and their relationship to the Agreement."\(^8^0\)

**XVIII. ARTICLE XIV BIS**

A. **TEXT OF ARTICLE XIV BIS**

  **Article XIV bis**

  *Security Exceptions*

1. Nothing in this Agreement shall be construed:
   
   (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
   
   (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
   
   (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
   
   (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
   
   (iii) taken in time of war or other emergency in international relations; or
   
   (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

B. **INTERPRETATION AND APPLICATION OF ARTICLE XIV BIS**

1. **Paragraph 2**

   (a) Format for notifications

57. With respect to the format for notifications under paragraph 2, see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^8^1\)

**XIX. ARTICLE XV**

A. **TEXT OF ARTICLE XV**

  **Article XV**

  *Subsidies*

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.\(^7\) The negotiations shall also address the

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\(^7\) S/C/M/1. The adopted Decision can be found in S/L/4.

\(^8^0\) S/L/4, para. 1.

\(^8^1\) S/L/5.
appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

*footnote original* A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

B. **INTERPRETATION AND APPLICATION OF ARTICLE XV**

1. **Working Party on GATS Rules**

58. Negotiations on subsidies have been carried out in the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services.

**PART III**

**SPECIFIC COMMITMENTS**

XX. **ARTICLE XVI**

A. **TEXT OF ARTICLE XVI**

*Article XVI*

*Market Access*

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

*footnote original* If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

   (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

   (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

   (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

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82 S/C/M/2, paras. 23-25. See also the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1-6.
Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVI

1. General

(a) Electronic commerce

59. With respect to application of Article XVI to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999. 83

2. Relationship with Article VI:4

60. With respect to the relationship between Article VI:4 and XVI, see paragraph 45 above.

XXI. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. 10

(footnote original) 10 Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

83 S/L/74, para. 15-16.
B. **INTERPRETATION AND APPLICATION OF ARTICLE XVII**

1. **General**

(a) **Electronic commerce**

61. With respect to application of Article XVII to electronic commerce, see the Progress Report adopted by the Council for Trade in Services in the context of the Work Programme on Electronic Commerce on 19 July 1999.\(^{84}\)

2. **Likeness of services and service suppliers**

62. The Panel on *EC – Bananas III*, in a finding not reviewed by the Appellate Body, addressed the issue of likeness under Article XVII:

"[T]he nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."\(^{85}\)

3. **"aims and effects" test**

63. In *EC – Bananas III*, the Appellate Body rejected the alleged relevance of the so-called "aims and effects" test in the context of Article XVII:

"We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the 'aims and effects' theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations 'should not be applied to imported or domestic products so as to afford protection to domestic production'. There is no comparable provision in the GATS. Furthermore, in our Report in Japan - Alcoholic Beverages the Appellate Body rejected the 'aims and effects' theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, United States - Taxes on Automobiles as authority for its proposition, despite our recent ruling."\(^{86}\)

4. **Footnote 10**

64. In *Canada – Autos*, one of the measures at issue was the so-called Canada Value Added (CVA) requirement, according to which a tax duty exemption was granted, *inter alia*, only if the amount of Canadian value added in a manufacturer's local production of motor vehicles exceeded a certain level. One component of this CVA requirement was "maintenance and repair work executed in Canada on buildings, machinery and equipment used for production purposes". Canada argued that

\(^{84}\) S/L/74, paras. 17-18.

\(^{85}\) Panel Report on *EC – Bananas III*, para. 7.322.

there can be no discrimination against these services supplied through modes 1 and 2, as cross-border supply and consumption abroad of these services are not technically feasible. Further, Canada pointed out that "the competitive disadvantage in the foreign provision of many services listed by the complainants as being affected by the CVA requirements is inherent in the foreign character of these services and, as stated in footnote 10 to Article XVII, should not be regarded as a national treatment restriction." The Panel, in a finding not reviewed by the Appellate Body, disagreed with Canada:

"We consider that, although the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 might not be technically feasible, as they require the physical presence of the supplier, all other services listed by the complainants as being affected by the CVA requirements, including some consulting and advisory services relating to repair and maintenance of machinery, can be supplied through modes 1 and 2. We further consider that treatment less favourable granted to services supplied outside Canada cannot be justified on the basis of inherent disadvantages due to their foreign character. Footnote 10 to Article XVII only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character. We therefore find that lack of technical feasibility only excludes the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 from Canada's national treatment obligation. We also find that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the CVA requirements."

5. Relationship with Article VI:4

65. With respect to the relationship between Article VI:4 and XVII, see paragraph 45 above.

XXII. ARTICLE XVIII

A. TEXT OF ARTICLE XVIII

Article XVIII

Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

No jurisprudence or decision of a competent WTO body.

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87 Panel Report on Canada – Autos, para. 10.298.
88 Panel Report on Canada – Autos, paras. 10.300-10.301.
PART IV

PROGRESSIVE LIBERALIZATION

XXIII. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX

Negotiations on Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. Paragraph 1

(a) Information exchange

66. On 9-13 December 1996 in Singapore, the Ministerial Conference endorsed the recommendation that the Council for Trade in Services would develop an information exchange programme, as part of the requisite work to facilitate the negotiations of progressive liberalization of trade in services as mandated by Paragraph 1 of Article XIX. On 11 May 1998, the Council on Trade in Services agreed, on an ad referendum basis, on certain aspects concerning the structure and content of the exchange of information exercise.

89 S/C/3, para. 47.
90 WT/MIN(96)/DEC, para. 19. See also S/C/M/17, para. 14.
91 S/C/M/27, para. 3.
2. Negotiations in specific services sectors

(a) Movement of natural persons

67. At its meeting of 21 July 1995\(^92\), the Council for Trade in Services decided to adopt the Third Protocol to the General Agreement on Trade in Services\(^93\), which had been proposed by the Negotiating Group on Movement of Natural Persons.

(b) Financial services

68. At its meeting of 21 July 1995, the Committee on Trade in Financial Services decided to adopt the Second Protocol to the General Agreement on Trade in Services.\(^94\) Following the adoption of the Second Protocol, at its meeting of 21 July 1995, the Council for Trade in Services, so as to address the situation where the Second Protocol would not enter into force, adopted the Decision on Commitments in Financial Services\(^95\) and the Second Decision on Financial Services\(^96\), both of which had been proposed by the Committee on Trade in Financial Services.\(^97\)

69. On 12 and 14 November 1997, the Committee on Trade in Financial Services approved the final results of the negotiations on financial services, and adopted the Fifth Protocol to the General Agreement on Trade in Services.\(^98\) Following the adoption of the Fifth Protocol, the Council for Trade in Services, at its meeting of 12 December 1997, so as to address the situation where the Fifth Protocol would not enter into force, adopted the Decision of December 1997 on Commitments in Financial Services\(^99\), which had been proposed by the Committee on Trade in Financial Services.

(c) Maritime transport services

70. At its meeting of 28 June 1996, the Council for Trade in Services adopted a Decision to suspend the negotiations on maritime transport services and to resume them with the commencement of comprehensive negotiations on services, in accordance with Article XIX of GATS, and to conclude them no later than at the end of this first round of progressive liberalization.\(^100\) The Group was to

\(^92\) S/C/M/5, para. 4.
\(^93\) S/C/M/5, paras. 4-5. The Decision can be found in S/L/10, and the text of the adopted Third Protocol can be found in S/L/12.
\(^94\) S/FIN/M/8, para. 4. The text of the Second Protocol can be found in S/L/11. Also, the text of the decision to adopt the Second Protocol can be found in S/L/13.
\(^95\) The text of the adopted Decision can be found in S/L/8.
\(^96\) The text of the adopted Second Decision can be found in S/L/9.
\(^97\) S/C/M/5, paras. 2-3.
\(^98\) S/FIN/M/18, para. 25. The text of the Fifth Protocol can be found in S/L/45. Also, the text of the decision to adopt the Fifth Protocol can be found in S/L/44.
\(^99\) S/C/M/22, para. 2. The text of the decision can be found in S/L/50.
\(^100\) S/C/M/11, paras. 12-13. The text of the Decision can be found in S/L/24. The Council for Trade in Services noted in its report to the General Council, (S/C/3) para. 32-33, dated 6 November 1996:

"After the suspension of the negotiations, two Members, Iceland and Norway, consolidated their best offers, i.e. transformed their offers into specific commitments to be inscribed in their schedules. Two Members, Austria (in the context of its accession to the European Union) and the Dominican Republic, withdrew their commitments, while two Members, Canada and Malaysia, modified their commitments slightly. Currently, 35 Members have commitments on maritime transport services. This includes: 29 Members who made commitments in the Uruguay Round, 4 Members (Papua New Guinea, Saint Christopher and Nevis, Sierra Leone and Slovenia) who acceded subsequently, and 2 Members (Iceland and Norway) who made commitments after the extended negotiations."
resume "with the commencement of comprehensive negotiations on Services." A Special Session of the Council for Trade in Services formally launched the new negotiations on services on 25 February 2000.

(d) Basic telecommunications

71. On 30 April 1996, the Council for Trade in Services decided to adopt the Decision on Commitments in Basic Telecommunications and the Fourth Protocol to the General Agreement on Trade in Services, both of which had been proposed by the Negotiating Group on Basic Telecommunications.

(e) Professional services

72. With respect to the establishment of the Working Party on Professional Services, and its successor, the Working Party on Domestic Regulation, see paragraphs 83-85 below.

(i) Disciplines on domestic regulation

73. With respect to disciplines on domestic regulation, see paragraph 44 above.

XXIV. ARTICLE XX

A. TEXT OF ARTICLE XX

*Article XX*

*Schedule of Specific Commitments*

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

   (a) terms, limitations and conditions on market access;
   (b) conditions and qualifications on national treatment;
   (c) undertakings relating to additional commitments;
   (d) where appropriate the time-frame for implementation of such commitments; and
   (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

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At the time of suspension of the negotiations, 56 governments (including the European Communities and their Member States) had elected to participate fully in the negotiations. Another 16 governments were participating in the process as observers. By that time 24 conditional offers had been submitted."

101 S/L/24.

102 S/CSS/M/1, paras. 4-35. The decision to hold the negotiations in Special Sessions of the Council for Trade in Services was tabled by the General Council on 7 February 2000. The text of the decision can be found in WT/GC/M/53.

103 S/C/M/9, paras. 2-3. The text of the adopted Fourth Protocol can be found in S/L/19. Also, the text of the adopted Fourth Protocol can be found in S/L/20.
B. **INTERPRETATION AND APPLICATION OF ARTICLE XX**

1. **General**

(a) Committee on Specific Commitments

74. With regard to the establishment and terms of reference of the Committee on Specific Commitments under the *GATS*, see paragraph 88 below.

(b) Guidelines for Scheduling of Specific Commitments

75. At its meeting of 23 March 2001, the Council for Trade in Services adopted the Guidelines for the Scheduling of Specific Commitments. 104

XXV. **ARTICLE XXI**

A. **TEXT OF ARTICLE XXI**

**Article XXI**

*Modification of Schedules*

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

   (b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

   (b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

   (b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

   (b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings.

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104 S/C/M/52, para. 11. The text of the adopted Guidelines can be found in S/L/92.
Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

1. Paragraph 1(b)

(a) Format for notifications

76. With respect to the format for notifications under paragraph 1(b), see the Guidelines for Notifications under the General Agreement on Trade in Services.\(^{105}\)

2. Paragraph 5

(a) Procedures for the rectification or modification of schedules

77. Since the conclusion of the Uruguay Round, an ad hoc certification procedure had been applied for the purpose of introducing changes or adding new commitments to Members' schedules, pending the adoption of a formal set of procedures under Article XXI (Modification of Schedules). On 20 July 1999, the Council for Trade in Services adopted the Procedures for the Implementation of Article XXI upon the recommendation of the Committee on Specific Commitments.\(^{106}\) The Procedures are to be used whenever a Member intends to modify or withdraw a scheduled commitment.

78. On 14 April 2000, upon a recommendation of the Committee on Specific Commitments, the Council for Trade in Services adopted the Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments.\(^{107}\) These Procedures are to be used whenever a Member intends to undertake new commitments, improve existing ones, or introduce rectifications or changes of a purely technical nature that do not alter the scope on the substance of the existing commitments.

PART V

INSTITUTIONAL ARRANGEMENTS

XXVI. ARTICLE XXII

A. TEXT OF ARTICLE XXII

Article XXII

Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with

\(^{105}\) S/L/5.

\(^{106}\) S/C/M/38, section D. The text of the adopted procedure can be found in S/L/80. The text of the decision to adopt Procedures can be found in S/L/79.

\(^{107}\) S/C/M/42, para. 38-41. The text of the adopted Procedures can be found in S/L/84. The text of the decision to adopt the Procedures can be found in S/L/83.
respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

(footnote original) With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

No jurisprudence or decision of a competent WTO body.

XXVII. ARTICLE XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII

Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

1. Disputes under GATS

79. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of GATS were invoked:

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108 Paragraph 4 of Annex on Air Transport Services relates to the dispute settlement in air transport services.
109 Paragraph 4 of Annex on Financial Services relates to the dispute settlement in financial services.
2. **Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services**

80. On 1 March 1995, pursuant to the Ministers’ Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services, the Council for Trade in Services adopted the Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services\(^{110}\), which called for the establishment of a roster of panellists.\(^{111}\) The text of the decision is as follows:

"Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services

Ministers,

Decide to recommend that the Council for Trade in Services at its first meeting adopt the decision set out below.

The Council for Trade in Services,

Taking into account the specific nature of the obligations and specific commitments of the Agreement, and of trade in services, with respect to dispute settlement under Articles XXII and XXIII,

Decides as follows:

1. A roster of panellists shall be established to assist in the selection of panellists.

2. To this end, Members may suggest names of individuals possessing the qualifications referred to in Paragraph 3 for inclusion on the roster, and shall provide a curriculum vitae of their qualifications including, if applicable, indication of sector-specific expertise.

3. Panels shall be composed of well-qualified governmental and/or non-governmental individuals who have experience in issues related to the General Agreement on Trade in Services and/or trade in services, including associated regulatory matters. Panellists shall serve in their individual capacities and not as representatives of any government or organisation.

4. Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors which the dispute concerns.

\(^{110}\) S/C/M/1. The text of the adopted Decision can be found in S/L/2.

\(^{111}\) S/L/2, para. 1.
5. The Secretariat shall maintain the roster and shall develop procedures for its administration in consultation with the Chairman of the Council.112

81. On 4 October 1995, the Council for Trade in Services decided that, given the comprehensive nature of the indicative list established by the DSB pursuant to Article 8(4) of the DSU, there was no need for the Council to establish a separate roster of serving panellists.112

XXVIII. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV

Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIV

1. Paragraph 1

(a) Establishment of subsidiary bodies

(i) Committee on Trade in Financial Services

82. On 1 March 1995, pursuant to the Ministers' Decisions in Marrakesh, the Council for Trade in Services adopted the Decision on Institutional Arrangements for the General Agreement on Trade in Services113, thereby establishing the Committee on Trade in Financial Services. Its responsibilities are listed in paragraph 2 of the Decision and comprise, inter alia, the duty:

(a) to keep under continuous review and surveillance the application of the Agreement with respect to the sector concerned;

(b) to formulate proposals or recommendations for consideration by the Council in connection with any matter relating to trade in the sector concerned;

(c) if there is an annex pertaining to the sector, to consider proposals for amendment of that sectoral annex, and to make appropriate recommendations to the Council;

(d) to provide a forum for technical discussions, to conduct studies on measures of Members and to conduct examinations of any other technical matters affecting trade in services in the sector concerned;

(e) to provide technical assistance to developing country Members and developing countries negotiating accession to the Agreement Establishing the World Trade

112 S/C/M/6, paras. 41-42.
113 S/C/M/1, paras. 6-7. The text of the adopted Decision can be found in S/L/1.
Organization in respect of the application of obligations or other matters affecting trade in services in the sector concerned; and

(f) to cooperate with any other subsidiary bodies established under the General Agreement on Trade in Services or any international organizations active in any sector concerned.\(^{114}\)

(ii) **Working Party on Professional Services and Working Party on Domestic Regulation**

83. On 1 March 1995, pursuant to paragraph 2 of the Decision on Professional Services, the Council for Trade in Services established a Working Party on Professional Services.\(^{115}\) With respect to disciplines on domestic regulation and mutual recognition guidelines, see paragraph 44 above.

84. The Working Party reported to the Council for Trade in Services on an annual basis.\(^{116}\)

85. On 26 April 1999, the Council for Trade in Services discussed the issue of how to manage the two overlapping mandates under Article VI:4 which called upon the Council to develop disciplines on domestic regulation in all services sectors, and the Decision on Professional Services which called upon the Working Party on Professional Services (WPPS) to fulfill the same task for professional services.\(^{117}\) For this purpose, at the same meeting, the Council for Trade in Services adopted a decision establishing the Working Party on Domestic Regulation (WPDR).\(^{118}\) The WPDR would replace the WPPS and would be responsible for carrying out all the work foreseen under Article VI:4. It would give priority to the development of horizontal disciplines applicable to all services sectors, while retaining the possibility of developing further disciplines applicable to specific sectors or groups of sectors, including the development of general disciplines for professional services.\(^{119}\)

86. The WPDR reports to the Council for Trade in Services on an annual basis.

(iii) **Working Party on GATS Rules**

87. At its meeting of 30 March 1995, the Council for Trade in Services established a Working Party on GATS Rules to carry out the negotiating mandates contained in the GATS on "Emergency Safeguard Measures" (Article X), "Government Procurement" (Article XIII) and "Subsidies" (Article XV).\(^{120}\)

(iv) **Committee on Specific Commitments**

88. On 4 October 1995, the Council for Trade in Services established the Committee on Specific Commitments.\(^{121}\) At its meeting on 22 November 1995, the Council for Trade in Services adopted the Decision on the Terms of Reference for the Committee on Specific Commitments.\(^{122}\)

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\(^{114}\) S/L/1, para. 1.
\(^{115}\) S/L/3.
\(^{116}\) The reports are numbered S/WPPS/1-4.
\(^{117}\) S/C/M/35, paras. 18-22.
\(^{118}\) S/L/70.
\(^{120}\) S/C/M/2, paras. 22-25.
\(^{121}\) S/C/M/6, paras. 22-25.
\(^{122}\) S/L/16.
Negotiating Groups on Natural Persons, Maritime Transport Services and Basic Telecommunications

89. The Negotiating Group on Natural Persons, the Negotiating Group on Maritime Transport Services and the Negotiating Group on Basic Telecommunications were established by Ministerial Decisions at Marrakesh.

2. Rules of procedure of the Council for Trade in Services

(a) Rules of procedure

90. On 4 October 1995, the Council for Trade in Services adopted the Rules of Procedure of the General Council, along with appropriate modifications. See also the Chapter on WTO Agreement, paragraph 64.

(b) Observer status

91. At its meeting of 1 March 1995, the Council for Trade in Services took note of the decision by the General Council of 31 January 1995 in which it granted observer status to a number of governments and separate territories and also covered observership to the subsidiary bodies to the General Council, including the Council for Trade in Services. The Council for Trade in Services also took note of the decision of the General Council which agreed on an ad hoc arrangement whereby the IMF, the World Bank, the UN and UNCTAD were invited to participate as observers in the first meetings of the General Council and its subsidiary Councils.

C. Decision on Institutional Arrangements for the GATS

92. With respect to institutional arrangements for the GATS, Ministers at the 1994 Marrakesh Ministerial conference adopted the following Decision:

"Decision on Institutional Arrangements for the General Agreement on Trade in Services

Ministers,

Decide to recommend that the Council for Trade in Services at its first meeting adopt the decision on subsidiary bodies set out below.

The Council for Trade in Services,

Acting pursuant to Article XXIV with a view to facilitating the operation and furthering the objectives of the General Agreement on Trade in Services,

Decides as follows:

1. Any subsidiary bodies that the Council may establish shall report to the Council annually or more often as necessary. Each such body shall establish its own rules of procedure, and may set up its own subsidiary bodies as appropriate.

123 S/L/15.
124 S/C/M/6.
125 WT/GC/M/1.
126 S/C/M/1.
127 S/C/M/1.
2. Any sectoral committee shall carry out responsibilities as assigned to it by the Council, and shall afford Members the opportunity to consult on any matters relating to trade in services in the sector concerned and the operation of the sectoral annex to which it may pertain. Such responsibilities shall include:

(a) to keep under continuous review and surveillance the application of the Agreement with respect to the sector concerned;

(b) to formulate proposals or recommendations for consideration by the Council in connection with any matter relating to trade in the sector concerned;

(c) if there is an annex pertaining to the sector, to consider proposals for amendment of that sectoral annex, and to make appropriate recommendations to the Council;

(d) to provide a forum for technical discussions, to conduct studies on measures of Members and to conduct examinations of any other technical matters affecting trade in services in the sector concerned;

(e) to provide technical assistance to developing country Members and developing countries negotiating accession to the Agreement Establishing the World Trade Organization in respect of the application of obligations or other matters affecting trade in services in the sector concerned; and

(f) to cooperate with any other subsidiary bodies established under the General Agreement on Trade in Services or any international organizations active in any sector concerned."

XXIX. ARTICLE XXV

A. TEXT OF ARTICLE XXV

*Article XXV*

*Technical Cooperation*

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXV

*No jurisprudence or decision of a competent WTO body.*
XXX. ARTICLE XXVI

A. TEXT OF ARTICLE XXVI

Article XXVI

Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVI

1. Agreement between the International Telecommunication Union and the World Trade Organization

93. On 26 May 2000, the Council for Trade in Services adopted the Cooperation Agreement between the International Telecommunication Union and the World Trade Organization. At its meeting on 10 October 2000, the General Council approved the Agreement between the ITU and WTO contained in document S/C/11 and consequently authorized the WTO Director-General to sign this Agreement.

94. With respect to the relationship of the WTO to other international organizations in general, see the Chapter on the WTO Agreement, paragraphs 144-151.

PART V

FINAL PROVISIONS

XXXI. ARTICLE XXVII

A. TEXT OF ARTICLE XXVII

Article XXVII

Denial of Benefits

A Member may deny the benefits of this Agreement:

(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

(i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

128 The text is contained in document S/C/9/Rev.1.
B. **INTERPRETATION AND APPLICATION OF ARTICLE XXVII**

*No jurisprudence or decision of a competent WTO body.*

XXXII. **ARTICLE XXVIII**

A. **TEXT OF ARTICLE XXVIII**

*Article XXVIII*

**Definitions**

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

(c) "measures by Members affecting trade in services" include measures in respect of:
   (i) the purchase, payment or use of a service;
   (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
   (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through:
   (i) the constitution, acquisition or maintenance of a juridical person, or
   (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means:
   (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
   (ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,
   (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or
   (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) "service supplier" means any person that supplies a service;

(footnote original) 12 Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) "service consumer" means any person that receives or uses a service;

(j) "person" means either a natural person or a juridical person;

(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:
   (i) is a national of that other Member, or
(ii) has the right of permanent residence in that other Member, in the case of a Member which:
1. does not have nationals; or
2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:
(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
(ii) in the case of the supply of a service through commercial presence, owned or controlled by:
1. natural persons of that Member; or
2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:
(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXVIII

No jurisprudence or decision of a competent WTO body.

XXXIII. ARTICLE XXIX

A. TEXT OF ARTICLE XXIX

Article XXIX

Annexes

The Annexes to this Agreement are an integral part of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIX

No jurisprudence or decision of a competent WTO body.
XXXIV. ANNEX ON ARTICLE II EXEMPTIONS

A. TEXT OF THE ANNEX ON ARTICLE II EXEMPTIONS

Annex on Article II Exemptions

Scope

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.

2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

Review

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.

4. The Council for Trade in Services in a review shall:
   (a) examine whether the conditions which created the need for the exemption still prevail; and
   (b) determine the date of any further review.

Termination

5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.

6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.

7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.

List of Article II Exemptions

[The agreed list of exemptions under paragraph 2 of Article II is omitted.]

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON ARTICLE II EXEMPTIONS

No jurisprudence or decision of a competent WTO body.

XXXV. ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

A. TEXT OF THE ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

Annex on Movement of Natural Persons
Supplying Services under the Agreement

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.13

(footnote original) 13 The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.9

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

1. Measures relating to the entry and stay of natural persons

95. At its meeting of 1 March 1995, the Council for Trade in Services adopted a conclusion of the Sub-Committee on Services concerning measures relating to the entry and stay of natural persons. 130 The Sub-Committee had dealt with the question on what basis a distinction between "temporary" and "permanent" residency and employment should be made. The Sub-Committee, however, ultimately decided that the commitments set out in the individual countries' schedules were sufficiently clear, so that there was no need for further multilateral work on this issue.131

XXXVI. ANNEX ON AIR TRANSPORT SERVICES

A. TEXT OF THE ANNEX ON AIR TRANSPORT SERVICES

Annex on Air Transport Services

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:
   (a) traffic rights, however granted; or
   (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:
   (a) aircraft repair and maintenance services;
   (b) the selling and marketing of air transport services;
   (c) computer reservation system (CRS) services.

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130 S/C/M/1, para. 14.
131 G/C/1, para. 6.
4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

6. Definitions:
   (a) 'Aircraft repair and maintenance services' mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.
   (b) 'Selling and marketing of air transport services' mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
   (c) 'Computer reservation system (CRS) services' mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.
   (d) 'Traffic rights' mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON AIR TRANSPORT SERVICES

No jurisprudence or decision of a competent WTO body.

XXXVII. ANNEX ON FINANCIAL SERVICES

A. TEXT OF THE ANNEX ON FINANCIAL SERVICES

Annex on Financial Services

1. Scope and Definition

   (a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

   (b) For the purposes of subparagraph 3(b) of Article I of the Agreement, 'services supplied in the exercise of governmental authority' means the following:
      (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
      (ii) activities forming part of a statutory system of social security or public retirement plans; and
      (iii) other activities conducted by a public entity for the account or with the guarantee of or using the financial resources of the Government.

   (c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b) (ii) or (b) (iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, 'services' shall include such activities.

   (d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.
2. **Domestic Regulation**

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. **Recognition**

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. **Dispute Settlement**

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. **Definitions**

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

- **Insurance and insurance-related services**
  - (i) Direct insurance (including co-insurance): (A) life, (B) non-life
  - (ii) Reinsurance and retrocession;
  - (iii) Insurance intermediation, such as brokerage and agency;
  - (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

- **Banking and other financial services (excluding insurance)**
  - (v) Acceptance of deposits and other repayable funds from the public;
  - (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
  - (vii) Financial leasing;
(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
(ix) Guarantees and commitments;
(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
   (A) money market instruments (including cheques, bills, certificates of deposits);
   (B) foreign exchange;
   (C) derivative products including, but not limited to, futures and options;
   (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
   (E) transferable securities;
   (F) other negotiable instruments and financial assets, including bullion.
(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
(xii) Money broking;
(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term 'financial service supplier' does not include a public entity.

(c) 'Public entity' means:
   (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
   (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

B. INTERPRETATION AND APPLICATION OF THE ANNEX ON FINANCIAL SERVICES

No jurisprudence or decision of a competent WTO body.

XXXVIII. SECOND ANNEX ON FINANCIAL SERVICES

A. TEXT OF THE SECOND ANNEX ON FINANCIAL SERVICES

Second Annex on Financial Services

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.
2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve, modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.

3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

B. **INTERPRETATION AND APPLICATION OF THE SECOND ANNEX ON FINANCIAL SERVICES**

*No jurisprudence or decision of a competent WTO body.*

**XXXIX. ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES**

A. **TEXT OF THE ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES**

**Annex on Negotiations on Maritime Transport Services**

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

   (a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,

   (b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.

3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.

B. **INTERPRETATION AND APPLICATION OF THE ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES**

*No jurisprudence or decision of a competent WTO body.*

**XL. ANNEX ON TELECOMMUNICATIONS**

A. **TEXT ON THE ANNEX ON TELECOMMUNICATIONS**

**Annex on Telecommunications**

1. **Objectives**

   Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.
2. **Scope**

   (a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.\(^{14}\)

   (footnote original)\(^{14}\) This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

   (b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

   (c) Nothing in this Annex shall be construed:

   (i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

   (ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. **Definitions**

   For the purposes of this Annex:

   (a) 'Telecommunications' means the transmission and reception of signals by any electromagnetic means.

   (b) 'Public telecommunications transport service' means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, inter alia, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

   (c) 'Public telecommunications transport network' means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

   (d) 'Intra-corporate communications' means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, 'subsidiaries', 'branches' and, where applicable, 'affiliates' shall be as defined by each Member. 'Intra-corporate communications' in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

   (e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. **Transparency**

   In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.
5. **Access to and use of Public Telecommunications Transport Networks and Services**

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).\(^{15}\)

\(^{15}\) The term 'non-discriminatory' is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean 'terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances'.

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services, or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;
(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. Technical Cooperation

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. Relation to International Organizations and Agreements

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.
B. **INTERPRETATION AND APPLICATION OF THE ANNEX ON TELECOMMUNICATIONS**

*No jurisprudence or decision of a competent WTO body.*

**XLII. ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS**

A. **TEXT OF THE ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS**

**Annex on Negotiations on Basis Telecommunications**

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:

   (a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,

   (b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

B. **INTERPRETATION AND APPLICATION OF THE ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS**

*No jurisprudence or decision of a competent WTO body.*

**XLII. UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES**

A. **TEXT OF THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES**

**Understanding on Commitments in Financial Services**

Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (hereinafter referred to as the "Agreement") on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement. It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;

(ii) it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement;

(iii) resulting specific commitments shall apply on a most-favoured-nation basis;

(iv) no presumption has been created as to the degree of liberalization to which a Member is committing itself under the Agreement.

Interested Members, on the basis of negotiations, and subject to conditions and qualifications where specified, have inscribed in their schedule specific commitments conforming to the approach set out below.

**A. Standstill**

Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.
B. Market Access

Monopoly Rights

1. In addition to Article VIII of the Agreement, the following shall apply:

Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope. Notwithstanding subparagraph 1(b) of the Annex on Financial Services, this paragraph applies to the activities referred to in subparagraph 1(b)(iii) of the Annex.

Financial Services purchased by Public Entities

2. Notwithstanding Article XIII of the Agreement, each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory.

Cross-border Trade

3. Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:

   (a) insurance of risks relating to:
       (i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and
       (ii) goods in international transit;

   (b) reinsurance and retrocession and the services auxiliary to insurance as referred to in subparagraph 5(a)(iv) of the Annex;

   (c) provision and transfer of financial information and financial data processing as referred to in subparagraph 5(a)(xv) of the Annex and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph 5(a)(xvi) of the Annex.

4. Each Member shall permit its residents to purchase in the territory of any other Member the financial services indicated in:

   (a) subparagraph 3(a);

   (b) subparagraph 3(b); and

   (c) subparagraphs 5(a)(v) to (xvi) of the Annex.

Commercial Presence

5. Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence.

6. A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement.
New Financial Services

7. A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

Temporary Entry of Personnel

9. (a) Each Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other Member that is establishing or has established a commercial presence in the territory of the Member:
   (i) senior managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and
   (ii) specialists in the operation of the financial service supplier.

   (b) Each Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other Member:
      (i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and
      (ii) actuarial and legal specialists.

Non-discriminatory Measures

10. Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:

   (a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;

   (b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;

   (c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and

   (d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market;

provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

11. With respect to the non-discriminatory measures referred to in subparagraphs 10(a) and (b), a Member shall endeavour not to limit or restrict the present degree of market opportunities nor the benefits already enjoyed by financial service suppliers of all other Members as a class in the territory of
the Member, provided that this commitment does not result in unfair discrimination against financial service suppliers of the Member applying such measures.

C. National Treatment

1. Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.

2. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.

D. Definitions

For the purposes of this approach:

1. A non-resident supplier of financial services is a financial service supplier of a Member which supplies a financial service into the territory of another Member from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member in which the financial service is supplied.

2. "Commercial presence" means an enterprise within a Member's territory for the supply of financial services and includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations.

3. A new financial service is a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.

B. INTERPRETATION AND APPLICATION OF THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;
Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. In *India – Patents (US)*, addressing the US claim that the Indian legal regime for patent protection for certain products was inconsistent with the *TRIPS Agreement*, the Appellate Body referred to a part of the preamble in its interpretation of Article 70.8(a):

"The Panel's interpretation here [of Article 70.8(a)] is consistent also with the object and purpose of the TRIPS Agreement. The Agreement takes into account, inter alia, 'the need to promote effective and adequate protection of intellectual property rights'.”

PART I

GENERAL PROVISIONS AND BASIC PRINCIPLES

II. ARTICLE 1

A. TEXT OF ARTICLE 1

*Article 1*

 overloaded

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

(footnote original) 1 When "nationals" are referred to in this Agreement, they 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.


1 Appellate Body Report on *India – Patents (US)*, para. 57.
B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Paragraph 1

(a) "free to determine the appropriate method of implementing"

2. In India – Patents (US), the Appellate Body reviewed the Panel's decision that India did not meet its obligations under the TRIPS Agreement in that it failed to provide "a sound legal basis to preserve novelty and priority" of certain patent applications:

"[W]hat constitutes such a sound legal basis in Indian law? To answer this question, we must recall first an important general rule in the TRIPS Agreement. Article 1.1 of the TRIPS Agreement states, in pertinent part:

'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'

Members, therefore, are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal systems. And, as a Member, India is 'free to determine the appropriate method of implementing' its obligations under the TRIPS Agreement within the context of its own legal system."

3. In Canada – Patent Term the Panel examined Canada's argument that Article 1.1 permitted it to maintain a term for patent protection of 17 years counting from the date of grant of a patent, in spite of the minimum requirement, under Article 33 and 70, of granting patent protection for a period of 20 years from the date of filing of such application. The Panel noted the discretion of Members, under Article 1.1, to determine the appropriate method of implementing their obligations under the TRIPS Agreement, but emphasized that such discretion did not extend to choosing which obligation to comply with:

"(…) Article 33 contains an obligation concerning the earliest available date of expiry of patents, and Article 62.2 contains a separate obligation prohibiting acquisition procedures which lead to unwarranted curtailment of the period of protection. We recognize that some curtailment is permitted by the text of these two provisions. However, Article 1.1 gives Members the freedom to determine the appropriate method of implementing those two specific requirements, but not to ignore either requirement in order to implement another putative obligation concerning the length of effective protection."³

III. ARTICLE 2 AND INCORPORATED PROVISIONS OF THE PARIS CONVENTION (1967)

A. TEXT OF ARTICLE 2

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).⁴

³ Panel Report on Canada – Patent Term, para. 6.94.
⁴ The text of Articles 1-12 and 19 of the Paris Convention appears in Section LXXV.
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2 AND INCORPORATED PROVISIONS OF THE PARIS CONVENTION (1967)

1. Paragraph 2

4. In EC – Bananas (22.6), the Arbitrators followed Ecuador's request under Article 22.2 of the DSU for suspension of concessions and obligations, including certain obligations under the TRIPS Agreement. In their award, the Arbitrators addressed, inter alia, the relationship between the WTO Agreement and the obligations of WTO Members to each other arising under the four conventions listed in Article 2:

"This provision can be understood to refer to the obligations that the contracting parties of the Paris, Berne and Rome Conventions and the IPIC Treaty, who are also WTO Members, have between themselves under these four treaties. This would mean that, by virtue of the conclusion of the WTO Agreement, e.g. Berne Union members cannot derogate from existing obligations between each other under the Berne Convention. For example, the fact that Article 9.1 of the TRIPS Agreement incorporates into that Agreement Articles 1-21 of the Berne Convention with the exception of Article 6bis does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention."5

2. Article 6ter of the Paris Convention (1967) as incorporated in the TRIPS Agreement

5. At its meeting of 11 December 1995, the Council for TRIPS decided on arrangements that apply with respect to implementation of the obligations under the TRIPS Agreement stemming from the incorporation of the provisions of Article 6ter of the Paris Convention (1967) on Marks: Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations.6

6. Article 3 of the Agreement between the World Intellectual Property Organization and the World Trade Organization, done on 22 December 1995, (the "WIPO-WTO Agreement"), provides for procedures relating to communication of emblems and transmittal of objections under Article 6ter of the Paris Convention for the purposes of the TRIPS Agreement.7

IV. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971),

5 Decision by the Arbitrators on EC – Bananas (Ecuador) (Article 22.6 – EC), para. 149.
6 Decision of the Council for TRIPS, document IP/C/7.
7 The text of the Agreement can be found in IP/C/6.
the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

(footnote original) For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Paragraph 1

(a) "treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property"

7. Indonesia – Autos concerned the consistency of Indonesia's National Car Programme with several WTO agreements, including claims that the provisions of the programme discriminated against nationals of other WTO Members with respect to trademarks, in violation of Article 3 (the Panel Report was not appealed). With respect to the claim relating to the acquisition of trademarks, the Panel rejected the United States' claim that Indonesian law was according less favourable treatment to foreign nationals than to Indonesian nationals. The Panel saw the Indonesian law as merely stipulating, in a non-discriminatory manner, that only certain signs could be used as trademarks:

"The issue to be examined therefore in regard to the United States' claim relating to the 'acquisition' of trademarks is whether, under the Indonesian law and practice which is before us, the treatment accorded to foreign nationals in respect of the acquisition of trademark rights, through the applicable procedures, is less favourable than that accorded to the Indonesian company in the National Car Programme. We do not consider that any evidence has been produced in this case to support such a claim. … The fact that only certain signs can be used as trademarks for meeting the relevant qualifications under the National Car Programme, and many others not, does not mean that trademark rights, as stipulated in Indonesian trademark law, cannot be acquired for these other signs in a non-discriminatory manner."

8. Equally, with respect to the argument that less favourable treatment was being accorded by the regulations pertaining to the maintenance of trademarks, the Panel could not discern any less favourable treatment under Indonesian law for foreign nationals:

"We do not accept this argument for the following reasons. First, no evidence has been put forward to refute the Indonesian statement that the system, in requiring a new, albeit Indonesian-owned, trademark to be created, applies equally to pre-existing trademarks owned by Indonesian nationals and foreign nationals. Second, if a foreign company enters into an arrangement with a Pioneer company, it would do so voluntarily, with knowledge of any consequent implications for its

ability to maintain pre-existing trademark rights, as indeed the United States itself has acknowledged in its submissions to the Panel.9

9. The Panel in Indonesia – Autos also cautioned against construing the national treatment obligation under Article 3 of the TRIPS Agreement as addressing also issues of tariffs, subsidies or other measure with respect to domestic companies which could have an indirect impact on the maintenance of trademark rights by foreign nationals:

"In considering this argument, we note that any customs tariff, subsidy or other governmental measure of support could have a 'de facto' effect of giving such an advantage to the beneficiaries of this support. We consider that considerable caution needs to be used in respect of 'de facto' based arguments of this sort, because of the danger of reading into a provision obligations which go far beyond the letter of that provision and the objectives of the Agreement. It would not be reasonable to construe the national treatment obligation of the TRIPS Agreement in relation to the maintenance of trademark rights as preventing the grant of tariff, subsidy or other measures of support to national companies on the grounds that this would render the maintenance of trademark rights by foreign companies wishing to export to that market relatively more difficult."10

10. The following passage in Indonesia – Autos illustrates the Panel's approach to the relationship between Article 3 and other provisions of the TRIPS Agreement:

"As is made clear by the footnote to Article 3 of the TRIPS Agreement, the national treatment rule set out in that Article does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights specifically addressed in this Agreement'. In putting forward its claim on this point, the United States has developed arguments relating to the use of trademarks specifically addressed by Article 20 of the TRIPS Agreement. It is the first sentence of this Article, which is entitled 'Other Requirements', to which the United States has made reference. …

The main issues before us in examining this claim of the United States are therefore: first, is the use of a trademark to which the Indonesian law and practices at issue relates 'specifically addressed' by Article 20; and, second, if so, does this aspect of the system discriminate in favour of Indonesian nationals and against those of other WTO Members."11

(b) Notification requirements

11. At its meeting of 27 February 1997, the Council for TRIPS referred to three options for meeting obligations to notify laws and regulations that correspond to the obligations of Articles 3, 4 and 5 of the TRIPS Agreement. It circulated a format as a practical aid in respect of one of those options.12

2. Relationship with other Articles

12. With respect to the relationship with Article 65.2, see the excerpt from the panel report referenced in paragraph 109 below.

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12 IP/C/M/12, paras. 10-16. The format can be found in IP/C/9.
V.  **ARTICLE 4**

A.  **TEXT OF ARTICLE 4**

*Article 4*

**Most-Favoured-Nation Treatment**

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

B.  **INTERPRETATION AND APPLICATION OF ARTICLE 4**

1.  **Paragraph (d)**

(a) Notification requirements

13. At its meeting of 27 February 1997, the Council for TRIPS referred to three options for meeting obligations to notify laws and regulations that correspond to the obligations of Articles 3, 4 and 5 of the *TRIPS Agreement*. It circulated a format as a practical aid in respect of one of those options.  

VI.  **ARTICLE 5**

A.  **TEXT OF ARTICLE 5**

*Article 5*

**Multilateral Agreements on Acquisition or Maintenance of Protection**

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

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13 See document IP/C/9.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 5**

1. **Notification**

14. With respect to notifications of laws and regulations relating to Articles 3, 4 and 5 of the *TRIPS Agreement*, see paragraph 11 above.

VII. **ARTICLE 6**

A. **TEXT OF ARTICLE 6**

*Article 6*

*Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

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*

*Objectives*

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 7**

1. **Relationship with other Articles**

15. With respect to the relationship with Article 30, see the excerpt from the panel report referenced in paragraph 72 below.

IX. **ARTICLE 8**

A. **TEXT OF ARTICLE 8**

*Article 8*

*Principles*

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

1. Relationship with other Articles

16. With respect to the relationship with Article 30, see paragraph 72 below.

PART II

STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

Section 1: Copyright and Related Rights

X. ARTICLE 9 AND INCORPORATED PROVISIONS OF THE BERNE CONVENTION (1971)

A. TEXT OF ARTICLE 9

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

The text of Articles 1-21 of the Berne Convention and Appendix, other than Article 6bis appears in Section LXXVI below.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9 AND INCORPORATED PROVISIONS OF THE BERNE CONVENTION (1971)

1. Relationship with the Berne Convention (1971)

17. In US – Section 110(5) Copyright Act, in examining the consistency of certain provisions of the US Copyright Act with the TRIPS Agreement, the Panel made a finding on the relationship between the TRIPS Agreement and the Berne Convention (1971):

"Articles 9–13 of Section 1 of Part II of the TRIPS Agreement entitled 'Copyright and Related Rights' deal with the substantive standards of copyright protection. Article 9.1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1–21 of the Berne Convention (1971) (with the exception of Article 6bis on moral rights and the rights derived therefrom) and the Appendix thereto. …

We note that through their incorporation, the substantive rules of the Berne Convention (1971), including the provisions of its Articles 11bis(1)(iii) and 11(1)(ii),
have become part of the TRIPS Agreement and as provisions of that Agreement have to be read as applying to WTO Members."


"We note that Article 30 of the Vienna Convention on the application of successive treaties is not relevant in this respect, because all provisions of the TRIPS Agreement – including the incorporated Articles 1–21 of the Berne Convention (1971) – entered into force at the same point in time."

19. With respect to the relationship of the minor exceptions doctrine under the Berne Convention (1971) and the TRIPS Agreement, see also the excerpt from the panel report referenced in paragraph 28 below.

20. In US – Section 110(5) Copyright Act, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions of the TRIPS Agreement and the Berne Convention (1971):

"In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases. We believe that our interpretation of the legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."

21. The Panel adopted the same approach to the interpretation of the TRIPS Agreement and the WIPO Copyright Treaty ("WCT") as it had applied with respect to the TRIPS Agreement and the Berne Convention (1971) the Panel stated as follows:

"In paragraph 6.66 we discussed the need to interpret the Berne Convention and the TRIPS Agreement in a way that reconciles the texts of these two treaties and avoids a conflict between them, given that they form the overall framework for multilateral copyright protection. The same principle should also apply to the relationship between the TRIPS Agreement and the WCT. The WCT is designed to be compatible with this framework, incorporating or using much of the language of the Berne Convention and the TRIPS Agreement. The WCT was unanimously concluded at a diplomatic conference organized under the auspices of WIPO in December 1996, one year after the WTO Agreement entered into force, in which 127 countries participated. Most of these countries were also participants in the TRIPS negotiations and are Members of the WTO. For these reasons, it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid
conflicts within this overall framework, except where these treaties explicitly contain different obligations.”

2. Article 11 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

(a) Scope of Article 11

22. In US – Section 110(5) Copyright Act, the Panel was called upon to interpret Article 11 of the Berne Convention (1971). The Panel considered the scope of Article 11 and agreed with the parties that a particular type of communication was covered by the exclusive rights set forth in Article 11(1) of the Berne Convention (1971):

"As in the case of Article 11bis(1) of the Berne Convention (1971), which concerns broadcasting to the public and communication of a broadcast to the public, the exclusive rights conferred by Article 11 cover public performance; private performance does not require authorization. Public performance includes performance by any means or process, such as performance by means of recordings (e.g., CDs, cassettes and videos). It also includes communication to the public of a performance of the work.

We share the understanding of the parties that a communication to the public by loudspeaker of a performance of a work transmitted by means other than hertzian waves is covered by the exclusive rights conferred by Article 11(1) of the Berne Convention (1971)."

(b) Relationship between Article 11 of the Berne Convention (1971) and other Articles of this Convention.

23. In US – Section 110(5) Copyright Act, the Panel found Article 11 to be a general rule concerning the communication of performances of works, while Article 11bis provided a specific rule concerning a particular type of communication:

"Regarding the relationship between Articles 11 and 11bis, we note that the rights conferred in Article 11(1)(ii) concern the communication to the public of performances of works in general. Article 11bis(1)(iii) is a specific rule conferring exclusive rights concerning the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work."

3. Article 11bis of the Berne Convention (1971) as incorporated in the TRIPS Agreement

(a) Paragraph 1

24. In US – Section 110(5) Copyright Act, in interpreting Article 11bis(1), the Panel addressed the three "separate exclusive" rights provided by Article 11bis(1) subparagraph (i) through (iii):
"In the light of Article 2 of the Berne Convention (1971), 'artistic' works in the meaning of Article 11bis(1) include non-dramatic and other musical works. Each of the subparagraphs of Article 11bis(1) confers a separate exclusive right; exploitation of a work in a manner covered by any of these subparagraphs requires an authorization by the right holder. For example, the communication to the public of a broadcast creates an additional audience and the right holder is given control over, and may expect remuneration from, this new public performance of his or her work.

The right provided under subparagraph (i) of Article 11bis(1) is to authorize the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both radio and television broadcasts. Subparagraph (ii) concerns the subsequent use of this emission; the authors' exclusive right covers any communication to the public by wire or by rebroadcasting of the broadcast of the work, when the communication is made by an organization other than the original one.

Subparagraph (iii) provides an exclusive right to authorize the public communication of the broadcast of the work by loudspeaker, on a television screen, or by other similar means. Such communication involves a new public performance of a work contained in a broadcast, which requires a licence from the right holder.\textsuperscript{21}

\begin{itemize}
  \item \textbf{(b)} \textit{Paragraph 2}
  \begin{itemize}
    \item In \textit{US – Section 110(5) Copyright Act}, the Panel addressed the authorization, provided by Article 11bis(2), to substitute a compulsory licence for an exclusive right under Article 11bis (1):
      \begin{quote}
        "We also conclude that Article 11bis(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement allows Members to substitute a compulsory licence for an exclusive right under Article 11bis(1), or determine other conditions provided that they are not prejudicial to the right holder's right to obtain an equitable remuneration. Article 11bis(2) is not relevant for the case at hand, because the United States has not provided a right in respect of the uses covered by the present Section 110(5), the exercise of which would have been subjected to conditions determined in its legislation."\textsuperscript{22}
      \end{quote}
  \end{itemize}
\end{itemize}

\begin{itemize}
  \item \textbf{(c)} \textit{Relationship between Article 11bis of the Berne Convention (1971) and other Articles of the Convention}
  \begin{itemize}
    \item With respect to the relationship between Articles 11 and 11bis of the Berne Convention (1971) as incorporated in the \textit{TRIPS Agreement}, see paragraph 23 above.
  \end{itemize}
\end{itemize}

\begin{itemize}
  \item \textbf{(d)} \textit{Minor exceptions doctrine}
  \begin{itemize}
    \item In \textit{US – Section 110(5) Copyright Act}, the Panel addressed the question whether the "minor exceptions doctrine" in the context of copyrights applied under the \textit{TRIPS Agreement}. The Panel decided first to examine to what extent this doctrine formed part of the Berne Convention (1971) \textit{acquis} and second, to assess whether that doctrine had been incorporated into the \textit{TRIPS Agreement}. With respect to the scope of the minor exceptions doctrine under the Berne Convention (1971), the Panel held:
  \end{itemize}
\end{itemize}

\textsuperscript{22} Panel Report on \textit{US – Section 110(5) Copyright Act}, para. 6.95.
"The General Report of the Brussels Conference of 1948 refers to 'religious ceremonies, military bands and the needs of the child and adult education' as examples of situations in respect of which minor exceptions may be provided. The Main Committee I Report of the Stockholm Conference of 1967 refers also to 'popularization' as one example. When these references are read in their proper context, it is evident that the given examples are of an illustrative character. …

… On the basis of the information provided to us, we are not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders. On the other hand, non-commercial uses of works, e.g., in adult and child education, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed minor. …"

23

28. As the second step in its "minor exceptions analysis", the Panel examined to what extent this doctrine under the Berne Convention (1971) had been incorporated into the TRIPS Agreement

"Having concluded that the minor exceptions doctrine forms part of the 'context' of, at least, Articles 11bis and 11 of the Berne Convention (1971) by virtue of an agreement within the meaning of Article 31(2)(a) of the Vienna Convention, which was made between the Berne Union members in connection with the conclusion of the respective amendments to that Convention, we next address the second step of our analysis …

… we conclude that, in the absence of any express exclusion in Article 9.1 of the TRIPS Agreement, the incorporation of Articles 11 and 11bis of the Berne Convention (1971) into the Agreement includes the entire acquis of these provisions, including the possibility of providing minor exceptions to the respective exclusive rights."24

(e) Relationship between Article 11bis(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement

29. With respect to the relationship between Article 11bis(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement, see paragraphs 34-36 below.

4. Article 20 of the Berne Convention (1971) as incorporated in the TRIPS Agreement

30. In US – Section 110(5) Copyright Act, the Panel declined to address Article 20 of the Berne Convention (1971), because – contrary to the European Communities' argument – the United States was not claiming that the TRIPS Agreement authorizes exceptions inconsistent with the Berne Convention (1971):

"In regard to the argument of the European Communities that the US interpretation of Article 13 is incompatible with Article 20 of the Berne Convention (1971) and Article 2.2 of the TRIPS Agreement because it treats Article 13 of the TRIPS Agreement as providing a basis for exceptions that would be inconsistent with those

permitted under the Berne Convention (1971), we note that the United States is not arguing this but rather that Article 13 clarifies and articulates the standards applicable to minor exceptions under the Berne Convention (1971). Since the EC arguments in relation to these provisions would only be relevant if a finding that would involve inconsistency with the Berne Convention (1971) were being advocated, we do not feel it is necessary to examine them further.  

5. Appendix to the Berne Convention (1971) as incorporated in the TRIPS Agreement

1. At its meeting of 16 July 1998, the Council for TRIPS took note of the following statement by its Chairperson, in the light of informal consultations on the calculation of renewable periods of ten years under Article I(2) of the Appendix to the Berne Convention (1971):

"The provisions of Article I(2) of the Appendix as incorporated into the TRIPS Agreement can be understood so that, for the purposes of the TRIPS Agreement, the relevant periods are calculated by reference to the same date, i.e. 10 October 1974, as for the purposes of the Berne Convention. This would mean that renewable periods of ten years would be the same for the purposes of both Agreements, and that, also under the TRIPS Agreement, the period of ten years currently running would expire on 10 October 2004."

XI. ARTICLE 10

A. TEXT OF ARTICLE 10

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

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

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which

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25 Panel Report on US – Section 110(5) Copyright Act, para. 6.82.
26 IP/C/M/19, para. 8; IP/C/14.
is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

B. **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**

*Term of Protection*

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

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**

*Limitations and Exceptions*

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 13**

1. **General**

   (a) Scope

31. In *US – Section 110(5) Copyright Act*, the Panel rejected a suggested limitation of the scope of Article 13:

"In our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."²⁷

32. With respect to the scope of Article 13, see paragraph 34 below.

33. In interpreting Article 13, the Panel in *US – Section 110(5) Copyright Act* outlined its interpretative approach to this provision, specified the conditions for limitations or exceptions to exclusive rights and found that these conditions apply cumulatively:

"Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to 'redundancy or inutility'. The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. Both parties agree on the cumulative nature of the three conditions. The Panel shares their view. It may be noted at the outset that Article 13 cannot have more than a narrow or limited operation. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature. The narrow sphere of its operation will emerge from our discussion and application of its provisions in the paragraphs which follow."\(^{28}\)

(b) Relationship with other Articles

34. In *US – Section 110(5) Copyright Act*, the Panel made a finding on the scope of application of Article 13 with respect to individual subparagraphs of Articles 11 and 11bis of the Berne Convention (1971):

"We conclude that Article 13 of the TRIPS Agreement applies to Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement, given that neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement."\(^{29}\)

35. The Panel also clearly distinguished the different situations covered by Article 11bis(2) of the Berne Convention (1971) and Article 13 of the *TRIPS Agreement*, respectively:

"We believe that Article 11bis(2) of the Berne Convention (1971) and Article 13 cover different situations. On the one hand, Article 11bis(2) authorizes Members to determine conditions under which the rights conferred by Article 11bis(1)(i-iii) may be exercised. The imposition of such conditions may completely replace the free exercise of the exclusive right of authorizing the use of the rights embodied in subparagraphs (i-iii) provided that equitable remuneration and the author's moral rights are not prejudiced. However, unlike Article 13 of the TRIPS Agreement, Article 11bis(2) of the Berne Convention (1971) would not in any case justify use free of charge.

On the other hand, it is sufficient that a limitation or an exception to the exclusive rights provided under Article 11bis(1) of the Berne Convention (1971) as incorporated into the TRIPS Agreement meets the three conditions contained in its Article 13 to be permissible. If these three conditions are met, a government may

\(^{28}\) Panel Report on *US – Section 110(5) Copyright Act*, para. 6.97.

\(^{29}\) Panel Report on *US – Section 110(5) Copyright Act*, para. 6.94.
choose between different options for limiting the right in question, including use free of charge and without an authorization by the right holder. This is not in conflict with any of the paragraphs of Article 11bis because use free of any charge may be permitted for minor exceptions by virtue of the minor exceptions doctrine which applies, inter alia, also to Article 11bis.

As regards situations that would not meet the above-mentioned three conditions, a government may not justify an exception, including one involving use free of charge, by Article 13 of the TRIPS Agreement. However, also in these situations Article 11bis(2) of the Berne Convention (1971) as incorporated into the TRIPS Agreement would nonetheless allow Members to substitute, for an exclusive right, a compulsory licence, or determine other conditions provided that they were not prejudicial to the right holder's right to obtain an equitable remuneration.  

30 Panel Report on US – Section 110(5) Copyright Act, paras. 6.87-6.89.


36. In the same context, the Panel considered that a reading of Articles 11bis(2) of the Berne Convention (1971) and Article 13 of the TRIPS Agreement which did not differentiate the situations covered respectively by these provisions, would render Article 13 "somewhat redundant":

"We believe that our interpretation gives meaning and effect to Article 11bis(2), the minor exceptions doctrine as it applies to Article 11bis, and Article 13. However, in our view, under the interpretation suggested by the European Communities this would not be the case, e.g., in the following situations. If any de minimis exception from rights conferred by Article 11bis(1)(i-iii) were subject to the requirement to provide equitable remuneration within the meaning of Article 11bis(2), no exemption whatsoever from the rights recognized by Article 11bis(1) could permit use free of charge even if the three criteria of Article 13 were met. As a result, narrow exceptions or limitations would be subject to the three conditions of Article 13 in addition to the requirement to provide equitable remuneration. At the same time, broader exceptions or limitations which do not comply with the criteria of Article 13 could arguably still be justified under Article 11bis(2) as long as the conditions imposed ensure, inter alia, equitable remuneration. Such an interpretation could render Article 13 somewhat redundant because narrow exceptions would be subject to all the requirements of Article 13 and Article 11bis(2) on a cumulative basis, while for broader exceptions compliance with Article 11bis(2) could suffice. Both situations would lead to the result that any use free of charge would not be permissible. These examples are illustrative of situations where the terms and conditions of Article 13, Article 11bis(2) and the minor exceptions doctrine would not be given full meaning and effect."

37. With respect to the relationship of Article 13 to Article 9(2) of the Berne Convention (1971) and Articles 17, 26.2 and 30 of the TRIPS Agreement, see footnote 77.

(c) "certain special cases"

38. In US – Section 110(5) Copyright Act, the Panel interpreted the meaning of the phrase "certain special cases", the first condition in Article 13: In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute. However, public policy purposes stated by
law-makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition. 32

39. The Panel also addressed the relevance of whether the measure at issue had as its declared aim a legitimate public policy:

"As regards the parties' arguments on whether the public policy purpose of an exception is relevant, we believe that the term 'certain special cases' should not lightly be equated with 'special purpose'. 33 It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article. We also recall in this respect that in interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation. 34-35

40. The Panel subsequently applied the above quoted standard under Article 13 to examine whether the United States' measure at issue in US – Section 110(5) Copyright Act met the first condition of "certain special cases":

"[W]e first examine whether the exceptions have been clearly defined. Second, we ascertain whether the exemptions are narrow in scope, inter alia, with respect to their reach. In that respect, we take into account what percentage of eating and drinking establishments and retail establishments may benefit from the business exemption under subparagraph (B), and in turn what percentage of establishments may take advantage of the homestyle exemption under subparagraph (A). On a subsidiary basis, we consider whether it is possible to draw inferences about the reach of the business and homestyle exemptions from the stated policy purposes underlying these exemptions according to the statements made during the US legislative process." 36

(d) "do not conflict with a normal exploitation of the work"

41. In US – Section 110(5) Copyright Act, in examining the second condition under Article 13, i.e. "do not conflict with a normal exploitation of the work", the Panel first sought a definition for the term "exploitation":

"The ordinary meaning of the term 'exploit' connotes 'making use of' or 'utilising for one's own ends'. We believe that 'exploitation' of musical works thus refers to the

33 (footnote original) We note that the term "special purpose" has been referred to in interpreting the largely similarly worded Article 9(2) of the Berne Convention (1971). See Ricketson, The Berne Convention, op.cit., p. 482. We are ready to take into account "teachings of the most highly qualified publicists of the various nations" as a "subsidiary source for the determination of law". We refer to this phrase in the sense of Article 38(d) of the Statute of the International Court of Justice which refers to such "teachings" (or, in French "la doctrine") as "subsidiary means for the determination of law." But we are cautious to use the interpretation of a term developed in the context of an exception for the reproduction right for interpreting the same terms in the context of a largely similarly worded exception for other exclusive rights conferred by copyrights.
34 (footnote original) See Appellate Body Report on Japan – Alcoholic Beverages, pp. 19-23, for the rejection of the so-called "aims and effects" test in the context of the national treatment clause of Article III of GATT 1994. See also the Appellate Body Report on EC – Bananas III, paras. 241, 243, 246, for the rejection of the "aims-and-effects" test in the context of the national treatment clause of Article XVII of GATS.
activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.\textsuperscript{37}

42. The Panel then proceeded to provide an interpretation of the term "normal":

"We note that the ordinary meaning of the term 'normal' can be defined as 'constituting or conforming to a type or standard; regular, usual, typical, ordinary, conventional ...'. In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard. We do not feel compelled to pass a judgment on which one of these connotations could be more relevant. Based on Article 31 of the Vienna Convention, we will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of 'normal'.

If 'normal' exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning. Therefore, 'normal' exploitation clearly means something less than full use of an exclusive right.\textsuperscript{38,39}

43. The Panel then endorsed a differentiated examination of whether a limitation or an exception conflicts with the normal exploitation of a work:

"We agree with the European Communities that whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually."\textsuperscript{40}

44. The Panel also indicated that when assessing the meaning of "normal exploitation", it would consider both empirical and normative criteria:

"In our view, this test [whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available for exploitation because of this exemption] seems to reflect the empirical or quantitative aspect of the connotation of 'normal', the meaning of 'regular, usual, typical or ordinary'.

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\textsuperscript{38} (footnote original) In the context of exceptions to reproduction rights under Article 9(2) of the Berne Convention (1971) – whose second condition is worded largely identically to the second condition of Article 13 of the TRIPS Agreement – the Main Committee I of the Stockholm Diplomatic Conference (1967) stated:

"If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."


\textsuperscript{40} Panel Report on \textit{US – Section 110(5) Copyright Act}, para. 6.173.
ordinary'. We can, therefore, accept this US approach, but only for the empirical or quantitative side of the connotation. We have to give meaning and effect also to the second aspect of the connotation, the meaning of 'conforming to a type or standard'. We described this aspect of normalcy as reflecting a more normative approach to defining normal exploitation, that includes, _inter alia_, a dynamic element capable of taking into account technological and market developments. The question then arises how this normative aspect of 'normal' exploitation could be given meaning in relation to the exploitation of musical works.

…

Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.  

41 After exploring the two different connotations of the term "normal exploitation", the Panel then set forth a test for "normal exploitation" based on the consideration of "economic competition" and "market conditions":

"We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point in time, given that, in its view, it is the potential effect that determines the market conditions.

…

We base our appraisal of the actual and potential effects on the commercial and technological conditions that prevail in the market currently or in the near future. What is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences. Thus, while we do not wish to speculate on future developments, we need to consider the actual and potential effects of the exemptions in question in the current market and technological environment.

We do acknowledge that the extent of exercise or non-exercise of exclusive rights by right holders at a given point in time is of great relevance for assessing what is the normal exploitation with respect to a particular exclusive right in a particular market. However, in certain circumstances, current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation. For example, where a particular use of works is not covered by the exclusive rights conferred in the law of a jurisdiction, the fact that the right

holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation. The same would be true in a situation where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights.\(^{42}\)

(e) "do not unreasonably prejudice the legitimate interests of the right holder"

46. In *US – Section 110(5) Copyright Act*, in examining the third condition under Article 13, i.e. the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel distinguished several steps in the analysis of this requirement:

"We note that the analysis of the third condition of Article 13 of the TRIPS Agreement implies several steps. First, one has to define what are the 'interests' of right holders at stake and which attributes make them 'legitimate'. Then, it is necessary to develop an interpretation of the term 'prejudice' and what amount of it reaches a level that should be considered 'unreasonable'.\(^{43}\)

47. The Panel then proceeded to examined each of these terms in turn and began with their ordinary meaning:

"The ordinary meaning of the term 'interests' may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of 'interests' is not necessarily limited to actual or potential economic advantage or detriment.

The term 'legitimate' has the meanings of

(a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper;

(b) normal, regular, conformable to a recognized standard type.'

Thus, the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

We note that the ordinary meaning of 'prejudice' connotes damage, harm or injury. 'Not unreasonable' connotes a slightly stricter threshold than 'reasonable'. The latter term means 'proportionate', 'within the limits of reason, not greatly less or more than might be thought likely or appropriate', or 'of a fair, average or considerable amount or size'.\(^{44}\)

48. After considering the ordinary meaning of the individual terms of the phrase "do not unreasonably prejudice the legitimate interests of the right holder", the Panel considered these terms more specifically:

\(^{42}\) Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.183-6.184 and 6.187-6.188.

\(^{43}\) Panel Report on *US – Section 110(5) Copyright Act*, para. 6.222.

\(^{44}\) Panel Report on *US – Section 110(5) Copyright Act*, paras. 6.223-6.225.
"Given that the parties do not question the 'legitimacy' of the interest of right holders to exercise their rights for economic gain, the crucial question becomes which degree or level of 'prejudice' may be considered as 'unreasonable'. Before dealing with the question of what amount or which kind of prejudice reaches a level beyond reasonable, we need to find a way to measure or quantify legitimate interests.

In our view, one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders. It is possible to estimate in economic terms the value of exercising, e.g., by licensing, such rights. That is not to say that legitimate interests are necessarily limited to this economic value.

In examining the second condition of Article 13, we have addressed the US argument that the prejudice to right holders caused by the exemptions at hand are minimal because they already receive royalties from broadcasting stations. We concluded that each exclusive right conferred by copyright, inter alia, under each subparagraph of Articles 11bis and 11 of the Berne Convention (1971), has to be considered separately for the purpose of examining whether a possible conflict with a 'normal exploitation' exists.

The crucial question is which degree or level of 'prejudice' may be considered as 'unreasonable', given that, under the third condition, a certain amount of 'prejudice' has to be presumed justified as 'not unreasonable'. In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.  


49. The Panel indicated that the "reasonableness" of the prejudice to the right holder should not be assessed only with respect to the parties of the dispute at hand:

"However, given our considerations above, our assessment of whether the prejudice, caused by the exemptions contained in Section 110(5), to the legitimate interests of the right holder is of an unreasonable level is not limited to the right holders of the European Communities."

50. With respect to its methodology for examination of the existence of a prejudice, the Panel stated that it would consider information on market conditions and consider both actual and potential effects:

"We will consider the information on market conditions provided by the parties taking into account, to the extent feasible, the actual as well as the potential prejudice caused by the exemptions, as a prerequisite for determining whether the extent or degree of prejudice is of an unreasonable level. In these respects, we recall our consideration above that taking account of actual as well as potential effects is consistent with past GATT/WTO dispute settlement practice.

..."

[I]n considering the prejudice to the legitimate interests of right holders caused by the business exemption, we have to take into account not only the actual loss of income from those restaurants that were licensed by the CMOs at the time that the exemption
become effective, but also the loss of potential revenue from other restaurants of similar size likely to play music that were not licensed at that point.”

XV. ARTICLE 14

A. TEXT OF ARTICLE 14

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply mutatis mutandis to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, mutatis mutandis, to the rights of performers and producers of phonograms in phonograms.

B. INTERPRETATION AND APPLICATION OF ARTICLE 14

No jurisprudence or decision of a competent WTO body.

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Section 2: Trademarks

XVI. ARTICLE 15

A. TEXT OF ARTICLE 15

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

B. 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

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.
3. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 16**

1. **General**

51. In its review under Article 24.2 concerning the application of the provisions from the Section of the TRIPS Agreement on geographical indications, the Council for TRIPS invited Members to respond to a Checklist of Questions, some of which relate to Article 16. See paragraph 58 below

**XVIII. ARTICLE 17**

A. **TEXT OF ARTICLE 17**

*Article 17*

*Exceptions*

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 17**

52. With respect to the relationship of Article 17 to Article 9(2) of the Berne Convention (1971) and Articles 13, 26.2 and 30 of the TRIPS Agreement, see footnote 77.

**XIX. ARTICLE 18**

A. **TEXT OF ARTICLE 18**

*Article 18*

*Term of Protection*

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 18**

No jurisprudence or decision of a competent WTO body.
XX. ARTICLE 19

A. TEXT OF ARTICLE 19

Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

B. INTERPRETATION AND APPLICATION OF ARTICLE 19

No jurisprudence or decision of a competent WTO body.

XXI. ARTICLE 20

A. TEXT OF ARTICLE 20

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

B. INTERPRETATION AND APPLICATION OF ARTICLE 20

53. The dispute in Indonesia – Autos occurred before the end of the transitional period for developing country Members to implement certain provisions of the TRIPS Agreement. However, the complaint raised Article 20 only in conjunction with two other articles to which the transitional period did not apply. With respect to the claim concerning national treatment under Article 3, the Panel did not consider the provisions of the relevant Indonesian law as "requirements" within the meaning of Article 20:

"In taking up the first of these questions, [i.e. is the use of a trademark to which the Indonesian law and practices at issue relates 'specifically addressed' by Article 20] the issue to be considered initially is whether the Indonesian law and practices in question constitute a special requirement that might encumber the use of the trademarks of nationals of other WTO Members in terms of Article 20 of the TRIPS Agreement. The United States has put forward two basic arguments on this question, which are similar to the arguments it has put forward also in regard to the maintenance of trademarks (...). The first argument is that a foreign company that enters into an arrangement with a Pioneer company would be encumbered in using the trademark that it used elsewhere for the model that was adopted by the National
Car Programme. We do not accept that this argument establishes an inconsistency with the provisions of Article 20, for the reason (…) that, if a foreign company enters into an arrangement with a Pioneer company it does so voluntarily and in the knowledge of any consequent implications for its ability to use any pre-existing trademark. In these circumstances, we do not consider the provisions of the National Car Programme as they relate to trademarks can be construed as 'requirements', in the sense of Article 20.

The second United States argument is that non-Indonesian car companies are encumbered in using their trademarks in Indonesia by being put at a competitive disadvantage because the cars produced under the National Car Programme bearing the Indonesian trademark benefit from tariff, subsidy and other benefits flowing from that programme. In regard to this argument, we also feel that the points developed in our earlier discussion of the United States claims regarding the maintenance of trademarks are relevant in particular in paragraph 14.273 above. Moreover, the United States has not explained to our satisfaction how the ineligibility for benefits accruing under the National Car Programme could constitute 'requirements' imposed on foreign trademark holders, in the sense of Article 20 of the TRIPS Agreement.\textsuperscript{48}

The Panel made the same finding with respect to the claim concerning the commitment under Article 65.5:

"The arguments put forward by the United States in support of its claim are essentially the same as those that have been considered in paragraphs 14.277 and 14.278 above. For the reasons set out in those paragraphs above, we find that the United States has not demonstrated that measures have been taken that reduce the degree of consistency with the provisions of Article 20 and which would therefore be in violation of Indonesia's obligations under Article 65.5 of the TRIPS Agreement."\textsuperscript{49}

XXII. ARTICLE 21

A. TEXT OF ARTICLE 21

\textbf{Article 21}

\textit{Licensing and Assignment}

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

\textit{No jurisprudence or decision of a competent WTO body.}

Section 3: Geographical Indications

XXIII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

   (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

   (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

55. With respect to the review under Article 24.2 of the application of the provisions of the Section of the TRIPS Agreement on geographical indications, see paragraph 58 below.

XXIV. ARTICLE 23

A. TEXT OF ARTICLE 23

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.\(^4\)

\(^4\) Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.
2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, _ex officio_ if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

B. _INTERPRETATION AND APPLICATION OF ARTICLE 23_

1. **General**

56. With respect to the review under Article 24.2 of the application of the provisions of the Section of the _TRIPS Agreement_ on geographical indications, see paragraph 58 below.

2. **Paragraph 4**

57. At its meeting of 27 February 1997, the Council for TRIPS agreed to initiate preliminary work on issues relevant to the negotiations specified in Article 23.4 of the _TRIPS Agreement_ through an information-gathering activity. In this connection, at its meeting of 19 September 1997, the Council requested the Secretariat to prepare a factual background note on existing international notification and registration systems for geographical indications relating to wines and spirits, according to an agreed outline. At its meeting of 17 February 1999, the Council agreed to request the Secretariat to look to see what additional information it could provide on national and international systems for the protection of geographical indications relating to products other than wines and spirits, taking into account certain matters.

XXV. **ARTICLE 24**

A. **TEXT OF ARTICLE 24**

*Article 24*

*International Negotiations; Exceptions*

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members...
in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI;

or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

1. Paragraph 2

58. At its meeting of 12 May 1998, the Council for TRIPS, in its review under Article 24.2 of the application of the provisions of the section of the TRIPS Agreement on geographical indications, took note of a Checklist of Questions53 and invited those Members already under an obligation to apply the provisions of the section on geographical indications to provide responses, it being understood that

53 IP/C/M/18, para. 45. The Checklist of Questions was circulated as IP/C/13.
other Members could also furnish replies on a voluntary basis. Further, at its meeting of 16 July 1998, the Council for TRIPS took note of some additional questions and agreed that those questions be included in the Checklist. At its meeting of 7-8 July 1999, the Council for TRIPS requested the Secretariat to prepare a paper summarizing the responses to the Checklist of Questions on the basis of an outline, on the understanding that it would be made explicit that the paper would be without prejudice to the rights and obligations of Members and that its purpose was merely to facilitate an understanding of the more detailed information that had been provided in national responses to the Checklist.

Section 4: Industrial Designs

XXVI. ARTICLE 25

A. TEXT OF ARTICLE 25

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

No jurisprudence or decision of a competent WTO body.

XXVII. ARTICLE 26

A. TEXT OF ARTICLE 26

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least 10 years.

54 IP/C/M/19, para. 42. The additional questions were circulated as IP/C/13/Add.1.
55 IP/C/M/24, para. 39. The Secretariat note was circulated as IP/C/W/253.
XXVIII. ARTICLE 27

A. TEXT OF ARTICLE 27

*Article 27*

*Patentable Subject Matter*

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

(footnote original) For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 27

1. Paragraph 1

(a) "Without discrimination"

60. In *Canada – Pharmaceutical Patents*, in explaining its understanding of the term "without discrimination" in Article 27, the Panel advised against using the term "discrimination" whenever "more precise standards are available", given the potentially "infinite complexity" of the term:

"The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions of Articles 3 and 4, do not use the term 'discrimination'. They speak in more precise terms. The ordinary meaning of the word 'discriminate' is potentially broader than these more specific definitions. It
certainly extends beyond the concept of differential treatment. It is a normative term, pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment. Discrimination may arise from explicitly different treatment, sometimes called 'de jure discrimination', but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called 'de facto discrimination'. The standards by which the justification for differential treatment is measured are a subject of infinite complexity. 'Discrimination' is a term to be avoided whenever more precise standards are available, and, when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.

In considering how to address these conflicting claims of discrimination, the Panel recalled that various claims of discrimination, de jure and de facto, have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with various GATT or WTO provisions prohibiting variously defined forms of discrimination. As the Appellate Body has repeatedly made clear, each of these rulings has necessarily been based on the precise legal text in issue, so that it is not possible to treat them as applications of a general concept of discrimination. Given the very broad range of issues that might be involved in defining the word 'discrimination' in Article 27.1 of the TRIPS Agreement, the Panel decided that it would be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues.\footnote{Panel Report on Canada – Pharmaceutical Patents, paras. 7.94 and 7.98.}

The Panel also attributed two different meanings to the term "de facto discrimination" under Article 27.1 in the following terms:

"[D]e facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable. Two main issues figure in the application of that general concept in most legal systems. One is the question of de facto discriminatory effect - whether the actual effect of the measure is to impose differentially disadvantageous consequences on certain parties. The other, related to the justification for the disadvantageous effects, is the issue of purpose - not an inquiry into the subjective purposes of the officials responsible for the measure, but an inquiry into the objective characteristics of the measure from which one can infer the existence or non-existence of discriminatory objectives.\footnote{Panel Report on Canada – Pharmaceutical Patents, para. 7.101.}

With respect to the anti-discrimination rule in Article 27.1 and Articles 30 and 31, see paragraphs 65 and 66 below.

(b) "the field of technology"

In Canada – Patent Term, addressing a claim of discrimination in terms of the field of technology, the Panel stated that it had ascertained neither de jure nor de facto discrimination:
"In sum, the Panel found that the evidence in record before it did not raise a plausible claim of discrimination under Article 27.1 of the TRIPS Agreement. It was not proved that the legal scope of Section 55.2(1) was limited to pharmaceutical products, as would normally be required to raise a claim of de jure discrimination. Likewise, it was not proved that the adverse effects of Section 55.2(1) were limited to the pharmaceutical industry, or that the objective indications of purpose demonstrated a purpose to impose disadvantages on pharmaceutical patents in particular, as is often required to raise a claim of de facto discrimination. Having found that the record did not raise any of these basic elements of a discrimination claim, the Panel was able to find that Section 55.2(1) is not inconsistent with Canada's obligations under Article 27.1 of the TRIPS Agreement. Because the record did not present issues requiring any more precise interpretation of the term 'discrimination' in Article 27.1, none was made."

2. Paragraph 3

64. At its meeting of 1-2 December 1998, the Council for TRIPS agreed to initiate the review due under Article 27.3(b) of the provisions of that subparagraph through an information-gathering exercise. In this connection, the Council invited Members that were already under an obligation to apply Article 27.3(b) to provide information on how the matters addressed in this provision were presently treated in their national law. Other Members were invited to provide such information on a best endeavours basis. While it was left to each Member to provide information as it saw fit, having regard to the specific provisions of Article 27.3(b), the Council requested the Secretariat to provide an illustrative list of questions relevant in this regard, in order to assist Members prepare their contributions. The Council also requested the Secretariat to establish contact with the FAO, the Secretariat of the Convention on Biological Diversity and UPOV, to request factual information on their activities of relevance. It was understood that this information-gathering was without prejudice to the nature of the review provided for in Article 27.3(b). At its meeting of 2 to 5 April 2001, the Council agreed that the Secretariat re-issue the illustrative list of questions and invited Members to provide their responses to it, if they had not yet done so.

3. Relationship with other Articles

65. In Canada – Pharmaceutical Patents, rejecting Canada's argument that Article 27.1 did not apply to exceptions granted under Article 30, the Panel addressed the relationship between these provisions:

"The text of the TRIPS Agreement offers no support for such an interpretation. Article 27.1 prohibits discrimination as to enjoyment of 'patent rights' without qualifying that term. Article 30 exceptions are explicitly described as 'exceptions to the exclusive rights conferred by a patent' and contain no indication that any exemption from non-discrimination rules is intended. A discriminatory exception that takes away enjoyment of a patent right is discrimination as much as is discrimination in the basic rights themselves. The acknowledged fact that the Article 31 exception for compulsory licences and government use is understood to be subject to the non-discrimination rule of Article 27.1, without the need for any textual provision so providing, further strengthens the case for treating the non-discrimination rules as applicable to Article 30. Articles 30 and 31 are linked together by the opening words of Article 31 which define the scope of Article 31 in

59 IP/C/M/21, para. 111. The Secretariat note was circulated as IP/C/W/122.
60 IP/C/M/30, para.186. The Secretariat note was reissued as IP/C/W/273.
terms of exceptions not covered by Article 30.\textsuperscript{61} Finally, the Panel could not agree with Canada's attempt to distinguish between Articles 30 and 31 on the basis of their mandatory/permisssive character; both provisions permit exceptions to patent rights subject to certain mandatory conditions. Nor could the Panel understand how such a 'mandatory/permisssive' distinction, even if present, would logically support making the kind of distinction Canada was arguing. In the Panel's view, what was important was that in the rights available under national law, that is to say those resulting from the basic rights and any permissible exceptions to them, the forms of discrimination referred to in Article 27.1 should not be present.\textsuperscript{62}

66. Rejecting Canada's related arguments, the Panel also provided guidance as to the policy considerations contained in Article 27:

"Nor was the Panel able to agree with the policy arguments in support of Canada's interpretation of Article 27. To begin with, it is not true that being able to discriminate against particular patents will make it possible to meet Article 30's requirement that the exception be 'limited'. An Article 30 exception cannot be made 'limited' by limiting it to one field of technology, because the effects of each exception must be found to be 'limited' when measured against each affected patent. Beyond that, it is not true that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued, that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers.\textsuperscript{63}

67. In \textit{India – Patents (US)}, the Appellate Body addressed the relationship between Article 27 and Article 70.8 and held that the latter provision applies in a situation where a Member does not make available patents pursuant to the former provision:

"The introductory clause to Article 70.8 provides that it applies '[w]here a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27 ...' of the TRIPS Agreement. Article 27 requires that patents be made available 'for any inventions, whether products or processes, in all fields of technology', subject to certain exceptions. However, pursuant to paragraphs 1, 2 and 4 of Article 65, a developing country Member may delay providing product patent protection in areas of technology not protectable in its territory on the general date of application of the TRIPS Agreement for that Member until 1 January 2005. Article 70.8 relates specifically and

\textsuperscript{61} (footnote original) Article 31 is titled "Other Use Without Authorization of the Rights Holder", and footnote 7 to Article 31 defines "other use" as "use" (derogations from exclusive patent rights) other than that allowed by Article 30.


\textsuperscript{63} Panel Report on \textit{Canada – Pharmaceutical Patents}, para. 7.91.
exclusively to situations where a Member does not provide, as of 1 January 1995, patent protection for pharmaceutical and agricultural chemical products.

68. With respect to the relationship of Section 5 of Part II and Article 70.2, see paragraph 121 below.

XXIX. ARTICLE 28

A. TEXT OF ARTICLE 28

**Article 28**

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

   (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

   (footnote original) 6 This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

   (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

B. INTERPRETATION AND APPLICATION OF ARTICLE 28

69. In Canada – Pharmaceutical Patents, the Panel was called on to examine a complaint that a Canadian measure was in violation of Article 28.1:

"There was no dispute as to the meaning of Article 28.1 exclusive rights as they pertain to Section 55.2(2) of Canada's Patent Act. Canada acknowledged that the provisions of Section 55.2(2) permitting third parties to 'make', 'construct' or 'use' the patented product during the term of the patent, without the patent owner's permission, would be a violation of Article 28.1 if not excused under Article 30 of the Agreement. The dispute on the claim of violation of Article 28.1 involved whether Section 55.2(2) of the Patent Act complies with the conditions of Article 30." 65

XXX. ARTICLE 29

A. TEXT OF ARTICLE 29

**Article 29**

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may

64 Appellate Body Report on India – Patents (US), para. 52.
require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

B. INTERPRETATION AND APPLICATION OF ARTICLE 29

No jurisprudence or decision of a competent WTO body.

XXXI. ARTICLE 30

A. TEXT OF ARTICLE 30

_Article 30_

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

B. INTERPRETATION AND APPLICATION OF ARTICLE 30

1. General

70. In _Canada – Pharmaceutical Patents_, the Panel addressed the basic structure of Article 30, outlined the conditions for its application and then found that these conditions apply cumulatively:

"Article 30 establishes three criteria that must be met in order to qualify for an exception: (1) the exception must be 'limited'; (2) the exception must not 'unreasonably conflict with normal exploitation of the patent'; (3) the exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'. The three conditions are cumulative, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 30 exception being disallowed.

The three conditions must, of course, be interpreted in relation to each other. Each of the three must be presumed to mean something different from the other two, or else there would be redundancy. Normally, the order of listing can be read to suggest that an exception that complies with the first condition can nevertheless violate the second or third, and that one which complies with the first and second can still violate the third. The syntax of Article 30 supports the conclusion that an exception may be 'limited' and yet fail to satisfy one or both of the other two conditions. The ordering further suggests that an exception that does not 'unreasonably conflict with normal exploitation' could nonetheless 'unreasonably prejudice the legitimate interests of the patent owner'."  

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71. For a similar analysis of Article 13, see paragraphs 31-33 above.

The Panel then considered both the systemic importance of Article 30 within the *TRIPS Agreement* and the extent to which other provisions of the Agreement can impart meaning to Article 30:

"In the Panel's view, Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement. Obviously, the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions. The words of those conditions must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."\(^{67}\)

2. "limited exceptions"

In *Canada – Pharmaceutical Patents*, the Panel addressed the question whether the "stockpiling" exception was exempted under Article 30, in the light of the requirement under Article 30 that exceptions to Article 28 be "limited". The Panel first agreed with the proposition that the "limited" character of an exception is to be assessed with respect to their impact on the rights of the patent owner:

"The Panel agreed with the EC interpretation that 'limited' is to be measured by the extent to which the exclusive rights of the patent owner have been curtailed. The full text of Article 30 refers to 'limited exceptions to the exclusive rights conferred by a patent'. In the absence of other indications, the Panel concluded that it would be justified in reading the text literally, focusing on the extent to which legal rights have been curtailed, rather than the size or extent of the economic impact. In support of this conclusion, the Panel noted that the following two conditions of Article 30 ask more particularly about the economic impact of the exception, and provide two sets of standards by which such impact may be judged. The term 'limited exceptions' is the only one of the three conditions in Article 30 under which the extent of the curtailment of rights as such is dealt with."\(^{68}\)

The Panel, however, rejected suggested approaches to measure the curtailment of the patent owner's rights by counting the number of rights impaired or by considering whether the exclusive right to sell during the patent term is affected:

"The Panel does not agree, however, with the EC's position that the curtailment of legal rights can be measured by simply counting the number of legal rights impaired by an exception. A very small act could well violate all five rights provided by Article 28.1 and yet leave each of the patent owner's rights intact for all useful purposes. To determine whether a particular exception constitutes a limited exception, the extent to which the patent owner's rights have been curtailed must be measured.

The Panel could not accept Canada's argument that the curtailment of the patent owner's legal rights is 'limited' just so long as the exception preserves the exclusive right to sell to the ultimate consumer during the patent term. Implicit in the Canadian

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\(^{67}\) Panel Report on *Canada – Pharmaceutical Patents*, para. 7.26.

\(^{68}\) Panel Report on *Canada – Pharmaceutical Patents*, para. 7.31.
argument is a notion that the right to exclude sales to consumers during the patent term is the essential right conveyed by a patent, and that the rights to exclude 'making' and 'using' the patented product during the term of the patent are in some way secondary. The Panel does not find any support for creating such a hierarchy of patent rights within the TRIPS Agreement. If the right to exclude sales were all that really mattered, there would be no reason to add other rights to exclude 'making' and 'using'. The fact that such rights were included in the TRIPS Agreement, as they are in most national patent laws, is strong evidence that they are considered a meaningful and independent part of the patent owner's rights.  

75. Subsequently, the Panel stated that while economic impact was addressed by two of the conditions under Article 30, the "limited exception" condition was not related to economic concerns:

"After analysing all three conditions stated in Article 30 of the TRIPS Agreement, the Panel was satisfied that Article 30 does in fact address the issue of economic impact, but only in the other two conditions contained in that Article. As will be seen in the analysis of these other conditions below, the other two conditions deal with the issue of economic impact, according to criteria that relate specifically to that issue. Viewing all three conditions as a whole, it is apparent that the first condition ('limited exception') is neither designed nor intended to address the issue of economic impact directly."

3. "do not unreasonably conflict with a normal exploitation of the patent"

76. In Canada – Pharmaceutical Patents, the Panel addressed the meaning of the term "normal exploitation" contained in the second condition under Article 30, i.e. the phrase "do not unreasonably conflict with a normal exploitation of the patent".

"The Panel considered that 'exploitation' refers to the commercial activity by which patent owners employ their exclusive patent rights to extract economic value from their patent. The term 'normal' defines the kind of commercial activity Article 30 seeks to protect. The ordinary meaning of the word 'normal' is found in the dictionary definition: 'regular, usual, typical, ordinary, conventional'. As so defined, the term can be understood to refer either to an empirical conclusion about what is common within a relevant community, or to a normative standard of entitlement. The Panel concluded that the word 'normal' was being used in Article 30 in a sense that combined the two meanings.

The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity. The specific forms of patent exploitation are not static, of course, for to be effective exploitation must adapt to changing forms of competition due to technological development and the evolution of marketing practices. Protection of all normal exploitation practices is a key element of the policy reflected in all patent laws. Patent laws establish a carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined."

77. After holding that the term "normal" referred to both what is common and to a "normative standard of entitlement", the Panel deliberated regarding what could be considered "normal" in the specific circumstances of the case at issue:

"Canada has raised the argument that market exclusivity occurring after the 20-year patent term expires should not be regarded as 'normal'. The Panel was unable to accept that as a categorical proposition. Some of the basic rights granted to all patent owners, and routinely exercised by all patent owners, will typically produce a certain period of market exclusivity after the expiration of a patent. For example, the separate right to prevent 'making' the patented product during the term of the patent often prevents competitors from building an inventory needed to enter the market immediately upon expiration of a patent. There is nothing abnormal about that more or less brief period of market exclusivity after the patent has expired.

The Panel considered that Canada was on firmer ground, however, in arguing that the additional period of de facto market exclusivity created by using patent rights to preclude submissions for regulatory authorization should not be considered 'normal'. The additional period of market exclusivity in this situation is not a natural or normal consequence of enforcing patent rights. It is an unintended consequence of the conjunction of the patent laws with product regulatory laws, where the combination of patent rights with the time demands of the regulatory process gives a greater than normal period of market exclusivity to the enforcement of certain patent rights. It is likewise a form of exploitation that most patent owners do not in fact employ. For the vast majority of patented products, there is no marketing regulation of the kind covered by Section 55.2(1), and thus there is no possibility to extend patent exclusivity by delaying the marketing approval process for competitors."72

78. In this context, the Panel found that "normal exploitation" could not simply refer back to the general concern to protect Article 28 exclusionary rights as such:

"The Panel could not agree with the EC's assertion that the mere existence of the patent owner's rights to exclude was a sufficient reason, by itself, for treating all gains derived from such rights as flowing from 'normal exploitation'. In the Panel's view, the EC's argument contained no evidence or analysis addressed to the various meanings of 'normal' - neither a demonstration that most patent owners extract the value of their patents in the manner barred by Section 55.2(1), nor an argument that the prohibited manner of exploitation was "normal" in the sense of being essential to the achievement of the goals of patent policy. To the contrary, the EC's focus on the exclusionary rights themselves merely restated the concern to protect Article 28 exclusionary rights as such. This is a concern already dealt with by the first condition of Article 30 ('limited exception') and the Panel found the ultimate EC arguments here impossible to distinguish from the arguments it had made under that first condition."73

4. "do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties"

79. In Canada – Pharmaceutical Patents, with respect to the term "legitimate interests" in the third condition "do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties" under Article 30, the Panel first acknowledged the difficulty for Canada in proving a negative proposition:

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"The third condition of Article 30 is the requirement that the proposed exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties'. Although Canada, as the party asserting the exception provided for in Article 30, bears the burden of proving compliance with the conditions of that exception, the order of proof is complicated by the fact that the condition involves proving a negative. One cannot demonstrate that no legitimate interest of the patent owner has been prejudiced until one knows what claims of legitimate interest can be made. Likewise, the weight of legitimate third party interests cannot be fully appraised until the legitimacy and weight of the patent owner's legitimate interests, if any, are defined. Accordingly, without disturbing the ultimate burden of proof, the Panel chose to analyse the issues presented by the third condition of Article 30 according to the logical sequence in which those issues became defined."74

80. The Panel then proceeded to examine whether the Canadian regulatory review's exception was compatible with the third condition under Article 30 – i.e. whether it did not 'unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'. The exception at issue was an exception applicable specifically to producers of generic pharmaceuticals, enabling such producers to complete the burdensome and time-consuming marketing authorization procedure (up to two and a half years) prior to the expiration of the patent term of the relevant original product:

"The ultimate issue with regard to the regulatory review exception's compliance with the third condition of Article 30 involved similar considerations to those arising under the second condition ('normal exploitation') - the fact that the exception would remove the additional period of de facto market exclusivity that patent owners could achieve if they were permitted to employ their rights to exclude 'making' and 'using' (and 'selling') the patented product during the term of the patent to prevent potential competitors from preparing and/or applying for regulatory approval during the term of the patent. The issue was whether patent owners could claim a 'legitimate interest' in the economic benefits that could be derived from such an additional period of de facto market exclusivity and, if so, whether the regulatory review exception 'unreasonably prejudiced' that interest."75

81. The Panel addressed the claim that "legitimate interests" should be identified with legal interests:

"The word 'legitimate' is commonly defined as follows:

(a) Conformable to, sanctioned or authorized by, law or principle: lawful; justifiable; proper;

(b) Normal, regular, conformable to a recognized standard type.

Although the European Communities' definition equating 'legitimate interests' with a full respect of legal interests pursuant to Article 28.1 is within at least some of these definitions, the EC definition makes it difficult to make sense of the rest of the third condition of Article 30, in at least three respects. First, since by that definition every exception under Article 30 will be causing 'prejudice' to some legal rights provided by Article 28 of the Agreement, that definition would reduce the first part of the third condition to a simple requirement that the proposed exception must not be
'unreasonable'. Such a requirement could certainly have been expressed more directly if that was what was meant. Second, a definition equating 'legitimate interests' with legal interests makes no sense at all when applied to the final phrase of Article 30 referring to the 'legitimate interests' of third parties. Third parties are by definition parties who have no legal right at all in being able to perform the tasks excluded by Article 28 patent rights. An exceptions clause permitting governments to take account of such third party legal interests would be permitting them to take account of nothing. And third, reading the third condition as a further protection of legal rights would render it essentially redundant in light of the very similar protection of legal rights in the first condition of Article 30 ('limited exception').”

82. After expressing its disagreement with the suggested definition of "legitimate interests" as "legal interests", as proposed by the European Communities, the Panel put forth its own definition of "legitimate interests":

"To make sense of the term 'legitimate interests' in this context, that term must be defined in the way that it is often used in legal discourse - as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms. This is the sense of the word that often appears in statements such as 'X has no legitimate interest in being able to do Y'. We may take as an illustration one of the most widely adopted Article 30-type exceptions in national patent laws - the exception under which use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. It is often argued that this exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the dissemination and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the term of the patent would frustrate part of the purpose of the requirement that the nature of the invention be disclosed to the public. To the contrary, the argument concludes, under the policy of the patent laws, both society and the scientist have a 'legitimate interest' in using the patent disclosure to support the advance of science and technology. While the Panel draws no conclusion about the correctness of any such national exceptions in terms of Article 30 of the TRIPS Agreement, it does adopt the general meaning of the term 'legitimate interests' contained in legal analysis of this type.

... 

The text of the present, more general version of Article 30 of the TRIPS Agreement was obviously based on the text of Article 9(2) of the Berne Convention. Berne Article 9(2) deals with exceptions to the copyright holder's right to exclude reproduction of its copyrighted work without permission. The text of Article 9(2) is as follows:

'It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

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76 Panel Report on Canada – Pharmaceutical Patents, para. 7.68.
77 (footnote original) The text of Berne Article 9(2) also served as the model for three other exceptions clauses in the TRIPS Agreement - Articles 13, 17 and 26.2, providing respectively for similar exceptions from
The text of Berne Article 9(2) was not adopted into Article 30 of the TRIPS Agreement without change. Whereas the final condition in Berne Article 9(2) ("legitimate interests") simply refers to the legitimate interests of the author, the TRIPS negotiators added in Article 30 the instruction that account must be taken of 'the legitimate interests of third parties'. Absent further explanation in the records of the TRIPS negotiations, however, the Panel was not able to attach a substantive meaning to this change other than what is already obvious in the text itself, namely that the reference to the 'legitimate interests of third parties' makes sense only if the term 'legitimate interests' is construed as a concept broader than legal interests.

83. Another claim put forth in Canada – Pharmaceutical Patents called attention to the fact that patent owners whose innovative products are subject to marketing approval requirements suffer a loss of economic benefits to the extent that delays in obtaining government approval prevent them from marketing their product during a substantial part of the patent term (the same government approval which producers of generic pharmaceuticals, under the above-mentioned regulatory review exception, were able to obtain prior to the date of the expiry of the patent term). The Panel considered the relevant practice by some Members to ascertain whether the European Communities' policy concern was "a widely recognized policy norm":

"The Panel therefore examined whether the claimed interest should be considered a 'legitimate interest' within the meaning of Article 30. The primary issue was whether the normative basis of that claim rested on a widely recognized policy norm.

The type of normative claim put forward by the EC has been affirmed by a number of governments that have enacted de jure extensions of the patent term, primarily in the case of pharmaceutical products, to compensate for the de facto diminution of the normal period of market exclusivity due to delays in obtaining marketing approval. According to the information submitted to the Panel, such extensions have been enacted by the European Communities, Switzerland, the United States, Japan, Australia and Israel. The EC and Switzerland have done so while at the same time allowing patent owners to continue to use their exclusionary rights to gain an additional, de facto extension of market exclusivity by preventing competitors from applying for regulatory approval during the term of the patent. The other countries that have enacted de jure patent term extensions have also, either by legislation or by judicial decision, created a regulatory review exception similar to Section 55.2(1), thereby eliminating the possibility of an additional de facto extension of market exclusivity.

84. While finding some support for the European Communities' claim in the practice of a certain number of Member governments who had granted compensatory adjustment for the effective diminution of patent holder rights, the Panel held that such practice has not been universal:

"This positive response to the claim for compensatory adjustment has not been universal, however. In addition to Canada, several countries have adopted, or are in the process of adopting, regulatory review exceptions similar to Section 55.2(1) of the Canadian Patent Act, thereby removing the de facto extension of market exclusivity, but these countries have not enacted, and are not planning to enact, any de jure extensions of the patent term for producers adversely affected by delayed marketing approval. When regulatory review exceptions are enacted in this manner, they
represent a decision not to restore any of the period of market exclusivity due to lost
delays in obtaining marketing approval. Taken as a whole, these government
decisions may represent either disagreement with the normative claim made by the
EC in this proceeding, or they may simply represent a conclusion that such claims are
outweighed by other equally legitimate interests.

... 

On balance, the Panel concluded that the interest claimed on behalf of patent owners
whose effective period of market exclusivity had been reduced by delays in
marketing approval was neither so compelling nor so widely recognized that it could
be regarded as a 'legitimate interest' within the meaning of Article 30 of the TRIPS
Agreement. Notwithstanding the number of governments that had responded
positively to that claimed interest by granting compensatory patent term extensions,
the issue itself was of relatively recent standing, and the community of governments
was obviously still divided over the merits of such claims. Moreover, the Panel
believed that it was significant that concerns about regulatory review exceptions in
general, although well known at the time of the TRIPS negotiations, were apparently
not clear enough, or compelling enough, to make their way explicitly into the
recorded agenda of the TRIPS negotiations. The Panel believed that Article 30's
'legitimate interests' concept should not be used to decide, through adjudication, a
normative policy issue that is still obviously a matter of unresolved political
debate."\(^{80}\)

5. Relationship with other Articles

85. With respect to the relationship of Article 30 to Article 9(2) of the Berne Convention (1971)
and Articles 13, 17 and 26.2 of the TRIPS Agreement, see footnote 77 above.

XXXII. ARTICLE 31

A. TEXT OF ARTICLE 31

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use\(^ {7}\) of the subject matter of a patent without the
authorization of the right holder, including use by the government or third parties authorized by
the government, the following provisions shall be respected:

\(^{(footnote original)}\)\(^ {7}\) “Other use” refers to use other than that allowed under Article 30.

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts
to obtain authorization from the right holder on reasonable commercial terms and
conditions and that such efforts have not been successful within a reasonable period of
time. This requirement may be waived by a Member in the case of a national
emergency or other circumstances of extreme urgency or in cases of public non-
commercial use. In situations of national emergency or other circumstances of extreme
urgency, the right holder shall, nevertheless, be notified as soon as reasonably
practicable. In the case of public non-commercial use, where the government or
contractor, without making a patent search, knows or has demonstrable grounds to

\(^{80}\) Panel Report on *Canada – Pharmaceutical Patents*, paras. 7.79 and 7.82.
know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

B. INTERPRETATION AND APPLICATION OF ARTICLE 31

*No jurisprudence or decision of a competent WTO body.*
XXXIII. ARTICLE 32

A. TEXT OF ARTICLE 32

**Article 32**

*Revocation/Forfeiture*

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 32**

No jurisprudence or decision of a competent WTO body.

XXXIV. ARTICLE 33

A. TEXT OF ARTICLE 33

**Article 33**

*Term of Protection*

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.\(^8\)

\(^{8}\) It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 33**

1. **General**

(a) Basic structure

86. In *Canada – Patent Term*, Canada argued that although it was making available a patent protection period of only 17 years from the date of the *grant* of the patent, contrary to the requirement under Article 33 of a 20-year protection period counting from the date of the *filing* of the patent application, the relevant Canadian law was not inconsistent with Article 33, because – due to the length of the application procedures – the *effective* patent protection period was in fact equal to 20 years, as required by Article 33. The Panel rejected this argument and found a violation of Article 33. On appeal, the Appeal Body first considered the ordinary meaning of Article 33:

"In our view, the words used in Article 33 present very little interpretative difficulty. The 'filing date' is the date of filing of the patent application. The term of protection 'shall not end' before twenty years counted from the date of filing of the patent application. The calculation of the period of 'twenty years' is clear and specific. In simple terms, Article 33 defines the earliest date on which the term of protection of a patent may end. This earliest date is determined by a straightforward calculation: it results from taking the date of filing of the patent application and adding twenty years. As the filing date of the patent application and the twenty-year figure are both unambiguous, so too is the resultant earliest end date of the term of patent protection."\(^{81}\)

\(^{81}\) Appellate Body Report on *Canada – Patent Term*, para. 85.
87. As Article 33 requires that a Member "make available" a patent protection period of 20 years, the Appellate Body then considered the meaning of the term "available":

"We agree with the Panel that, in Article 33 of the TRIPS Agreement, the word 'available' means 'available, as a matter of right', that is to say, available as a matter of legal right and certainty.

... To demonstrate that the patent term in Article 33 is 'available', it is not sufficient to point, as Canada does, to a combination of procedures that, when used in a particular sequence or in a particular way, may add up to twenty years. The opportunity to obtain a twenty-year patent term must not be 'available' only to those who are somehow able to meander successfully through a maze of administrative procedures. The opportunity to obtain a twenty-year term must be a readily discernible and specific right, and it must be clearly seen as such by the patent applicant when a patent application is filed. The grant of the patent must be sufficient in itself to obtain the minimum term mandated by Article 33. The use of the word 'available' in Article 33 does not undermine but, rather, underscores this obligation."\(^{82}\)

88. The Appellate Body agreed with the Panel that Article 33 does not embody a notion of "effective" protection:

"The text of Article 33 gives no support to the notion of an 'effective' term of protection as distinguished from a 'nominal' term of protection. On the contrary, the obligation in Article 33 is straightforward and mandatory: to provide, as a specific right, a term of protection that does not end before the expiry of a period of twenty years counted from the filing date."\(^{83}\)

(b) Relationship with other Articles

89. With respect to the relationship of Article 33 with Articles 1.1 and 62.2, see paragraph 3 above.

90. In Canada – Pharmaceutical Patents, the Panel did not examine an Article 33 complaint after having found a violation of Article 28.1. On the issue of judicial economy more generally, see paragraphs 183-192 of the Chapter on the DSU.

XXXV. ARTICLE 34

A. TEXT OF ARTICLE 34

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of

\(^{82}\) Appellate Body Report on Canada – Patent Term, paras. 90 and 92.

\(^{83}\) Appellate Body Report on Canada – Patent Term, para. 95.
the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

(a) if the product obtained by the patented process is new;

(b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

B. INTERPRETATION AND APPLICATION OF ARTICLE 34

*No jurisprudence or decision of a competent WTO body.*

Section 6: Layout-Designs (Topographies) of Integrated Circuits

XXXVI. ARTICLE 35 AND INCORPORATED PROVISIONS OF THE IPIC TREATY

A. TEXT OF ARTICLE 35

*Article 35

Relation to the IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

*The text of Articles 2 through 7 (other than Article 6.3) and Articles 12 and 16.3 of the IPIC Treaty appears in Section LXXVII below.*

B. INTERPRETATION AND APPLICATION OF ARTICLE 35 AND INCORPORATED PROVISIONS OF THE IPIC TREATY

*No jurisprudence or decision of a competent WTO body.*

XXXVII. ARTICLE 36

A. TEXT OF ARTICLE 36

*Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder: importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.
(footnote original) The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 36**

*No jurisprudence or decision of a competent WTO body.*

**XXXVIII. ARTICLE 37**

A. **TEXT OF ARTICLE 37**

*Article 37*

*Acts Not Requiring the Authorization of the Right Holder*

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 37**

*No jurisprudence or decision of a competent WTO body.*

**XXXIX. ARTICLE 38**

A. **TEXT OF ARTICLE 38**

*Article 38*

*Term of Protection*

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 38**

*No jurisprudence or decision of a competent WTO body.*
Section 7: Protection of Undisclosed Information

XL. ARTICLE 39

A. TEXT OF ARTICLE 39

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices10 so long as such information:

   (footnote original) 10 For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

   (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

   (b) has commercial value because it is secret; and

   (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

B. INTERPRETATION AND APPLICATION OF ARTICLE 39

No jurisprudence or decision of a competent WTO body.

Section 8: Control of Anti-Competitive Practices in Contractual Licences

XLI. ARTICLE 40

A. TEXT OF ARTICLE 40

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights
having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member’s laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member’s laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

B. INTERPRETATION AND APPLICATION OF ARTICLE 40

No jurisprudence or decision of a competent WTO body.

PART III

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1: General Obligations

XLII. ARTICLE 41

A. TEXT OF ARTICLE 41

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member’s law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

B. INTERPRETATION AND APPLICATION OF ARTICLE 41

91. In Canada – Patent Term, the Panel rejected Canada's argument that, in light of a certain amount of delay in granting patent rights, the term of protection at issue met with the requirements under Article 33. In its finding, which was subsequently not addressed by the Appellate Body, the Panel referred to Article 41.2 as it is applied to acquisition procedures by Article 62.4:

"In our view, requiring applicants to resort to delays such as abandonment, reinstatement, non-payment of fees and non-response to a patent examiner's report would be inconsistent with the general principle that procedures not be unnecessarily complicated as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4. By their very nature, the delays, which are not tied to any valid reason related to the examination and grant process, would be inconsistent with the general principle that procedures not entail 'unwarranted delays' as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4.

We noted in paragraphs 6.107 and 6.108 above that the Commissioner's powers to reinstate and restore applications under Section 30(2) and Section 73 were discretionary at all material times and not available as a matter of right to patent applicants. Canada argued, however, that despite the use of the word 'may' in Section 73, the payment of the necessary fee enabled the applicant to obtain reinstatement of his patent application as a matter of right. In other words, had the Commissioner exercised his discretion to refuse an application for reinstatement, an applicant would have been required to pay an additional fee and pursue legal proceedings against the Commissioner in a court of law in order for a term of protection expiring 20 years from the date of filing the application to be available. We find potential requirements that an applicant commence proceedings for a writ of mandamus and pay additional fees to be in breach of the general principle that procedures not be 'unnecessarily complicated or costly' as expressed in Article 41.2 and applied to acquisition procedures by Article 62.4."

Section 2: Civil and Administrative Procedures and Remedies

XLIII. ARTICLE 42

A. TEXT OF ARTICLE 42

Article 42

Fair and Equitable Procedures

Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures, with respect to the claim that an equivalent "effective" period of protection can fulfill the requirement of Article 33, see paragraphs 86 to 89 above.

shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

(footnote original) 11 For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

B. INTERPRETATION AND APPLICATION OF ARTICLE 42

92. In India – Patents (EC), the European Communities claimed – similarly to the United States’ claim in the earlier case India – Patents (US) – that India had failed to provide an exclusive marketing system pursuant to its obligation under Article 70.9 of the TRIPS Agreement. India argued that a generally available system was not required under Article 70.9; as support for its claim, India pointed to the provisions of Articles 42 to 48 of the TRIPS Agreement, where the judicial authorities of Members "shall have authority" to order certain actions and contrasted this wording with that of Article 70.9, which provides that marketing rights 'shall be granted' when certain conditions are met”. The Panel rejected this argument by India:

"We do not share India’s view that it can be deduced from the use of these words in those Articles that a system of general availability is not called for under Article 70.9. To infer this, one would have to hold that the omission of the words 'shall have the authority' in Articles 42-48 (so that a court was required to act in a certain way when prescribed conditions were met, rather than merely having the authority to do so) would mean that a Member would not be expected to give its judicial authorities in advance the authority to act in this way, for example to award an injunction, but could legislate to this effect when a specific occasion arose. Such an inference would obviously be absurd. Rather the function of the words 'shall have the authority' is to address the issue of judicial discretion, not that of general availability."86

XLIV. ARTICLE 43

A. TEXT OF ARTICLE 43

Article 43

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

86 Panel Report on India – Patents (EC), para. 7.66.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 43**

93. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.

**XLV. ARTICLE 44**

A. **TEXT OF ARTICLE 44**

*Article 44*

*Injunctions*

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 44**

94. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.

**XLVI. ARTICLE 45**

A. **TEXT OF ARTICLE 45**

*Article 45*

*Damages*

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 45**

95. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.
XLVII. ARTICLE 46

A. TEXT OF ARTICLE 46

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

B. INTERPRETATION AND APPLICATION OF ARTICLE 46

96. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.

XLVIII. ARTICLE 47

A. TEXT OF ARTICLE 47

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

B. INTERPRETATION AND APPLICATION OF ARTICLE 47

97. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.

XLIX. ARTICLE 48

A. TEXT OF ARTICLE 48

Article 48

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.
2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

B. INTERPRETATION AND APPLICATION OF ARTICLE 48

98. With respect to the meaning of the words "shall have the authority" as used in Articles 42-48, see paragraph 92 above.

L. ARTICLE 49

A. TEXT OF ARTICLE 49

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

B. INTERPRETATION AND APPLICATION OF ARTICLE 49

No jurisprudence or decision of a competent WTO body.

Section 3: Provisional Measures

LI. ARTICLE 50

A. TEXT OF ARTICLE 50

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

   (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

   (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a
reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

B. INTERPRETATION AND APPLICATION OF ARTICLE 50

No jurisprudence or decision of a competent WTO body.

Section 4: Special Requirements Related to Border Measures

(footnote original) 12 Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

LII. ARTICLE 51

A. TEXT OF ARTICLE 51

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

(footnote original) 13 It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

(footnote original) 14 For the purposes of this Agreement:

(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

B. INTERPRETATION AND APPLICATION OF ARTICLE 51

No jurisprudence or decision of a competent WTO body.

LIII. ARTICLE 52

A. TEXT OF ARTICLE 52

*Article 52*

*Application*

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

B. INTERPRETATION AND APPLICATION OF ARTICLE 52

No jurisprudence or decision of a competent WTO body.

LV. ARTICLE 53

A. TEXT OF ARTICLE 53

*Article 53*

*Security or Equivalent Assurance*

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

B. INTERPRETATION AND APPLICATION OF ARTICLE 53

No jurisprudence or decision of a competent WTO body.
LV. ARTICLE 54

A. TEXT OF ARTICLE 54

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

B. INTERPRETATION AND APPLICATION OF ARTICLE 54

No jurisprudence or decision of a competent WTO body.

LVII. ARTICLE 55

A. TEXT OF ARTICLE 55

Article 55

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

B. INTERPRETATION AND APPLICATION OF ARTICLE 55

No jurisprudence or decision of a competent WTO body.

LVII. ARTICLE 56

A. TEXT OF ARTICLE 56

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

B. INTERPRETATION AND APPLICATION OF ARTICLE 56

No jurisprudence or decision of a competent WTO body.
LVIII. ARTICLE 57

A. TEXT OF ARTICLE 57

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

B. INTERPRETATION AND APPLICATION OF ARTICLE 57

No jurisprudence or decision of a competent WTO body.

LIX. ARTICLE 58

A. TEXT OF ARTICLE 58

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, mutatis mutandis, set out at Article 55;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

B. INTERPRETATION AND APPLICATION OF ARTICLE 58

No jurisprudence or decision of a competent WTO body.

LX. ARTICLE 59

A. TEXT OF ARTICLE 59

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order
the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 59**

*No jurisprudence or decision of a competent WTO body.*

**LXI. ARTICLE 60**

A. **TEXT OF ARTICLE 60**

**Article 60**

*De Minimis Imports*

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 60**

*No jurisprudence or decision of a competent WTO body.*

**Section 5: Criminal Procedures**

**LXII. ARTICLE 61**

A. **TEXT OF ARTICLE 61**

**Article 61**

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 61**

*No jurisprudence or decision of a competent WTO body.*
PART IV

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED INTER-PARTES PROCEDURES

LXIII. ARTICLE 62

A. TEXT OF ARTICLE 62

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply mutatis mutandis to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and inter partes procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

B. INTERPRETATION AND APPLICATION OF ARTICLE 62

99. In Canada – Patent Term, Canada argued that Article 33, a provision calling for a minimum patent protection period, must be read in conjunction with Article 62.2, which recognizes the fact that the length of the patent-granting process invariably involves some curtailment of the period of protection. From the interplay of these two provisions, Canada argued that Article 33 embodies a notion of "effective" protection and that Article 33 can be complied with by making available a nominally shorter period of protection, while taking into consideration "effective" protection during the period of the patent approval proceedings. The Appellate Body upheld the Panel's rejection of this argument:

"... Article 62.2 deals with procedures relating to the acquisition of intellectual property rights. Article 62.2 does not deal with the duration of those rights once they are acquired. Article 62.2 is of no relevance to this case. This purely procedural Article cannot be used to modify the clear and substantive standard set out in Article 33 so as to conjecture a new standard of 'effective' protection. Each Member of the WTO may well have its own subjective judgement about what constitutes a 'reasonable period of time' not only for granting patents in general, but also for granting patents in specific sectors or fields of complexity. If Canada's arguments were accepted, each and every Member of the WTO would be free to adopt a term of

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87 With respect to the claim that an equivalent "effective" period of protection can fulfill the requirement of Article 33, see paras. 86-89 of this Chapter.
'effective' protection for patents that, in its judgement, meets the criteria of 'reasonable period of time' and 'unwarranted curtailment of the period of protection', and to claim that its term of protection is substantively 'equivalent' to the term of protection envisaged by Article 33. Obviously, this cannot be what the Members of the WTO envisaged in concluding the TRIPS Agreement. Our task is to interpret the covered agreements harmoniously. A harmonious interpretation of Article 33 and Article 62.2 must regard these two treaty provisions as distinct and separate Articles containing obligations that must be fulfilled distinctly and separately.\(^{88}\)

100. With respect to the relationship of Article 62.2 with Articles 1.1 and 33, see paragraph 3 above.

PART V

DISPUTE PREVENTION AND SETTLEMENT

LXIV. ARTICLE 63

A. TEXT OF ARTICLE 63

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6ter of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members 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.

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B. INTERPRETATION AND APPLICATION OF ARTICLE 63

1. Paragraph 2

(a) Notification requirements

101. At its meeting of 21 November 1995, the Council for TRIPS adopted Decisions on the rules of procedure for notification under Article 63.2, including a possible format for listing of "Other Laws and Regulations" and a Checklist of Issues on Enforcement.


LXV. ARTICLE 64

A. TEXT OF ARTICLE 64

Article 64

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. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

B. INTERPRETATION AND APPLICATION OF ARTICLE 64

103. With respect to the interpretation and application of the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the DSU to provisions of the TRIPS Agreement, see the Chapter on the DSU.

104. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the TRIPS Agreement were invoked:

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89 IP/C/M/4, Section A.2.(i). The procedures can be found in Council Decision IP/C/2.
90 IP/C/M/4, Section A.2.(i). The format can be found in Decision of the Council for TRIPS, IP/C/4.
91 IP/C/M/4, Section A.2.(i). The Checklist can be found in Decision of the Council for TRIPS, IP/C/5.
92 The text of the Agreement can be found in IP/C/6.
PART VI
TRANSITIONAL ARRANGEMENTS

LXVI. ARTICLE 65

A. TEXT OF ARTICLE 65

**Article 65**

_Transitional Arrangements_

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 65

1. **General**

105. In _Canada – Patent Term_, after upholding the Panel's finding that a term of protection available under the Canadian patent law was shorter than required under Article 33, the Appellate Body distinguished the content of TRIPS obligations from their temporal effect:

"In conclusion, we wish to point out that our findings in this appeal have no effect whatsoever on the transitional arrangements found in Part VI of the TRIPS Agreement. The provisions in Part VI establish when obligations of the TRIPS
Agreement are to be applied by a WTO Member and not what those obligations are. The issues raised in this appeal relate to what the obligations are, not to when they apply.93

2. **Paragraph 4**

   (a) "an additional period of five years"

106. In *India – Patents (US)*, the Panel linked Articles 27 and 65:

   "Article 27 requires that patents be made available in all fields of technology, subject to certain narrow exceptions. Article 65 provides for transitional periods for developing countries: in general five years from the entry into force of the WTO Agreement, i.e. 1 January 2000, and an additional five years to provide for product patents in areas of technology not so patentable as of 1 January 2000. Thus, in such areas of technology, developing countries are not required to provide product patent protection until 1 January 2005."94

107. In *India – Patents (EC)*, the Panel emphasized that its findings on the substance of the TRIPS obligations do not relate in any way to the transition period:

   "Since the matter has been addressed by India in its arguments and caused some confusion in the previous case, we would like to underline that the Panel's findings do not in any way foreshorten the transition period of until, at the latest, 1 January 2005 that India has for meeting its obligations under Articles 65.4 and 70.8(b) and (c)."95

3. **Paragraph 5**

   (a) "changes … do not result in a lesser degree of consistency"

108. In *Indonesia – Autos*, the Panel noted that the transition period under Article 65.2 does not apply to Article 3:

   "The arguments put forward by the United States in support of its claim [under Article 65.5] are essentially the same as those that have been considered in paragraphs 14.277 and 14.278 above [in relation to Article 3, in conjunction with Article 20 on use of trademarks]. For the reasons set out in those paragraphs above, [that these are not 'requirements' in the sense of Article 20] we find that the United States has not demonstrated that measures have been taken that reduce the degree of consistency with the provisions of Article 20 and which would therefore be in violation of Indonesia's obligations under Article 65.5 of the TRIPS Agreement."96

4. **Relationship with other Articles**

109. In *Indonesia – Autos*, the Panel noted that the transition period under Article 65.2 does not apply to Article 3:

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94 Panel Report on *India – Patents (US)*, para. 7.27.
95 Panel Report on *India – Patents (EC)*, para. 8.1.
"[W]e note that Indonesia has been under an obligation to apply the provisions of Article 3 since 1 January 1996, Article 3 not benefiting from the additional four years of transition generally provided by Article 65.2 to developing country Members."\(^97\)

110. The Panel in *India – Patents (US)* made clear that Article 70.8 is also one of the provisions of the *TRIPS Agreement* to which the transition period of Article 65 does not apply:

"However, these transitional provisions [in Article 65] are not applicable to Article 70.8, which ensures that, if product patent protection is not already available for pharmaceutical and agricultural chemical product inventions, a means must be in place as of 1 January 1995 which allows for the entitlement to file patent applications for such inventions and the allocation of filing and priority dates to them so that the novelty of the inventions in question and the priority of the applications claiming their protection can be preserved for the purposes of determining their eligibility for protection by a patent at the time that product patent protection will be available for these inventions, i.e. at the latest after the expiry of the transitional period."\(^98\)

111. Certain provisions of the *TRIPS Agreement* contain obligations contingent upon the applicability of Article 65 (and 66). The Panel in *India – Patents (US)* held with respect to Article 70.9:

"As is the case with Article 70.8(a), the granting of exclusive marketing rights is a special obligation linked with the enjoyment by Members of the transitional arrangements under Articles 65 and 66 of the Agreement."\(^99\)

**LXVII. ARTICLE 66**

**A. TEXT OF ARTICLE 66**

*Article 66*

*Least-Developed Country Members*

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

**B. INTERPRETATION AND APPLICATION OF ARTICLE 66**

112. With respect to the relationship of Article 66 with Article 70.8(a) and 70.9, see paragraphs 110-111 above.

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\(^98\) Panel Report on *India – Patents (US)*, para. 7.27.
\(^99\) Panel Report on *India – Patents (US)*, para. 7.59.
LXVIII.  ARTICLE 67

A.  TEXT OF ARTICLE 67

*Article 67*

*Technical Cooperation*

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

B.  INTERPRETATION AND APPLICATION OF ARTICLE 67

113. Article 4 of the Agreement between the World Intellectual Property Organization and World Trade Organization contains provisions on legal-technical assistance and technical cooperation.\(^{100}\)

PART VII

INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

LXIX.  ARTICLE 68

A.  TEXT OF ARTICLE 68

*Article 68*

*Council for Trade-Related Aspects of Intellectual Property Rights*

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

B.  INTERPRETATION AND APPLICATION OF ARTICLE 68

1.  Rules of procedure of the Council for TRIPS

114. At its meetings of 24 May 1995 and 21 September 1995, the Council for TRIPS adopted its rules of procedure. At its meeting on 15 November 1995, the General Council approved those rules of procedure.\(^{101}\)

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\(^{100}\) The text of the Agreement can be found in IP/C/6.

\(^{101}\) IP/C/M/2, para 5; IP/C/M/3, para.2; WT/GC/M/8, para. 4. The rules of procedure can be found in IP/C/1.
2. Observer status

115. With respect to the entities that are given observer status in the Council for TRIPS, see below.

(a) Organizations granted Observer Status

– Food and Agricultural Organization (FAO)
– International Monetary Fund (IMF)
– International Union for the Protection of New Varieties of Plants (UPOV)
– Organization for Economic Cooperation and Development (OECD)
– United Nations (UN)
– United Nations Conference on Trade and Development (UNCTAD)
– World Bank
– World Customs Organization (WCO)
– World Intellectual Property Organization (WIPO)

(b) Organizations having ad hoc Observer Status

– World Health Organization (WHO)

3. Cooperation with WIPO

116. At its meeting of 11 December 1995, the Council for TRIPS approved the text of a proposed agreement between the World Intellectual Property Organization and the World Trade Organization, and agreed to submit it to the General Council for its approval. At its meeting on 13 December 1995, the General Council approved the proposed agreement. The Agreement was signed on behalf of the organizations on 22 December 1995 and entered into force on 1 January 1996.

LXX. ARTICLE 69

A. TEXT OF ARTICLE 69

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

A. INTERPRETATION AND APPLICATION OF ARTICLE 69

1. Notification requirements

117. At its meeting of 21 September 1995 the Council for TRIPS adopted a common procedure for the notification of contact points that Members had established for the purposes of Article 69.103

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102 IP/C/M/5, para.9; WT/GC/M/9, Section 1(e). The text of the agreement can be found in IP/C/6.
103 IP/C/M/3, para. 27.
LXXI. ARTICLE 70

A. TEXT OF ARTICLE 70

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and
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(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

B. INTERPRETATION AND APPLICATION OF ARTICLE 70

1. General

(a) Relationship between paragraphs 1 and 2

118. In Canada – Patent Term, Canada argued that the grant of a patent term is an integral part of the act granting the patent in question. As such, Canada considered that the length of the patent terms falls within the scope of the term "act" contained in Article 70.1. From this, Canada concluded that the grant of the patent term is part of an act which occurred before the entry into force of the TRIPS Agreement, with the result that Article 33 did not apply. With respect to the relationship between Articles 70.1 and 70.2, Canada argued that the phrase "except as otherwise provided for in this Agreement" demonstrates that Article 70.2 does not apply in this instance and that Article 70.1 takes precedence over Article 70.2. The Appellate Body rejected this argument:

"Like the Panel, we see Articles 70.1 and 70.2 as dealing with two distinct and separate matters. The former deals with past 'acts', while the latter deals with 'subject-matter' existing on the applicable date of the TRIPS Agreement. Article 70.1 of the TRIPS Agreement operates only to exclude obligations in respect of 'acts which occurred' before the entry into force of the TRIPS Agreement, but does not exclude rights and obligations in respect of continuing situations. On the contrary, 'subject matter existing … which is protected' is clearly a continuing situation, whether viewed as protected inventions, or as the patent rights attached to them. 'Subject matter existing … which is protected' is not within the scope of Article 70.1, and, therefore, the '[e]xcept as otherwise provided for' clause in Article 70.2 can have no application to it. Thus, for the sake of argument, even if there is a relationship between Article 70.1 and the opening proviso in Article 70.2, Canada's argument with respect to Old Act patents fails nonetheless, as we have concluded that the continuing rights relating to Old Act patents do not fall within the scope of Article 70.1.

We wish to point out that our interpretation of Article 70 does not lead to a 'retroactive' application of the TRIPS Agreement. Article 70.1 alone addresses 'retroactive' circumstances, and it excludes them generally from the scope of the Agreement. The application of Article 33 to inventions protected under Old Act patents is justified under Article 70.2, not Article 70.1. A treaty applies to existing rights, even when those rights result from 'acts which occurred' before the treaty entered into force."\(^{104}\)

2. **Paragraph 1**

(a) "acts which occurred before the date of application of the Agreement"

119. In *Canada – Patent Term*, in the context of juxtaposing the term "acts" under Article 70.1 and the term "subject-matter" under Article 70.2, the Appellate Body held with respect to the former:

"Our main task is to give meaning to the phrase 'acts which occurred before the date of application' and to interpret Article 70.1 harmoniously with the rest of the provisions of Article 70. We are of the view that the term 'acts' has been used in Article 70.1 in its normal or ordinary sense of 'things done', 'deeds', 'actions' or 'operations'. In the context of 'acts' falling within the domain of intellectual property rights, the term 'acts' in Article 70.1 may, therefore, encompass the 'acts' of public authorities (that is, governments as well as their regulatory and administrative authorities) as well as the 'acts' of private or third parties. Examples of the 'acts' of public authorities may include, in the field of patents, the examination of patent applications, the grant or rejection of a patent, the revocation or forfeiture of a patent, the grant of a compulsory licence, the impounding by customs authorities of goods alleged to infringe the intellectual property rights of a holder, and the like. Examples of 'acts' of private or third parties may include 'acts' such as the filing of a patent application, infringement or other unauthorized use of a patent, unfair competition, or abuse of patent rights."\(^{105}\)


120. The Appellate Body then reached a conclusion on the scope of application of Article 70.1:

"We conclude, therefore, that Article 70.1 of the TRIPS Agreement cannot be interpreted to exclude existing rights, such as patent rights, even if such rights arose through acts which occurred before the date of application of the TRIPS Agreement for a Member. We, therefore, confirm the finding of the Panel that Article 70.1 does not exclude from the scope of the TRIPS Agreement Old Act patents [i.e. Canadian patents granted on the basis of patent applications filed before 1 October 1989] that existed on the date of application of the TRIPS Agreement for Canada."\(^{106}\)


121. In reaching the previous conclusion, the Appellate Body relied both on the wording of Article 70.1, as well as on the object and purpose of the *TRIPS Agreement*

"The ordinary meaning of the term 'acts' suggests that the answer to this question must be no. An 'act' is something that is 'done', and the use of the phrase 'acts which occurred' suggests that what was done is now complete or ended. This excludes situations, including existing rights and obligations, that have *not* ended. Indeed, the title of Article 70, 'Protection of Existing Subject Matter', confirms contextually that the focus of Article 70 is on bringing within the scope of the *TRIPS Agreement* 'subject matter' which, on the date of the application of the Agreement for a Member, is existing and which meets the relevant criteria for protection under the Agreement.

A contrary interpretation would seriously erode the scope of the other provisions of Article 70, especially the explicit provisions of Article 70.2. Almost any existing situation or right can be said to have arisen from one or more past 'acts'. For example, virtually all contractual and property rights could be said to arise from 'acts which occurred' in the past. If the phrase 'acts which occurred' were interpreted to cover all *continuing* situations involving patents which were granted before the date..."
of application of the *TRIPS Agreement* for a Member, including such rights as those under Old Act patents, then Article 70.1 would preclude the application of virtually the whole of the *TRIPS Agreement* to rights conferred by the patents arising from such 'acts'. This is not consistent with the object and purpose of the *TRIPS Agreement*, as reflected in the Preamble of the Agreement.\(^{107}\)

3. **Paragraph 2**

(a) "subject matter existing at the date of application of this Agreement"

122. In *Canada – Patent Term*, the Appellate Body distinguished clearly between the term "acts" within Article 70.1, and the term "subject-matter" under Article 70.2. With respect to the latter term, the Appellate Body relied, *inter alia*, on the use of the term in other provisions of the *TRIPS Agreement*:

"We agree with the Panel's reasoning that 'subject matter' in Article 70.2 refers, in the case of patents, to inventions. The ordinary meaning of the term 'subject-matter' is a 'topic dealt with or the subject represented in a debate, exposition, or work of art'. Useful context is provided by the qualification of the term 'subject matter', in the same sentence of Article 70.2, by the word 'protected', as well as by the phrase 'meet the criteria for protection under the terms of this Agreement' appearing later in the same sentence. As noted earlier, the title to Article 70 also uses the words 'Protection of Existing Subject Matter'. We can deduce, therefore, that the 'subject matter', for purposes of Article 70.2, is that which is 'protected', or 'meets the criteria for protection', under the terms of the *TRIPS Agreement*. As, in the present case, patents are the means of protection, then whatever patents protect must be the 'subject matter' to which Article 70.2 refers.

Articles 27, 28, 31 and 34 of the *TRIPS Agreement* also use the words 'subject-matter' with respect to patents and provide an equally useful context for interpretation. Article 27, entitled 'Patentable Subject-matter', states: 'patents shall be available for any inventions' .... This Article identifies the criteria that an invention must fulfill in order to be eligible to receive a patent, and it also identifies the types of inventions that may be excluded from patentability even if they meet those criteria. On the other hand, in Articles 28, 31 and 34, the words 'subject-matter' relate to patents that are granted pursuant to the criteria in Article 27; that is to say, these Articles relate to inventions that are protected by patents granted, as distinguished from the 'patentable' inventions to which Article 27 refers. These Articles confirm the conclusion that *inventions* are the relevant 'subject-matter' in the case of patents, and that the 'subject-matter' in Article 70.2 means, in the case of patents, patentable or patented inventions. Article 70.2 thus gives rise to obligations in respect of all such inventions existing on the date of application of the *TRIPS Agreement* for a Member. In the appeal before us, where the measure in dispute is Section 45 of Canada's *Patent Act*, which applies to Old Act patents, the word 'subject-matter' means the inventions that were protected by those patents. We, therefore, confirm the conclusion of the Panel in this regard.\(^{108}\)"


4. **Paragraph 8**

(a) "a means by which applications for patents for such inventions can be filed"

123. In *India – Patents (US)*, in reviewing the Panel's finding that the patent law of India was inconsistent with Article 70.8, the Appellate Body considered the meaning of the term "means" within the phrase "a means by which applications for patents for such inventions can be filed":

"Article 70.8(a) imposes an obligation on Members to provide 'a means' by which mailbox applications can be filed 'from the date of entry into force of the WTO Agreement'. Thus, this obligation has been in force since 1 January 1995. The issue before us in this appeal is not whether this obligation exists or whether this obligation is now in force. Clearly, it exists, and, equally clearly, it is in force now. The issue before us in this appeal is: what precisely is the 'means' for filing mailbox applications that is contemplated and required by Article 70.8(a)?

... We believe the Panel was correct in finding that the 'means' that the Member concerned is obliged to provide under Article 70.8(a) must allow for 'the entitlement to file mailbox applications and the allocation of filing and priority dates to them'. Furthermore, the Panel was correct in finding that the 'means' established under Article 70.8(a) must also provide 'a sound legal basis to preserve novelty and priority as of those dates'. These findings flow inescapably from the necessary operation of paragraphs (b) and (c) of Article 70.8."

124. While the term "means" was held to include the notion of a "sound legal basis", the Appellate Body also found that such a "sound legal basis" did not have to provide for complete legal certainty with respect to the future grant of the relevant patent:

"However, we do not agree with the Panel that Article 70.8(a) requires a Member to establish a means 'so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated because, at the filing or priority date, the matter for which protection was sought was unpatentable in the country in question'. India is entitled, by the 'transitional arrangements' in paragraphs 1, 2 and 4 of Article 65, to delay application of Article 27 for patents for pharmaceutical and agricultural chemical products until 1 January 2005. In our view, India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates. No more."109

5. **Paragraph 9**

(a) "exclusive marketing rights"

125. In *India – Patents (US)*, reviewing the Panel's finding that the patent law of India was inconsistent with Article 70.9, the Appellate Body addressed the relationship between Article 70.8(a) and 70.9:

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109 Appellate Body Report on *India – Patents (US)*, paras. 54 and 57.
110 Appellate Body Report on *India – Patents (US)*, para. 58.
"By its terms, Article 70.9 applies only in situations where a product patent application is filed under Article 70.8(a). Like Article 70.8(a), Article 70.9 applies 'notwithstanding the provisions of Part VI'. Article 70.9 specifically refers to Article 70.8(a), and they operate in tandem to provide a package of rights and obligations that apply during the transitional periods contemplated in Article 65. It is obvious, therefore, that both Article 70.8(a) and Article 70.9 are intended to apply as from the date of entry into force of the WTO Agreement."

111

126. In India – Patents (EC), examining the EC claim under Article 70.9, the Panel addressed the argument by India that Article 70.9, by referring only to the grant of "exclusive marketing rights" should be distinguished from e.g. the phrase "patents shall be available" under Article 27:

"India essentially repeats its arguments in the previous case that the obligations under Article 70.9 should be distinguished from those under other provisions of the TRIPS Agreement because it uses the term 'exclusive marketing rights shall be granted ...'. According to India, there is a material difference between this expression and such other expressions as 'patents shall be available ...' in Article 27. We disagree. The Panel report in dispute WT/DS50 [India – Patents (US)] points out that the term 'right' connotes an entitlement to which a person has a just claim and that, as such, it implies general, non-discretionary availability in the case of those eligible to exercise it. It was held that an exclusive marketing right could not be 'granted' in a specific case unless it was 'available' in the first place. The Panel's view was upheld by the Appellate Body, and we do not see any reason to adopt a different position in the present case. In this connection, we would also note that India considers that exclusive marketing rights are to be granted in response to requests from those who are eligible. In our view, a request-based system of rights cannot operate effectively unless there is a mechanism in place that establishes general availability and enables such requests to be made."

112

6. Relationship with other Articles

(a) Relationship between Section 5 of Part II and Article 70.2

127. In Canada – Patent Term, the Appellate Body addressed the relationship between Section 5 and Article 70.2:

"Article 70.2 applies the obligations of the TRIPS Agreement to 'all subject matter existing … and which is protected' on the date of application of the TRIPS Agreement for a Member. A Member is required, as from that date, to implement all obligations under the TRIPS Agreement in respect of such existing subject matter. This includes the obligation in Article 33. We see no basis in the text for isolating or insulating the obligation in Article 33 relating to the duration of a patent term from the other obligations relating to patents that are also found in Section 5 of the TRIPS Agreement. There is nothing whatsoever in Section 5 to indicate that the obligation relating to patent term in Article 33 differs in application in any respect from the other obligations in Section 5. An obligation that relates to duration must necessarily have a beginning and an end date. On that ground alone, it cannot be argued that the obligation is attached to, and arises uniquely from, certain 'acts'. Although Canada has not done so, it could just as easily be argued that the exclusive rights under Article 28 are also an 'integral part' of the 'act' of granting a patent, as

111 Appellate Body Report on India – Patents (US), para. 82.
112 Panel Report on India – Patents (EC), para. 7.65.
those rights also can arise only from the grant and consequent existence of a patent.\textsuperscript{113}

(b) Relationships among Articles 65 and 66 and Article 70.8 and 70.9

128. With respect to the relationship between Article 65 and Article 70.8, see paragraph 110 above. With respect to the relationship between Articles 65 and 66 and Article 70.9, see paragraph 111 above.

LXXII. ARTICLE 71

A. TEXT OF ARTICLE 71

\textit{Article 71}

\textit{Review and Amendment}

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

B. INTERPRETATION AND APPLICATION OF ARTICLE 71

\textit{No jurisprudence or decision of a competent WTO body.}

LXXIII. ARTICLE 72

A. TEXT OF ARTICLE 72

\textit{Article 72}

\textit{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 72

\textit{No jurisprudence or decision of a competent WTO body.}

\textsuperscript{113} Appellate Body Report on \textit{Canada – Patent Term}, para. 77.
LXXIV. ARTICLE 73

A. TEXT OF ARTICLE 73

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member 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 a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

B. INTERPRETATION AND APPLICATION OF ARTICLE 73

No jurisprudence or decision of a competent WTO body.

LXXV. TEXT OF THE PROVISIONS OF THE PARIS CONVENTION (1967) INCORPORATED BY ARTICLE 2.1 OF THE TRIPS AGREEMENT

Article 1

[Establishment of the Union; Scope of Industrial Property]

(footnote original) Articles have been given titles to facilitate their identification. There are no titles in the signed (French) text.

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.
Article 2
[National Treatment for Nationals of Countries of the Union]

(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

(2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.

Article 3
[Same Treatment for Certain Categories of Persons as for Nationals of Countries of the Union]

Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.

Article 4
[A to I. Patents, Utility Models, Industrial Designs, Marks, Inventors' Certificates: Right of Priority. – G. Patents: Division of the Application]

A.—

(1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B.—

Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union.
C.—

(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks.

(2) These periods shall start from the date of filing of the first application; the day of filing shall not be included in the period.

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

(4) A subsequent application concerning the same subject as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union shall be considered as the first application, of which the filing date shall be the starting point of the period of priority, if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority. The previous application may not thereafter serve as a basis for claiming a right of priority.

D.—

(1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation.

(4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.

(5) Subsequently, further proof may be required.

Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2), above.

E.—

(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model, the period of priority shall be the same as that fixed for industrial designs.

(2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa.
F. —

No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple priorities, even if they originate in different countries, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed, provided that, in both cases, there is unity of invention within the meaning of the law of the country.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions.

G.—

(1) If the examination reveals that an application for a patent contains more than one invention, the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any.

(2) The applicant may also, on his own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.

H. —

Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

I.—

(1) Applications for inventors' certificates filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate shall give rise to the right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate.

Article 4bis

[Patents: Independence of Patents Obtained for the Same Invention in Different Countries]

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

(3) The provision shall apply to all patents existing at the time when it comes into effect.

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession.
(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority.

**Article 4ter**

*Patents: Mention of the Inventor in the Patent*

The inventor shall have the right to be mentioned as such in the patent.

**Article 4quater**

*Patents: Patentability in Case of Restrictions of Sale by Law*

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

**Article 5**

[A. Patents: Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses. — B. Industrial Designs: Failure to Work; Importation of Articles. — C. Marks: Failure to Use; Different Forms; Use by Co–proprietors. — D. Patents, Utility Models, Marks, Industrial Designs: Marking]

A.—

(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non–exclusive and shall not be transferable, even in the form of the grant of a sub–license, except with that part of the enterprise or good/will which exploits such license.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.

B.—

The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected.

C.—

(1) If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.
(2) Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.

(3) Concurrent use of the same mark on identical or similar goods by industrial or commercial establishments considered as co–proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed shall not prevent registration or diminish in any way the protection granted to the said mark in any country of the Union, provided that such use does not result in misleading the public and is not contrary to the public interest.

D. —

No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.

Article 5bis
[All Industrial Property Rights: Period of Grace for the Payment of Fees for the Maintenance of Rights; Patents: Restoration]

(1) A period of grace of not less than six months shall be allowed for the payment of the fees prescribed for the maintenance of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.

(2) The countries of the Union shall have the right to provide for the restoration of patents which have lapsed by reason of non–payment of fees.

Article 5ter
[Patents: Patented Devices Forming Part of Vessels, Aircraft, or Land Vehicles]

In any country of the Union the following shall not be considered as infringements of the rights of a patentee:

1. the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel;

2. the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.

Article 5quater
[Patents: Importation of Products Manufactured by a Process Patented in the Importing Country]

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Article 5quinquies
[Industrial Designs]

Industrial designs shall be protected in all the countries of the Union.
Article 6

[Mark: Conditions of Registration; Independence of Protection of Same Mark in Different Countries]

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.

(2) However, an application for the registration of a mark filed by a national of a country of the Union in any country of the Union may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal, has not been effected in the country of origin.

(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

Article 6bis

[Mark: Well-Known Marks]

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

Article 6ter

[Mark: Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations]

(1) (a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.
(2) Prohibition of the use of official signs and hallmarks indicating control and warranty shall apply solely in cases where the marks in which they are incorporated are intended to be used on goods of the same or a similar kind.

(3)

(a) For the application of these provisions, the countries of the Union agree to communicate reciprocally, through the intermediary of the International Bureau, the list of State emblems, and official signs and hallmarks indicating control and warranty, which they desire, or may hereafter desire, to place wholly or within certain limits under the protection of this Article, and all subsequent modifications of such list. Each country of the Union shall in due course make available to the public the lists so communicated. Nevertheless such communication is not obligatory in respect of flags of States.

(b) The provisions of subparagraph (b) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

(4) Any country of the Union may, within a period of twelve months from the receipt of the notification, transmit its objections, if any, through the intermediary of the International Bureau, to the country or international intergovernmental organization concerned.

(5) In the case of State flags, the measures prescribed by paragraph (1), above, shall apply solely to marks registered after November 6, 1925.

(6) In the case of State emblems other than flags, and of official signs and hallmarks of the countries of the Union, and in the case of armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations, these provisions shall apply only to marks registered more than two months after receipt of the communication provided for in paragraph (3), above.

(7) In cases of bad faith, the countries shall have the right to cancel even those marks incorporating State emblems, signs, and hallmarks, which were registered before November 6, 1925.

(8) Nationals of any country who are authorized to make use of the State emblems, signs, and hallmarks, of their country may use them even if they are similar to those of another country.

(9) The countries of the Union undertake to prohibit the unauthorized use in trade of the State armorial bearings of the other countries of the Union, when the use is of such a nature as to be misleading as to the origin of the goods.

(10) The above provisions shall not prevent the countries from exercising the right given in paragraph (3) of Article 6quinquies, Section B, to refuse or to invalidate the registration of marks incorporating, without authorization, armorial bearings, flags, other State emblems, or official signs and hallmarks adopted by a country of the Union, as well as the distinctive signs of international intergovernmental organizations referred to in paragraph (1), above.

**Article 6quater**

*Marks: Assignment of Marks*

(1) When, in accordance with the law of a country of the Union, the assignment of a mark is valid only if it takes place at the same time as the transfer of the business or goodwill to which the mark belongs, it shall suffice for the recognition of such validity that the portion of the business or goodwill located in that country be transferred to the assignee, together with the exclusive right to manufacture in the said country, or to sell therein, the goods bearing the mark assigned.
(2) The foregoing provision does not impose upon the countries of the Union any obligation to regard as valid the assignment of any mark the use of which by the assignee would, in fact, be of such a nature as to mislead the public, particularly as regards the origin, nature, or essential qualities, of the goods to which the mark is applied.

Article 6quinquies
[Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union]

A.—

(1) Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate.

(2) Shall be considered the country of origin the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a national of a country of the Union, the country of which he is a national.

B.—

Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;

2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may, serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;

3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

This provision is subject, however, to the application of Article 10bis.

C.—

(1) In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.

(2) No trademark shall be refused in the other countries of the Union for the sole reason that it differs from the mark protected in the country of origin only in respect of elements that do not alter its distinctive character and do not affect its identity in the form in which it has been registered in the said country of origin.

D.—

No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin.
E. —

However, in no case shall the renewal of the registration of the mark in the country of origin involve an obligation to renew the registration in the other countries of the Union in which the mark has been registered.

F. —

The benefit of priority shall remain unaffected for applications for the registration of marks filed within the period fixed by Article 4, even if registration in the country of origin is effected after the expiration of such period.

**Article 6**

**sexies**

[**Marks:** Service Marks]

The countries of the Union undertake to protect service marks. They shall not be required to provide for the registration of such marks.

**Article 6**

**septies**

[**Marks:** Registration in the Name of the Agent or Representative of the Proprietor Without the Latter's Authorization]

(1) If the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favor of the said registration, unless such agent or representative justifies his action.

(2) The proprietor of the mark shall, subject to the provisions of paragraph (1), above, be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use.

(3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article.

**Article 7**

[**Marks:** Nature of the Goods to which the Mark is Applied]

The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

**Article 7**

**bis**

[**Marks:** Collective Marks]

(1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.

(2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.

(3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.
Article 8

[Trade Names]

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

Article 9

[Marks, Trade Names: Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name]

(1) All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection.

(2) Seizure shall likewise be effected in the country where the unlawful affixation occurred or in the country into which the goods were imported.

(3) Seizure shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country.

(4) The authorities shall not be bound to effect seizure of goods in transit.

(5) If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country.

(6) If the legislation of a country permits neither seizure on importation nor prohibition of importation nor seizure inside the country, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Article 10

[False Indications: Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer]

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the good or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10bis

[Unfair Competition]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:
1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Article 10ter
[Marks, Trade Names, False Indications, Unfair Competition: Remedies, Right to Sue]

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10bis.

(2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10 and 10bis, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

Article 11
[Inventions, Utility Models, Industrial Designs, Marks: Temporary Protection at Certain International Exhibitions]

(1) The countries of the Union shall, in conformity with their domestic legislation, grant temporary protection to patentable inventions, utility models, industrial designs, and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them.

(2) Such temporary protection shall not extend the periods provided by Article 4. If, later, the right of priority is invoked, the authorities of any country may provide that the period shall start from the date of introduction of the goods into the exhibition.

(3) Each country may require as proof of the identity of the article exhibited and of the date of its introduction, such documentary evidence as it considers necessary.

Article 12
[Special National Industrial Property Services]

(1) Each country of the Union undertakes to establish a special industrial property service and a central office for the communication to the public of patents, utility models, industrial designs, and trademarks.

(2) This service shall publish an official periodical journal. It shall publish regularly:

(a) the names of the proprietors of patents granted, with a brief designation of the inventions patented;

(b) the reproductions of registered trademarks.

...
Article 19
[Special Agreements]

It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.

...


Article 1
[Establishment of a Union]

Each Article and the Appendix have been given titles to facilitate their identification. There are no titles in the signed (English) text.

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

Article 2


(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such
works, designs and models shall be protected. Works protected in the country of origin solely as
designs and models shall be entitled in another country of the Union only to such special protection as
is granted in that country to designs and models; however, if no such special protection is granted in
that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to
miscellaneous facts having the character of mere items of press information.

Article 2bis

[Possible Limitation of Protection of Certain Works: 1. Certain speeches;
2. Certain uses of lectures and addresses; 3. Right to make collections of such works]

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or
in part, from the protection provided by the preceding Article political speeches and speeches delivered
in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the
conditions under which lectures, addresses and other works of the same nature which are delivered in
public may be reproduced by the press, broadcast, communicated to the public by wire and made the
subject of public communication as envisaged in Article 11bis(1) of this Convention, when such use is
justified by the informative purpose.

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his
works mentioned in the preceding paragraphs.

Article 3

[Criteria of Eligibility for Protection: 1. Nationality of author; place of publication of work;
2. Residence of author; 3. "Published" works; 4. "Simultaneously published" works]

(1) The protection of this Convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their
    works, whether published or not;
(b) authors who are not nationals of one of the countries of the Union, for their
    works first published in one of those countries, or simultaneously in a country outside
    the Union and in a country of the Union.

(2) Authors who are not nationals of one of the countries of the Union but who have their
habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals
of that country.

(3) The expression "published works" means works published with the consent of their
authors, whatever may be the means of manufacture of the copies, provided that the availability of such
copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature
of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the
public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic
works, the exhibition of a work of art and the construction of a work of architecture shall not constitute
publication.

(4) A work shall be considered as having been published simultaneously in several
countries if it has been published in two or more countries within thirty days of its first publication.

Article 4

[Criteria of Eligibility for Protection of Cinematographic Works,
Works of Architecture and Certain Artistic Works]

The protection of this Convention shall apply, even if the conditions of Article 3 are not
fulfilled, to:
Article 5

[Rights Guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin"]

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country;
(b) in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

Article 6

[Possible Restriction of Protection in Respect of Certain Works of Nationals of Certain Countries Outside the Union: 1. In the country of the first publication and in other countries; 2. No retroactivity; 3. Notice]

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.
(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General") by a written declaration specifying the countries in regard to which protection is restricted, and the restrictions to which rights of authors who are nationals of those countries are subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

Article 7

[Term of Protection: 1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works; 4. For photographic works and works of applied art; 5. Starting date of computation; 6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms]

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.
Article 7bis
[Term of Protection for Works of Joint Authorship]

The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.

Article 8
[Right of Translation]

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

Article 9

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10
[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10bis
[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.
It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Article 11
[Certain Rights in Dramatic and Musical Works: 1. Right of public performance and of communication to the public of a performance; 2. In respect of translations]

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11bis
[Broadcasting and Related Rights: 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Compulsory licenses; 3. Recording; ephemeral recordings]

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.
Article 11ter

[ Certain Rights in Literary Works: 1. Right of public recitation and of communication to the public of a recitation; 2. In respect of translations ]

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works.

(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 12

[ Right of Adaptation, Arrangement and Other Alteration ]

Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

Article 13

[ Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto: 1. Compulsory licenses; 2. Transitory measures; 3. Seizure on importation of copies made without the author's permission ]

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

Article 14

[ Cinematographic and Related Rights: 1. Cinematographic adaptation and reproduction; distribution; public performance and public communication by wire of works thus adapted or reproduced; 2. Adaptation of cinematographic productions; 3. No compulsory licenses ]

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.
(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.

(3) The provisions of Article 13(1) shall not apply.

**Article 14bis**

[Special Provisions Concerning Cinematographic Works: 1. Assimilation to "original" works; 2. Ownership; limitation of certain rights of certain contributors; 3. Certain other contributors]

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)

(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

**Article 14ter**


(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.
(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

**Article 15**

**[Right to Enforce Protected Rights]**: 1. Where author's name is indicated or where pseudonym leaves no doubt as to author's identity;
2. In the case of cinematographic works;
3. In the case of anonymous and pseudonymous works;
4. In the case of certain unpublished works of unknown authorship]

(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.

(2) The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

(3) In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

(4) 

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

**Article 16**

**[Infringing Copies]**: 1. Seizure; 2. Seizure on importation; 3. Applicable law]

(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.

(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

(3) The seizure shall take place in accordance with the legislation of each country.

**Article 17**

**[Possibility of Control of Circulation, Presentation and Exhibition of Works]**

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the
circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

**Article 18**

*Works Existing on Convention's Entry Into Force:*

1. Protectable where protection not yet expired in country of origin;
2. Non-protectable where protection already expired in country where it is claimed;
3. Application of these principles; 4. Special cases]

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

**Article 19**

*Protection Greater than Resulting from Convention*

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

**Article 20**

*Special Agreements Among Countries of the Union*

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

**Article 21**

*Special Provisions Regarding Developing Countries:*

1. Reference to Appendix; 2. Appendix part of Act]

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)(b), the Appendix forms an integral part of this Act.

...
APPENDIX

[SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES]

Article I

[Faculties Open to Developing Countries: 1. Availability of certain faculties; declaration; 2. Duration of effect of declaration; 3. Cessation of developing country status; 4. Existing stocks of copies; 5. Declarations concerning certain territories; 6. Limits of reciprocity]

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)(a).

(2) Any declaration under paragraph (1) notified before the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the said period. Any such declaration may be renewed in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(3) Any country of the Union which has ceased to be regarded as a developing country as referred to in paragraph (1) shall no longer be entitled to renew its declaration as provided in paragraph (2), and, whether or not it formally withdraws its declaration, such country shall be precluded from availing itself of the faculties referred to in paragraph (1) from the expiration of the ten-year period then running or from the expiration of a period of three years after it has ceased to be regarded as a developing country, whichever period expires later.

(4) Where, at the time when the declaration made under paragraph (1) or (2) ceases to be effective, there are copies in stock which were made under a license granted by virtue of this Appendix, such copies may continue to be distributed until their stock is exhausted.

(5) Any country which is bound by the provisions of this Act and which has deposited a declaration or a notification in accordance with Article 31(1) with respect to the application of this Act to a particular territory, the situation of which can be regarded as analogous to that of the countries referred to in paragraph (1), may, in respect of such territory, make the declaration referred to in paragraph (1) and the notification of renewal referred to in paragraph (2). As long as such declaration or notification remains in effect, the provisions of this Appendix shall be applicable to the territory in respect of which it was made.

(6) The fact that a country avails itself of any of the faculties referred to in paragraph (1) does not permit another country to give less protection to works of which the country of origin is the former country than it is obliged to grant under Articles 1 to 20.
(b) The right to apply reciprocal treatment provided for in Article 30(2)(b), second sentence, shall not, until the date on which the period applicable under Article I(3) expires, be exercised in respect of works the country of origin of which is a country which has made a declaration according to Article V(1)(a).

Article II

[Limitations on the Right of Translation: 1. Licenses grantable by competent authority; 2. to 4. Conditions allowing the grant of such licenses; 5. Works for which licenses may be granted; 6. Termination of licenses; 7. Works composed mainly of illustrations; 8. Works withdrawn from circulation; 9. Licenses for broadcasting organizations]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2)

(a) Subject to paragraph (3), if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.

(b) A license under the conditions provided for in this Article may also be granted if all the editions of the translation published in the language concerned are out of print.

(3)

(a) In the case of translations into a language which is not in general use in one or more developed countries which are members of the Union, a period of one year shall be substituted for the period of three years referred to in paragraph (2)(a).

(b) Any country referred to in paragraph (1) may, with the unanimous agreement of the developed countries which are members of the Union and in which the same language is in general use, substitute, in the case of translations into that language, for the period of three years referred to in paragraph (2)(a) a shorter period as determined by such agreement but not less than one year. However, the provisions of the foregoing sentence shall not apply where the language in question is English, French or Spanish. The Director General shall be notified of any such agreement by the Governments which have concluded it.

(4)

(a) No license obtainable after three years shall be granted under this Article until a further period of six months has elapsed, and no license obtainable after one year shall be granted under this Article until a further period of nine months has elapsed

   (i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

   (ii) where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.
AGREEMENT ON TRADE-RELATED ASPECTS
OF INTELLECTUAL PROPERTY RIGHTS

(b) If, during the said period of six or nine months, a translation in the language in respect of which the application was made is published by the owner of the right of translation or with his authorization, no license under this Article shall be granted.

(5) Any license under this Article shall be granted only for the purpose of teaching, scholarship or research.

(6) If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such translation is in the same language and with substantially the same content as the translation published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) For works which are composed mainly of illustrations, a license to make and publish a translation of the text and to reproduce and publish the illustrations may be granted only if the conditions of Article III are also fulfilled.

(8) No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.

(9)

(a) A license to make a translation of a work which has been published in printed or analogous forms of reproduction may also be granted to any broadcasting organization having its headquarters in a country referred to in paragraph (1), upon an application made to the competent authority of that country by the said organization, provided that all of the following conditions are met:

(i) the translation is made from a copy made and acquired in accordance with the laws of the said country;

(ii) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;

(iii) the translation is used exclusively for the purposes referred to in condition (ii) through broadcasts made lawfully and intended for recipients on the territory of the said country, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;

(iv) all uses made of the translation are without any commercial purpose.

(b) Sound or visual recordings of a translation which was made by a broadcasting organization under a license granted by virtue of this paragraph may, for the purposes and subject to the conditions referred to in subparagraph (a) and with the agreement of that organization, also be used by any other broadcasting organization having its headquarters in the country whose competent authority granted the license in question.

(c) Provided that all of the criteria and conditions set out in subparagraph (a) are met, a license may also be granted to a broadcasting organization to translate any text incorporated in an audio-visual fixation where such fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

(d) Subject to subparagraphs (a) to (c), the provisions of the preceding paragraphs shall apply to the grant and exercise of any license granted under this paragraph.
Article III

[Limitation on the Right of Reproduction: 1. Licenses grantable by competent authority; 2. to 5. Conditions allowing the grant of such licenses; 6. Termination of licenses; 7. Works to which this Article applies]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2)

(a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of

(i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work, or

(ii) any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date,

copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to reproduce and publish such edition at that or a lower price for use in connection with systematic instructional activities.

(b) A license to reproduce and publish an edition which has been distributed as described in subparagraph (a) may also be granted under the conditions provided for in this Article if, after the expiration of the applicable period, no authorized copies of that edition have been on sale for a period of six months in the country concerned to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.

(3) The period referred to in paragraph (2)(a)(i) shall be five years, except that

(i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;

(ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(4)

(a) No license obtainable after three years shall be granted under this Article until a period of six months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) Where licenses are obtainable after other periods and Article IV(2) is applicable, no license shall be granted until a period of three months has elapsed from the date of the dispatch of the copies of the application.
(c) If, during the period of six or three months referred to in subparagraphs (a) and (b), a distribution as described in paragraph (2)(a) has taken place, no license shall be granted under this Article.

(d) No license shall be granted if the author has withdrawn from circulation all copies of the edition for the reproduction and publication of which the license has been applied for.

(5) A license to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

(i) where the translation was not published by the owner of the right of translation or with his authorization, or

(ii) where the translation is not in a language in general use in the country in which the license is applied for.

(6) If copies of an edition of a work are distributed in the country referred to in paragraph (1) to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such edition is in the same language and with substantially the same content as the edition which was published under the said license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) Subject to subparagraph (b), the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

This Article shall also apply to the reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the country in which the license is applied for, always provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Article IV


(1) A license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as making the request, the applicant shall inform any national or international information center referred to in paragraph (2).

(2) If the owner of the right cannot be found, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent to grant the license, to the publisher whose name appears on the work and to any national or international information center which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country in which the publisher is believed to have his principal place of business.

(3) The name of the author shall be indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III. The title of the work shall...
appear on all such copies. In the case of a translation, the original title of the work shall appear in any case on all the said copies.

(4)

(a) No license granted under Article II or Article III shall extend to the export of copies, and any such license shall be valid only for publication of the translation or of the reproduction, as the case may be, in the territory of the country in which it has been applied for.

(b) For the purposes of subparagraph (a), the notion of export shall include the sending of copies from any territory to the country which, in respect of that territory, has made a declaration under Article I(5).

(c) Where a governmental or other public entity of a country which has granted a license to make a translation under Article II into a language other than English, French or Spanish sends copies of a translation published under such license to another country, such sending of copies shall not, for the purposes of subparagraph (a), be considered to constitute export if all of the following conditions are met:

(i) the recipients are individuals who are nationals of the country whose competent authority has granted the license, or organizations grouping such individuals;

(ii) the copies are to be used only for the purpose of teaching, scholarship or research;

(iii) the sending of the copies and their subsequent distribution to recipients is without any commercial purpose; and

(iv) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General has been notified of the agreement by the Government of the country in which the license has been granted.

(5) All copies published under a license granted by virtue of Article II or Article III shall bear a notice in the appropriate language stating that the copies are available for distribution only in the country or territory to which the said license applies.

(6)

(a) Due provision shall be made at the national level to ensure

(i) that the license provides, in favour of the owner of the right of translation or of reproduction, as the case may be, for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned, and

(ii) payment and transmittal of the compensation: should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

(b) Due provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.
Article V

[Alternative Possibility for Limitation of the Right of Translation:
1. Regime provided for under the 1886 and 1896 Acts;
2. No possibility of change to regime under Article II;
3. Time limit for choosing the alternative possibility]

(1)

(a) Any country entitled to make a declaration that it will avail itself of the faculty provided for in Article II may, instead, at the time of ratifying or acceding to this Act:

(i) if it is a country to which Article 30(2)(a) applies, make a declaration under that provision as far as the right of translation is concerned;

(ii) if it is a country to which Article 30(2)(a) does not apply, and even if it is not a country outside the Union, make a declaration as provided for in Article 30(2)(b), first sentence.

(b) In the case of a country which ceases to be regarded as a developing country as referred to in Article I(1), a declaration made according to this paragraph shall be effective until the date on which the period applicable under Article I(3) expires.

(c) Any country which has made a declaration according to this paragraph may not subsequently avail itself of the faculty provided for in Article II even if it withdraws the said declaration.

(2) Subject to paragraph (3), any country which has availed itself of the faculty provided for in Article II may not subsequently make a declaration according to paragraph (1).

(3) Any country which has ceased to be regarded as a developing country as referred to in Article I(1) may, not later than two years prior to the expiration of the period applicable under Article I(3), make a declaration to the effect provided for in Article 30(2)(b), first sentence, notwithstanding the fact that it is not a country outside the Union. Such declaration shall take effect at the date on which the period applicable under Article I(3) expires.

Article VI

[Possibilities of applying, or admitting the application of, certain provisions of the Appendix before becoming bound by it: 1. Declaration; 2. Deposition and effective date of declaration]

(1) Any country of the Union may declare, as from the date of this Act, and at any time before becoming bound by Articles 1 to 21 and this Appendix:

(i) if it is a country which, were it bound by Articles 1 to 21 and this Appendix, would be entitled to avail itself of the faculties referred to in Article I(1), that it will apply the provisions of Article II or of Article III or of both to works whose country of origin is a country which, pursuant to (ii) below, admits the application of those Articles to such works, or which is bound by Articles 1 to 21 and this Appendix; such declaration may, instead of referring to Article II, refer to Article V;

(ii) that it admits the application of this Appendix to works of which it is the country of origin by countries which have made a declaration under (i) above or a notification under Article I.

(2) Any declaration made under paragraph (1) shall be in writing and shall be deposited with the Director General. The declaration shall become effective from the date of its deposit.
Article 2
Definitions

For the purposes of this Treaty:

(i) "integrated circuit" means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function,

(ii) "layout-design (topography)" means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture,

(iii) "holder of the right" means the natural person who, or the legal entity which, according to the applicable law, is to be regarded as the beneficiary of the protection referred to in Article 6,

(iv) "protected layout-design (topography)" means a layout-design (topography) in respect of which the conditions of protection referred to in this Treaty are fulfilled,

(v) "Contracting Party" means a State, or an Intergovernmental Organization meeting the requirements of item (x), party to this Treaty,

(vi) "territory of a Contracting Party" means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an Intergovernmental Organization, the territory in which the constituting treaty of that Intergovernmental Organization applies,

(vii) "Union" means the Union referred to in Article 1,

(viii) "Assembly" means the Assembly referred to in Article 9,

(ix) "Director General" means the Director General of the World Intellectual Property Organization,

(x) "Intergovernmental Organization" means an organization constituted by, and composed of, States of any region of the world, which has competence in respect of matters governed by this Treaty, has its own legislation providing for intellectual property protection in respect of layout-designs (topographies) and binding on all its member States, and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Treaty.

Article 3
The Subject Matter of the Treaty

(1) [Obligation to Protect Layout-Designs (Topographies)]

(a) Each Contracting Party shall have the obligation to secure, throughout its territory, intellectual property protection in respect of layout-designs (topographies) in accordance with this Treaty. It shall, in particular, secure adequate measures to ensure the prevention of acts considered unlawful under Article 6 and appropriate legal remedies where such acts have been committed.
(b) The right of the holder of the right in respect of an integrated circuit applies whether or not the integrated circuit is incorporated in an article.

(c) Notwithstanding Article 2(i), any Contracting Party whose law limits the protection of layout-designs (topographies) to layout-designs (topographies) of semiconductor integrated circuits shall be free to apply that limitation as long as its law contains such limitation.

(2) [Requirement of Originality]

(a) The obligation referred to in paragraph (1)(a) shall apply to layout-designs (topographies) that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs (topographies) and manufacturers of integrated circuits at the time of their creation.

(b) A layout-design (topography) that consists of a combination of elements and interconnections that are commonplace shall be protected only if the combination, taken as a whole, fulfills the conditions referred to in subparagraph (a).

Article 4
The Legal Form of the Protection

Each Contracting Party shall be free to implement its obligations under this Treaty through a special law on layout-designs (topographies) or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of any of those laws.

Article 5
National Treatment

(1) [National Treatment]

Subject to compliance with its obligation referred to in Article 3(1)(a), each Contracting Party shall, in respect of the intellectual property protection of layout-designs (topographies), accord, within its territory,

(i) to natural persons who are nationals of, or are domiciled in the territory of, any of the other Contracting Parties, and

(ii) to legal entities which or natural persons who, in the territory of any of the other Contracting Parties, have a real and effective establishment for the creation of layout-designs (topographies) or the production of integrated circuits,

the same treatment that it accords to its own nationals.

(2) [Agents, Addresses for Service, Court Proceedings]

Notwithstanding paragraph (1), any Contracting Party is free not to apply national treatment as far as any obligations to appoint an agent or to designate an address for service are concerned or as far as the special rules applicable to foreigners in court proceedings are concerned.

(3) [Application of Paragraphs (1) and (2) to Intergovernmental Organizations]

Where the Contracting Party is an Intergovernmental Organization, "nationals" in paragraph (1) means nationals of any of the States members of that Organization.
Article 6
The Scope of the Protection

(1) [Acts Requiring the Authorization of the Holder of the Right]

(a) Any Contracting Party shall consider unlawful the following acts if performed without the authorization of the holder of the right:

(i) the act of reproducing, whether by incorporation in an integrated circuit or otherwise, a protected layout-design (topography) in its entirety or any part thereof, except the act of reproducing any part that does not comply with the requirement of originality referred to in Article 3(2),

(ii) the act of importing, selling or otherwise distributing for commercial purposes a protected layout-design (topography) or an integrated circuit in which a protected layout-design (topography) is incorporated.

(b) Any Contracting Party shall be free to consider unlawful also acts other than those specified in subparagraph (a) if performed without the authorization of the holder of the right.

(2) [Acts Not Requiring the Authorization of the Holder of the Right]

(a) Notwithstanding paragraph (1), no Contracting Party shall consider unlawful the performance, without the authorization of the holder of the right, of the act of reproduction referred to in paragraph (1)(a)(i) where that act is performed by a third party for private purposes or for the sole purpose of evaluation, analysis, research or teaching.

(b) Where the third party referred to in subparagraph (a), on the basis of evaluation or analysis of the protected layout-design (topography) ("the first layout-design (topography)") creates a layout-design (topography) complying with the requirement of originality referred to in Article 3(2) ("the second layout-design (topography)"), that third party may incorporate the second layout-design (topography) in an integrated circuit or perform any of the acts referred to in paragraph (1) in respect of the second layout-design (topography) without being regarded as infringing the rights of the holder of the right in the first layout-design (topography).

(c) The holder of the right may not exercise his right in respect of an identical original layout-design (topography) that was independently created by a third party.

…

(4) [Sale and Distribution of Infringing Integrated Circuits Acquired Innocently]

Notwithstanding paragraph (1)(a)(ii), no Contracting Party shall be obliged to consider unlawful the performance of any of the acts referred to in that paragraph in respect of an integrated circuit incorporating an unlawfully reproduced layout-design (topography) where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the said integrated circuit, that it incorporates an unlawfully reproduced layout-design (topography).

(5) [Exhaustion of Rights]

Notwithstanding paragraph (1)(a)(ii), any Contracting Party may consider lawful the performance, without the authorization of the holder of the right, of any of the acts referred to in that paragraph where the act is performed in respect of a protected layout-design (topography), or in respect of an integrated circuit in which such a layout-design (topography) is incorporated, that has been put on the market by, or with the consent of, the holder of the right.
Article 7
Exploitation; Registration, Disclosure

(1)  [Faculty to Require Exploitation]

Any Contracting Party shall be free not to protect a layout-design (topography) until it has been ordinarily commercially exploited, separately or as incorporated in an integrated circuit, somewhere in the world.

(2)  [Faculty to Require Registration; Disclosure]

(a) Any Contracting Party shall be free not to protect a layout-design (topography) until the layout-design (topography) has been the subject of an application for registration, filed in due form with the competent public authority, or of a registration with that authority; it may be required that the application be accompanied by the filing of a copy or drawing of the layout-design (topography) and, where the integrated circuit has been commercially exploited, of a sample of that integrated circuit, along with information defining the electronic function which the integrated circuit is intended to perform; however, the applicant may exclude such parts of the copy or drawing that relate to the manner of manufacture of the integrated circuit, provided that the parts submitted are sufficient to allow the identification of the layout-design (topography).

(b) Where the filing of an application for registration according to subparagraph (a) is required, the Contracting Party may require that such filing be effected within a certain period of time from the date on which the holder of the right first exploits ordinarily commercially anywhere in the world the layout-design (topography) of an integrated circuit; such period shall not be less than two years counted from the said date.

(c) Registration under subparagraph (a) may be subject to the payment of a fee.

Article 12
Safeguard of Paris and Berne Conventions

This Treaty shall not affect the obligations that any Contracting Party may have under the Paris Convention for the Protection of Industrial Property or the Berne Convention for the Protection of Literary and Artistic Works.

Article 16
Entry Into Force of the Treaty

(3)  [Protection of Layout-Designs (Topographies) Existing at Time of Entry Into Force]

Any Contracting Party shall have the right not to apply this Treaty to any layout-design (topography) that exists at the time this Treaty enters into force in respect of that Contracting Party, provided that this provision does not affect any protection that such layout-design (topography) may, at that time, enjoy in the territory of that Contracting Party by virtue of international obligations other than those resulting from this Treaty or the legislation of the said Contracting Party.
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GOVERNING THE SETTLEMENT OF DISPUTES

Understanding on Rules and Procedures
Governing the Settlement of Disputes

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I. **ARTICLE 1**

A. **TEXT OF ARTICLE 1**

*Members thereby agree as follows:*

**Article 1**

**Coverage and Application**

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. 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. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.
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B. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Article 1.1

(a) "covered agreements"

1. In Brazil – Desiccated Coconut, the Appellate Body defined the term "covered agreements" as follows:

"The 'covered agreements' include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."  

2. In India – Patents (US), the Appellate Body examined the Panel's interpretation of various provisions of the TRIPS Agreement and noted that "as one of the covered agreements under the DSU, the TRIPS Agreement is subject to the dispute settlement rules and procedures of that Understanding."  

3. The Appellate Body in EC – Poultry considered the relationship between Schedule LXXX of the European Communities and the so-called "Oilseeds Agreement", which had been negotiated by the European Communities and ten other contracting parties, including Brazil. As a part of its agreement with Brazil, a "global" tariff-rate quota had been introduced by the European Communities and subsequently incorporated into the European Communities' Schedule LXXX. Subsequently, in the context of the interpretation of the European Communities' Schedule, the question of the relationship between Schedule LXXX and the Oilseeds Agreement arose. The European Communities argued that Schedule LXXX superseded and terminated the Oilseeds Agreement because the WTO Agreement was a later treaty relating to the same subject matter in accordance with Article 59.1 of the Vienna Convention; alternatively, the European Communities argued that the Oilseeds Agreement only applied to the extent compatible with Schedule LXXX, pursuant to Article 30.3 of the Vienna Convention. The Appellate Body stated:

"In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the Vienna Convention, because the text of the WTO Agreement and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case. Schedule LXXX is annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (the 'Marrakesh Protocol'), and is an integral part of the GATT 1994. As such, it forms part of the multilateral obligations under the WTO Agreement. The Oilseeds Agreement, in contrast, 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. 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

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1 Appellate Body Report on Brazil – Desiccated Coconut, p. 13. With respect to the freedom of panels to rely, in their findings, on provisions other than those referred to by the parties in the request for establishment of a panel or in the terms of reference, see para. 143 in this Chapter.

2 Appellate Body Report on India – Patents (US), para. 29.
GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the WTO Agreement, the Oilseeds Agreement is not one of those legal instruments.” 3

4. The Appellate Body in Guatemala – Cement I examined the Panel's interpretation of the relationship between Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU. See also paragraphs 6-8 below. In this context, the Appellate Body made the following general statement about Article 1.1 of the DSU:

"Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (the 'covered agreements'). The DSU is a coherent system of rules and procedures for dispute settlement which applies to 'disputes brought pursuant to the consultation and dispute settlement provisions of' 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." 4

5. In India – Quantitative Restrictions, India appealed the Panel's conclusion that the Panel was competent to review the justification of India's balance-of-payments (BOP) restrictions under Article XVIII:B of the GATT 1994. India argued that the Panel had erred by failing to give proper consideration to the "institutional balance" embodied in the WTO Agreement; according to India, BOP measures were within the exclusive competence of the BOP Committee and the General Council. India claimed that in view of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of GATT 1994 and the BOP Understanding, the Panel erred in finding that the competence of panels to review the justification of balance-of-payments restrictions is "unlimited". The Appellate Body ruled:

"We note that Appendix 1 to the DSU lists 'Multilateral Agreements on Trade in Goods', to which the GATT 1994 belongs, among the agreements covered by the DSU. A dispute concerning Article XVIII:B is, therefore, covered by the DSU.

…

Appendix 2 does not identify any special or additional dispute settlement rules or procedures relating to balance-of-payments restrictions. It does not mention Article XVIII:B of the GATT 1994, or any of its paragraphs. The DSU is, therefore, fully applicable to the current dispute." 5

2. Article 1.2

(a) "special or additional rules and procedures"

6. In examining the relationship between Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU, the Appellate Body in Guatemala – Cement I stated regarding paragraph 3 of Article 17:

"Article 17.3 of the Anti-Dumping Agreement is not listed in Appendix 2 of the DSU as a special or additional rule and procedure. It is not listed precisely because it provides the legal basis for consultations to be requested by a complaining Member

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4 Appellate Body Report on Guatemala – Cement I, para. 64.
5 Appellate Body Report on India – Quantitative Restrictions, paras. 85-86. With respect to the competence of panels to review balance-of-payments restrictions, see also Chapter on GATT, paras. 427-429.
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 Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'), and under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the 'TRIPS Agreement').

7. The Appellate Body in Guatemala – Cement I also stated that special and additional rules within the meaning of Article 1.2 of the DSU apply only in the case of "inconsistency" or a "difference" between these rules and the provisions of the DSU:

"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."

8. The Appellate Body in Guatemala – Cement I further stated as follows:

"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.

For these reasons, we conclude that the Panel erred in finding that Article 17 of the Anti-Dumping Agreement 'provides for a coherent set of rules for dispute settlement specific to anti-dumping cases ... that replaces the more general approach of the DSU'."

9. In Australia – Automotive Leather II (Article 21.5 – US), both parties argued that Article 4.7 of the SCM Agreement should be read consistently with Article 19.1 of the DSU. The Panel concluded that Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies. The Panel stated:

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"Rather, the recommendation to 'withdraw the subsidy' is required by Article 4.7 of the SCM Agreement, which is a special or additional rule or procedure on dispute settlement, identified in Appendix 2 to the DSU. It is Article 4.7 which we must interpret and apply in this dispute. In this respect, we note Article 1.2 of the DSU…Thus, to the extent that 'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity', it is that different action which prevails."

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.¹

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

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

No jurisprudence or decision of a competent WTO body.

III. ARTICLE 3

A. TEXT OF ARTICLE 3

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry
into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.\footnote{This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.}

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

1. Article 3.2

(a) "security and predictability"

10. The Appellate Body in Japan – Alcoholic Beverages II examined whether the Japanese tax measure governing the taxation of alcoholic beverages violated Article III:2 of GATT 1994. After concurring with the Panel's finding that the Liquor Tax Law was not in compliance with Article III:2, the Appellate Body made the following general statement about WTO rules and the concept of "security and predictability":

"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."\footnote{Appellate Body Report on Japan – Alcoholic Beverages II, p. 31.}

11. In US – Section 301 Trade Act, the Panel examined the European Communities' argument that Section 301 is inconsistent with Article 23 of the DSU as well as various articles of GATT 1994. In its examination, the Panel discussed the importance of the concept of "security and predictability" and stated:

"Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself."\footnote{Panel Report on US – Section 301 Trade Act, para. 7.75.}

12. In Chile – Alcoholic Beverages, Chile claimed that the Panel's findings on the issues of "not similarly taxed" and "so as to afford protection" – which had found Chile to be in violation of its WTO obligations under Article III:2 of GATT 1994 – compromised the security and predictability of...
the multilateral trading system, as provided for in Article 3.2 of the DSU. Chile also claimed that the Panel had added to the rights and obligations of WTO Members under the WTO Agreement, contrary to Article 19.2 of the DSU. The Appellate Body rejected this argument. See paragraph 46 below.

(b) "clarify the existing provisions"

13. In US – Wool Shirts and Blouses, the Appellate Body examined whether a complaining party is entitled to a finding on each of the legal claims it makes to a panel. The Appellate Body stated:

"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."12

14. In EC – Poultry, the Appellate Body held that just as much as a panel is not required to address every legal claim made by a party, neither does it have an obligation to address every argument made by a party. See paragraph 143 below.

(c) "customary rules of interpretation of public international law"

(i) General rule of interpretation

15. The Appellate Body in US – Gasoline stated that the "general rule of interpretation", contained in Article 3113 of the Vienna Convention14 had attained the status of customary or general international law. The Appellate Body added that WTO law was not to be "read in clinical isolation from public international law":

"The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of

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12 Appellate Body Report on US – Wool Shirts and Blouses, p. 19. With respect to the issue of whether a Panel is required to address all legal claims raised by a party, see pp. 17-18 of the Report.
13 Article 31 of the Vienna Convention reads: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."
the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."\(^{15}\)

16. In connection with applying the "customary rules of interpretation of public international law", the Appellate Body in Japan – Alcoholic Beverages II stated:

"Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'.\(^{16}\)

17. The Panel on US – Section 301 Trade Act held that "the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order."\(^{17}\) In contrast, the Appellate Body in US – Shrimp adopted the following approach:

"A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."\(^{18}\)

18. In India – Patents (US), the Appellate Body emphasized that the principles of treaty interpretation "neither require nor condone" the importation into a treaty of "words that are not there" nor of "concepts that were not intended":

"The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended….These rules must be respected and applied in interpreting the TRIPS Agreement or any other covered agreements….Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."\(^{19}\)

19. In EC – Hormones, the Appellate Body paraphrased its statement from India – Patents(US), referenced in paragraph 18 above, in the following terms:

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\(^{15}\) Appellate Body Report on US – Gasoline, p.17. See also Appellate Body Reports on India – Patents (US), para. 46; Japan – Alcoholic Beverages II, pp. 10-12; and US – DRAMs, para. 6.13.

\(^{16}\) Appellate Body Report on, Japan – Alcoholic Beverages II, p. 11.

\(^{17}\) Panel Report on US – Section 301 Trade Act, para. 7.22.

\(^{18}\) Appellate Body Report on US – Shrimp, para. 114. See also Panel Reports on US – Section 301 Trade Act, para. 7.22; India – Patents (US), para. 7.18; US – Underwear, para. 7.18; Appellate Body Report on Argentina – Footwear (EC), para. 91.

\(^{19}\) Appellate Body Report on India – Patents (US), paras. 45-46. See also Appellate Body Report on India – Quantitative Restrictions, footnote 23, para. 94.
"The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used." 20

20. The Panel in Canada – Pharmaceutical Patents held that in the case of the TRIPS Agreement, the context of certain TRIPS provisions to which the Panel could have recourse for interpretative purposes also encompassed provisions of the international agreements on intellectual property incorporated into the TRIPS Agreement, such as the Berne Convention of 1971:

"The Panel noted that, in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Articles 27 and 28, is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties. Thus, as the Panel will have occasion to elaborate further below, Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971) (hereinafter referred to as the Berne Convention) is an important contextual element for the interpretation of Article 30 of the TRIPS Agreement." 21

(ii) Subsequent practice

21. In Japan – Alcoholic Beverages II, the Panel found that "panel reports adopted by the CONTRACTING PARTIES constitute subsequent practice in a specific case". Article 31(3)(b) of the Vienna Convention states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be "taken into account together with the context" in interpreting the terms of the treaty. In reversing the Panel's findings on this issue, the Appellate Body considered "subsequent practice" to mean a "concordant, common and consistent" sequence of acts:

"Article 31(3)(b) of the Vienna Convention states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is to be 'taken into account together with the context' in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant." 22

(iii) Supplementary means of interpretation

22. In Japan – Alcoholic Beverages II, the Appellate Body recalled its statement in US – Gasoline that there is a need to achieve clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention and that this general rule "has attained

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20 Appellate Body report on EC – Hormones, para. 181.
the status of a rule of customary or general international law.\textsuperscript{23} The Appellate Body then went on to state in \textit{Japan – Alcoholic Beverages II} that Article 32 of the \textit{Vienna Convention}\textsuperscript{24}, which deals with the role of supplementary means of interpretation, "has also attained the same status."\textsuperscript{25}

23. The Appellate Body in \textit{EC – Computer Equipment} found it was permissible, in the interpretation of a treaty provision (\textit{in casu} the European Communities' Schedule LXXX), to consider the "historical background against which the treaty was negotiated".

"The application of these rules in Article 31 of the \textit{Vienna Convention} will usually allow a treaty interpreter to establish the meaning of the term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

'... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'

With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.

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 \textit{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 \textit{WTO Agreement} and may be used as a supplementary means of interpretation within the meaning of Article 32 of the \textit{Vienna Convention}."\textsuperscript{26}

24. With respect to the question whether the classification practice of one country, existing at the time of tariff negotiation, was relevant for the interpretation of a country's Schedule of concessions, the Appellate Body emphasized that while of limited value, such unilateral practice was not irrelevant; also, the Appellate Body found that where such unilateral practice of one Member was inconsistent, it could not be considered relevant:

"We note that the Panel examined the classification practice of only the European Communities, and found that the classification of LAN equipment by the United States during the Uruguay Round tariff negotiations was not relevant. The purpose of treaty interpretation is to establish the \textit{common} intention of the parties to the treaty. To establish this intention, the prior practice of only \textit{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. However, the Panel was mistaken in finding that the classification practice of the United States was \textit{not} relevant.

\textsuperscript{23} Appellate Body Report on \textit{Japan – Alcoholic Beverages II}, p. 10.

\textsuperscript{24} Article 32 of the Vienna Convention reads: "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."

\textsuperscript{25} Appellate Body Report on \textit{Japan – Alcoholic Beverages II}, p. 10.

\textsuperscript{26} Appellate Body Report on \textit{EC – Computer Equipment}, paras. 86 and 92.
Then there is the question of the consistency of prior practice. Consistent prior classification practice may often be significant. Inconsistent classification practice, however, cannot be relevant in interpreting the meaning of a tariff concession.  

25. In EC – Poultry, the Appellate Body found that a bilateral agreement between two WTO Members could serve as "supplementary means" of interpretation for a provision of a covered agreement:

"[T]he Oilseeds Agreement may serve as a supplementary means of interpretation of Schedule LXXX pursuant to Article 32 of the Vienna Convention, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat."  

26. In Canada – Dairy, the Appellate Body examined the phrase "cross-border purchases imported by Canadian consumers" contained in the notation of Canada's Schedule. The phrase referred to a tariff-rate quota provided for by the same Schedule. The Appellate Body was called upon to decide whether this phrase could be interpreted so as to justify the Canadian practice of admitting, under this tariff-rate quota, only consumer packaged milk not exceeding the value of Can$20:

"In our view, the language in the notation in Canada's Schedule is not clear on its face. Indeed, the language is general and ambiguous, and, therefore, requires special care on the part of the treaty interpreter. For this reason, it is appropriate, indeed necessary, in this case, to turn to 'supplementary means of interpretation' pursuant to Article 32 of the Vienna Convention. In so doing, we are unable to share the apparent view of the Panel that the meaning of the notation at issue is so clear and self-evident that there was 'no need' to also examine the historical background against which these terms were negotiated."  

27. In EC – Hormones, the Appellate Body referred to "the interpretative principle of in dubio mitius" as a supplementary means of interpretation "widely recognized in international law". It there stated that "the principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."  

(iv) Good faith

28. In US – Shrimp, the Appellate Body held that the chapeau of Article XX was "but one expression of good faith" and also reflected the notion of "abus de droit":

"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

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exercised bona fide, that is to say, reasonably. 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.

(v) Principle of effective treaty interpretation

29. The Appellate Body in US – Gasoline considered the principle of effective treaty interpretation (ut res magis valeat quam pereat) as "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention". In particular, the Appellate Body 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 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."

30. In application of the principle of effective treaty interpretation as defined in paragraph 29 above, the Appellate Body in US – Gasoline found that the Panel had erroneously applied the same standard of discrimination to Article III:4 of GATT 1994 and to the chapeau of Article XX of GATT 1994. The Appellate Body held that to do so would be to effectively deprive the chapeau of its meaning and found that such an approach would be contrary to the principle of giving "meaning and effect to all the terms of a treaty":

"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

31 (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)


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 … 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. 36

31. In Korea – Dairy, the Appellate Body recalled the principle of effective treaty interpretation as it had defined it in US – Gasoline (see paragraph 29 above) and concluded that:

"In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. 37 An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. 38 Article II:2 of the WTO Agreement expressly manifests the intention of the Uruguay Round negotiators that the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole. 39

32. In Korea – Dairy, the Appellate Body applied the principle of effective treaty interpretation to the relationship between the Agreement on Safeguards and Article XIX of GATT 1994 and concluded that "having said that all of the provisions of a treaty must be given meaning and legal effect, we believe that the clause in 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 …' – must have meaning. 40 The Appellate Body therefore disagreed with the Panel on the latter's conclusion whereby the clause in Article XIX:1(a) of GATT 1994 – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … does not add conditions for any measure to be applied

37 (footnote original) We have emphasized this in Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, United States – Gasoline, supra, footnote 12, p. 23; Appellate Body Report, Japan – Alcoholic Beverages, supra, footnote 41, p. 12; and Appellate Body Report, India – Patents, supra, footnote 21, para. 45.
40 Appellate Body Report on Korea – Dairy, para. 82.
pursuant to Article XIX but rather serves as an explanation of why an Article XIX measure may be needed.\textsuperscript{41}

33. The same issue as referenced in paragraph 32 above, arose in Argentina – Footwear (EC). In this case, the Appellate Body also considered whether the Panel had reached a correct conclusion concerning the relationship between the Agreement on Safeguards and Article XIX of GATT 1994. The Appellate Body agreed with the Panel that "Article XIX of GATT and the Safeguards Agreement must \textit{a fortiori} be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction". However, the Appellate Body reversed the Panel's finding 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"\textsuperscript{42}. The Appellate Body held:

"[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to \textit{all} of them, harmoniously. And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to \textit{all} the relevant provisions of these two equally binding agreements."\textsuperscript{43}

\textbf{(vi) Presumption against conflict}

\textbf{Issue of \textit{lex specialis}}

34. In Indonesia – Autos, Indonesia argued that the measures under examination were subsidies and therefore the SCM Agreement, being \textit{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 context\textsuperscript{44} 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

\textsuperscript{41} Appellate Body Report on Korea – Dairy, para. 82, referring to Panel Report on Korea – Dairy, para. 7.42.
\textsuperscript{42} Panel Report on Argentina – Footwear (EC), para. 8.58.
\textsuperscript{43} Appellate Body Report on Argentina – Footwear (EC), para. 81.
\textsuperscript{44} (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.
of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.\textsuperscript{45} 

GATT 1994 and the Annex 1A Agreements 

35. In \textit{EC – Bananas III}, given the existence of claims raised under \textit{GATT 1994}, the \textit{Licensing Agreement} and the \textit{TRIMs Agreement}, the Panel was required to consider the interpretative interrelationship of these three agreements. In so doing, it first referred to the "\textit{General Interpretative Note to Annex 1A}" (of the \textit{WTO Agreement}), which provides:

"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."

36. Noting that both the \textit{Licensing Agreement} and the \textit{TRIMs Agreement} are agreements in Annex 1A to \textit{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 ..."\textsuperscript{46}

(vii) Non-retroactivity of treaties 

37. In \textit{Brazil – Dessicated Coconut}, the Appellate Body discussed Article 28 of the \textit{Vienna Convention}, i.e. the provision containing the general principle of non-retroactivity of treaties:

"The fundamental question in this case is one of the temporal application of one set of international legal norms, or the successor set of norms, to a particular measure taken during the period of co-existence of the GATT 1947 and the \textit{Tokyo Round SCM Code} with the \textit{WTO Agreement}. Article 28 of the \textit{Vienna Convention} contains a general principle of international law concerning the non-retroactivity of treaties.

... 

Article 28 states the general principle that a treaty shall not be applied retroactively 'unless a different intention appears from the treaty or is otherwise established'. 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."\textsuperscript{47}

38. In \textit{EC – Hormones}, the Appellate Body examined the Panel's finding that the \textit{SPS Agreement} should apply to the European Communities measures that were enacted before the entry into force of the \textit{WTO Agreement} on 1 January 1995 because the measures continued to exist after that date and the \textit{SPS Agreement} does not indicate any intention to limit its application to measures enacted after the entry into force of the \textit{WTO Agreement}. The Appellate Body stated:

"We agree with the Panel that the \textit{SPS Agreement} would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the \textit{SPS Agreement} reveals a contrary intention. We also agree with the Panel that the \textit{SPS Agreement} does not reveal such an intention. The \textit{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.  

48. In Canada – Patent Term, the Appellate Body stated that Article 70.1 of the TRIPS Agreement excludes obligations in respect of "acts which occurred" before the date of the application of the TRIPS Agreement but does not exclude rights and obligations in respect of continuing situations. The Appellate Body in noting that its interpretation did not lead to a retroactive application of the TRIPS Agreement stated:

"Article 28 of the Vienna Convention covers not only any 'act', but also any 'fact' or 'situation which ceased to exist'. Article 28 establishes that, in the absence of a contrary intention, treaty provisions do not apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations do apply to any 'situation' which has not ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty. Indeed, the very use of the word 'situation' suggests something that subsists and continues over time; it would, therefore, include 'subject matter existing … and which is protected', such as Old Act patents at issue in this dispute, even though those patents, and the rights conferred by those patents, arose from 'acts which occurred' before the date of application of the TRIPS Agreement for Canada.

This interpretation is confirmed by the Commentary on Article 28, which forms part of the preparatory work of the Vienna Convention:

... 

We note that Article 28 of the Vienna Convention is not applicable if 'a different intention appears from the treaty or is otherwise established'. We see no such 'different intention' in Article 70. Despite some differences in wording and structure from Article 28, we do not see Article 70.1 as in any way establishing 'a different intention' within the meaning of Article 28 of the Vienna Convention."  

(viii) State responsibility

49. In Turkey – Textiles, the Panel noted that in public international law, Turkey could be held responsible for the measures taken by the customs union between Turkey and the European Communities. The Panel noted and quoted the separate opinion of Judge Shahabuddeen's in the Nauru case before the ICJ:

"[T]he [International Law Commission] considered, that where States act through a common organ, each State is separately answerable for the wrongful act of the
common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded as technically as a common organ. …\(^5\) (Emphasis added.)\(^5\)

41. The Panel also noted the International Law Commission's commentaries to the adopted report:

"A similar conclusion is called for in cases of parallel attribution of single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then the two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other.\(^5\) (Emphasis added.)\(^5\)

42. In US – Section 301 Trade Act, although it eventually held that a statute "which … reserves the right for the Member concerned to do something which it has promised not to do under Article 23.2(a)" was a violation of Article 23.2(a) read together with Article 23.1 (see paragraph 294 below), the Panel made the following general statement on State responsibility:

"[U]nder traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance."\(^5\)

(ix) Legitimate expectations

43. The Appellate Body in India – Patents (US) held that the principles of treaty interpretation "neither require nor condone" the importation into a treaty of "words that are not there" or "concepts that were not intended". See paragraph 18 above. The Appellate Body made this statement while reversing the Panel's finding that "[t]he protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle, which derives in part from Article XXIII"\(^5\) and that, when interpreting the text of the TRIPS Agreement, "the legitimate


\(^{51}\) Panel Report on Turkey – Textiles, para. 9.42.

\(^{52}\) (footnote original) See the Yearbook of the International Law Commission, 1978, Vol.II, Part Two, at 99. These commentaries were adopted by the Commission in its session of 8 May to 28 July 1978. Article 27 on state responsibility to which these commentaries refer was adopted at the ILC session of 6 May to 26 July 1996. These commentaries and the report were submitted in the same years to the United Nations General Assembly for its consideration.

\(^{53}\) Panel Report on Turkey – Textiles, para. 9.43.

\(^{54}\) Panel Report on US – Section 301 Trade Act, para. 7.80.

\(^{55}\) Panel Report on India – Patents (US), para. 7.20.
The Appellate Body disagreed with the Panel that the legitimate expectations of Members and private rights holders concerning conditions of competition must always be taken into account in interpreting the TRIPS Agreement and stated that the concept of "reasonable expectations" belonged to the domain of non-violation complaints. The Appellate Body also criticized "the Panel's invocation of the 'legitimate expectations' of Members relating to conditions of competition [which] melds the legally distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action":

"The doctrine of protecting the 'reasonable expectations' of contracting parties developed in the context of 'non-violation' complaints brought under Article XXIII:1(b) of the GATT 1947. Some of the rules and procedures concerning 'non-violation' cases have been codified in Article 26.1 of the DSU. 'Non-violation' complaints are rooted in the GATT's origins as an agreement intended to protect the reciprocal tariff concessions negotiated among the contracting parties under Article II. In the absence of substantive legal rules in many areas relating to international trade, the 'non-violation' provision of Article XXIII:1(b) was aimed at preventing contracting parties from using non-tariff barriers or other policy measures to negate the benefits of negotiated tariff concessions. Under Article XXIII:1(b) of the GATT 1994, a Member can bring a 'non-violation' complaint when the negotiated balance of concessions between Members is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement. The ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation.

...the only cause of action permitted under the TRIPS Agreement during the first five years after the entry into force of the WTO Agreement is a 'violation' complaint under Article XXIII:1(a) of the GATT 1994. This case involves allegations of violation of obligations under the TRIPS Agreement. However, the Panel's invocation of the 'legitimate expectations' of Members relating to conditions of competition melds the legally-distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action. This is not consistent with either Article XXIII of the GATT 1994 or Article 64 of the TRIPS Agreement. Whether or not 'non-violation' complaints should be available for disputes under the TRIPS Agreement is a matter that remains to be determined by the Council for Trade-Related Aspects of Intellectual Property (the 'Council for TRIPS') pursuant to Article 64.3 of the TRIPS Agreement. It is not a matter to be resolved through interpretation by panels or by the Appellate Body."

44. In EC – Computer Equipment, the Appellate Body examined whether the Panel had erred in interpreting the meaning of a tariff concession in the European Communities Schedule in light of the "legitimate expectations" of an exporting Member. The Appellate Body disagreed with the Panel's finding that the tariff concession of a Member may be determined on the basis of the "legitimate expectation" of just one (namely the exporting) Member and emphasized that it was rather the common intention of the parties which should be ascertained. The Appellate Body stated:

"[W]e do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the 'legitimate expectations' of exporting Members

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56 Panel Report on India – Patents (US), para. 7.22.
57 (footnote original) See, in general, E.-U. Petersmann, "Violation Complaints and Non-violation Complaints in International Law" (1991) German Yearbook of International Law 175.
58 Appellate Body Report on India – Patents (US), paras. 41-42.
is consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention. Recently, in India - Patents, the panel stated that good faith interpretation under Article 31 required 'the protection of legitimate expectations'. We found that the panel had misapplied Article 31 of the Vienna Convention....

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.\textsuperscript{59}

45. With respect to the issue of "legitimate expectations" under non-violation complaints, see Chapter on GATT 1994, paragraphs 557-564.

(d) "add to or diminish the rights and obligations"

46. In Chile – Alcoholic Beverages, Chile argued before the Appellate Body that the Panel's findings under Article III:2 of GATT 1994 in connection with "not similarly taxed" and "so as to afford protection" added to the rights and obligations of Members in contravention of Articles 3.2 and 19.2 of the DSU. The Appellate Body stated:

"In this dispute, while we have rejected certain of the factors relied upon by the Panel, we have found that the Panel's legal conclusions are not tainted by any reversible error of law. In these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements. Chile's appeal under Articles 3.2 and 19.2 of the DSU must, therefore, be denied."\textsuperscript{60}

2. Article 3.3

(a) "measures taken by another Member"

47. See the excerpts from the reports of the panels and Appellate Body referenced in paragraphs 74-77 below.

3. Article 3.7

48. With respect to Article 3.7, see paragraph 184 below.


\textsuperscript{60} Appellate Body Report on Chile – Alcoholic Beverages, para. 79.
4. Article 3.8

(a) Presumption of "nullification or impairment"

49. In *EC – Bananas III*, the European Communities appealed the Panel's finding that "the infringement of obligations by the European Communities under a number of WTO agreements, are a prima facie case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU". The Appellate Body observed that the European Communities, in its appeal, attempted to "rebut the presumption of nullification or impairment on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage." The Appellate Body stated:

"[W]e note that the two issues of nullification or impairment and of the standing of the United States are closely related….Two points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas….They are…relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.

So too, is the panel report in *United States – Superfund*, to which the Panel referred. In that case, the panel examined whether measures with 'only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 ...'. The panel concluded (and in so doing, confirmed the views of previous panels) that:

'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."\(^{61}\)

The panel in *United States - Superfund* subsequently decided 'not to examine the submissions of the parties on the trade effects of the tax differential' on the basis of the legal grounds it had enunciated. The reasoning in *United States - Superfund* applies equally in this case.\(^{62}\)

50. In *Turkey – Textiles*, Turkey argued that even if its quantitative restrictions on imports of textile and clothing products from India were in violation of WTO law, India had not suffered any nullification or impairment of its WTO benefits within the meaning of Article 3.8 of the DSU. Turkey pointed out that that imports of textile and clothing from India had actually increased since the Turkish measures at issue had entered into force. The Panel, in a finding not reviewed by the Appellate Body, rejected this argument:

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\(^{61}\) (footnote original) GATT Panel Report on *US – Superfund*, para. 5.1.9.

"We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, is would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO." 63

51. In Guatemala – Cement II, Guatemala argued that its alleged failure to issue proper notifications and its failure to provide the Mexican interested party with the full text of the application for anti-dumping investigations, had not nullified or impaired Mexico's benefits accruing under the Anti-Dumping Agreement. The Panel declined to consider this preliminary objection by Guatemala, stating that "we will address the issue of nullification or impairment after we have considered whether Guatemala has acted consistently with its obligations under the AD Agreement." 64 Subsequently, the Panel held:

"Guatemala argues that in the case of the Article 5.5 notification it did not initiate the investigation until after Mexico had been notified and that it granted Cruz Azul an extension to respond to the questionnaire and thus Mexico was not impaired in the defence of its interests. We have already found that the initiation date was 11 January 1996 and thus notification under Article 5.5 was not provided until after initiation. 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." 64

52. In Argentina – Ceramic Tiles, Argentina claimed that the European Communities had failed to demonstrate that Italian tile exporters were "prejudiced" by the failure of the Argentine anti-dumping authority to calculate individual anti-dumping margins. In this context, Argentina relied on the Appellate Body's findings in Korea – Dairy. 65 The Panel rejected the Argentine arguments:

"We note, however, that the Appellate Body Report in the Korea – Dairy Safeguards case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining

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63 Panel Report on Turkey – Textiles, para. 9.204.
Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law.  

... 

Article 3.8 of the DSU thus provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of "harm" – where a provision of the Agreement has been violated. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption. In light of the presumption of Article 3.8 of the DSU, the EC having established that Argentina has acted in a manner inconsistent with the AD Agreement, it is up to Argentina to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement. Argentina has failed to adduce any evidence in this respect. Accordingly, we find that the presumption of nullification or impairment of benefits caused by the violation of Article 6.10 of the AD Agreement has not been rebutted by Argentina.

5. Article 3.10

(a) "good faith...effort to resolve the dispute"

53. In US – FSC, the United States requested that the Appellate Body dismiss the appeal on the basis that the request for consultations had not included a "statement of available evidence as required by Article 4.2 of the SCM Agreement". The Appellate Body noted in this regard that one year passed between submission of the request for consultations by the European Communities and the first mention of this objection by the United States. The Appellate Body stated that in light of the fact that consultations were held on three occasions and that the United States did not raise objections at the two DSB meetings at which the request for the establishment of a panel was on the agenda, the United States could not now assert that the European Communities claims under Article 3 of the SCM Agreement should have been dismissed and that the Panel's finding on these issues should be reversed. The Appellate Body went on to state:

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and..."
promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.\footnote{Appellate Body Report on \textit{US – FSC}, para. 166.}

IV. **ARTICLE 4**

A. **TEXT OF ARTICLE 4**

\textit{Article 4}

\textit{Consultations}

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. 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 any covered agreement taken within the territory of the former.\footnote{Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.}

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.
9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

(footnote original) The corresponding consultation provisions in the covered agreements are listed hereunder:

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

1. General

54. In India – Patents (US), the United States argued that if India had disclosed, during consultations, the existence of certain administrative instructions, the United States would have included in its request for establishment of a Panel a claim under Article 63 of the TRIPS Agreement. With respect to disclosure of information during consultations, the Appellate Body noted in India – Patents (US):

"All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding."71

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71 Appellate Body Report on India – Patents (US), para. 94.
2. **Article 4.4**

(a) Notification of requests for consultations

55. At its meeting on 19 July 1995, the DSB, with regard to the notification requirement contained in Article 4:4 of the DSU, agreed that delegations would send one single text of their notifications to the Secretariat (Council Division), simply specifying in that text, the other relevant Councils or Committees to which they wished the notification to be addressed. The Secretariat would then distribute it to the specified relevant bodies.\(^2\)

(b) Comparison with Article 4.2 of the SCM Agreement

56. See the excerpt from the reports of the Appellate Body referenced in the Chapter dealing with the SCM Agreement, paragraph 70.

(c) Relationship between request for consultations and request for the establishment of a panel

57. See the excerpt from the report of the Appellate Body referenced in paragraph 110 below.

3. **Article 4.6**

(a) "consultations shall be confidential"

58. In *Korea – Alcoholic Beverages*, Korea argued before the Panel that the complainants breached the confidentiality requirement of Article 4.6 of the DSU by making reference, in their submissions, to information supplied by Korea during consultations. The Panel, in a finding not reviewed by the Appellate Body, held that while confidentiality in consultations between parties to a dispute was "essential", it also found that "parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations":

"We note that Article 4.6 of the DSU requires confidentiality in the consultations between parties to a dispute. This is essential if the parties are to be free to engage in meaningful consultations. However, it is our view that this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. We are mindful of the fact that the panel proceedings between the parties remain confidential, and parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations. Indeed, in our view, the very essence of consultations is to enable the parties gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the panel. It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings. We find therefore, that there has been no breach of confidentiality by the complainants in this case in respect of information that they became aware of during the consultations with Korea on this matter."\(^3\)

59. The Panel on *Australia – Automotive Leather II* repeated the findings of the Panel on *Korea – Alcoholic Beverages* referenced in paragraph 58 above. In *Australia – Automotive Leather II*, Australia, the defending party, demanded that information which the United States, the complaining party, had obtained during consultations preceding a previous panel requested by the United States

\(^2\) WT/DSB/M/6.

\(^3\) Panel Report on *Korea – Alcoholic Beverages*, para. 10.23.
(a panel which had been established, but never composed and, as a result, never became active) be declared inadmissible in the second proceeding. The Panel rejected this request by Australia:

"As Australia rightly notes, Article 4.6 of the DSU provides that "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings". However, in our view, this does not mean that facts and information developed in the course of consultations held pursuant to one request cannot be used in a panel proceeding concerning, as it does in this case, the same dispute, between the same parties, conducted pursuant to another, different request.

We recall that Article 11 of the DSU obliges a panel to conduct "an objective assessment of the matter before it". As discussed earlier, any evidentiary rulings we make must be consistent with this obligation. The panel in Korea – Taxes on Alcoholic Beverages recently confirmed the right of a party to a WTO dispute to use information learned in consultations in panel proceedings. …

Given that, in this case, the parties and the dispute are the same, no panel was actually composed or considered the dispute in the first-requested proceeding, and there are no third parties involved in either proceeding who might have learned information in the course of consultations, we cannot see any reason to exclude the United States Exhibit 2 from our consideration, merely because it was developed in the course of the consultations held pursuant to the first request.74 Australia has failed to specify what other, if any, facts might have been derived by the United States from the earlier consultations, and so there is no basis for us to exclude any such facts."75

60. The Panel on EC – Bed Linen also referred to the finding of the Panel on Korea – Alcoholic Beverages referenced in paragraph 58 above. In that case, India presented transcripts of the consultation sessions held with the European Communities, so as to demonstrate the "bad faith" of the European Communities during consultations. Although the Panel concluded that the material submitted by India was not related to any specific legal claim and, as a result, was not relevant to the case, the Panel decided that it would not a priori exclude this evidence. Inter alia, the Panel recalled the findings of the Panel on Korea – Alcoholic Beverages that information obtained in consultations may be presented during subsequent panel proceedings.76

(b) "consultations shall be … without prejudice to the rights of any Member "

61. The Panel on US – Underwear declined to admit evidentiary material submitted by Costa Rica, the complaining party, pertaining to settlement offers made by the United States during consultations. The Panel held that such offers are "of no legal consequence to the later stages" of a dispute:

"Costa Rica submitted to the Panel information concerning the bilateral negotiations that took place between Costa Rica and the United States before and after the imposition of the restriction. More specifically, Costa Rica submitted information relating to settlement offers made by the United States concerning the level of the restriction to be imposed …

74 (footnote original) There is nothing to indicate that there would have been any different answers had the same questions been asked by the United States during consultations held pursuant to the second request. We note Australia's view that there were no consultations held pursuant to the second request, although there was a meeting between the parties. Presumably, this view is based on Australia's position that the second request for consultations, and the second request for establishment, like this Panel which flowed from those requests, were inconsistent with the DSU.

75 Panel Report on Australia – Automotive Leather II, paras. 9.32-9.34.
76 Panel Report on EC – Bed Linen, paras. 6.32-6.35.
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.”  

4. Article 4.9

62. In Canada – Patent Term, the United States submitted a request for expedited consideration of the dispute under Article 4.9 of the DSU on the grounds that the premature expiration of patents during the dispute settlement procedure caused irreparable harm to the patent owners. It referred to the alleged simplicity of the issues in dispute, the absence of third parties and other circumstances. The Panel indicated that due to other demands on its members' time, it could not accelerate the timetable prior to the first substantive meeting; however the Panel stated that it undertook to make every effort to issue its report as soon as possible after the second substantive meeting.  

5. Article 4.11

63. The Appellate Body in EC – Bananas III touched on Article 4.11 in its finding that no "legal interest" is required for a Member to bring a case under the DSU. See paragraph 69 below.

6. Adequacy of consultations

64. In Korea – Alcoholic Beverages, Korea argued before the Panel that the complaining parties violated Articles 3.3, 3.7 and 4.5 of the DSU by not engaging in consultations in good faith to reach a mutually agreed solution. Korea maintained that there had been no meaningful exchange of facts because the complainants treated the consultations as one-sided question and answer sessions. Korea asserted that such an approach frustrated any reasonable chance for a settlement and considered the non-observance of specific provisions of the DSU as a "violation of the tenets of the WTO dispute settlement system". The Panel stated:

"In our view, the WTO jurisprudence so far has not recognized any concept of 'adequacy' of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. What takes place in those consultations is not the concern of a panel. The point was put clearly by the Panel in Bananas III, where it was stated:

'Consultations are … a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that the consultations, if required, were in fact held. ..."  

We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no
mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case." 80

65. The Panel on Turkey – Textiles confirmed this approach and expressly referred to the finding of the Panel on Korea – Alcoholic Beverages referenced in paragraph 64 above:

"[W]e note that in EC – Bananas III the panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultations process functions, but could only determine whether consultations, if required, did in fact take place. 81 In this case, the parties never consulted, as Turkey declined to do so without the presence of the European Communities.

... We concur with [the finding of the Panel on Korea – Alcoholic Beverages]. We note also that our terms of reference (our mandate) are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel. 82 Consultations are a crucial and integral part of the DSU and are intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU. However, the only function we have as a panel in relation to Turkey's procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant. We consider that India complied with these procedural requirements and therefore we find it necessary to reject Turkey's claim." 83

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Article 8.10 of the ATC

66. The Panel on US – Wool Shirts and Blouses discussed the role of panels under the DSU and the role of the TMB under the ATC. With respect to consultations, the Panel stated:

"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 panels." 84

2. **Article 17 of the Anti-Dumping Agreement**

67. See the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *Anti-Dumping Agreement*, paragraphs 311-312.

V. **ARTICLE 5**

A. **TEXT OF ARTICLE 5**

*Article 5*

*Good Offices, Conciliation and Mediation*

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 5**

*No jurisprudence or decision of a competent WTO body.*

VI. **ARTICLE 6**

A. **TEXT OF ARTICLE 6**

*Article 6*

*Establishment of Panels*

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.\(^5\)

\(^5\) *Footnote original* If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.
2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

1. Article 6.2

(a) General

68. In *EC – Bananas III*, the Appellate Body held that there were two reasons why a panel request must be sufficiently precise:

"As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."85

(b) Right to bring claims

(i) Legal interest

69. In *EC – Bananas III*, the European Communities argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. The Appellate Body stated that no provision of the DSU contains any such explicit requirement. The Appellate Body also held that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU". While the Appellate Body stressed that Members are "self-regulating" in their decisions whether to bring a case, it also added that "[t]he United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the European Communities banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas":

"We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the WTO Agreement. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has 'standing' to bring claims under the GATT 1994."86

70. The Appellate Body went on to state:

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85 Appellate Body Report on *EC – Bananas III*, para. 142.
"[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'.

We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

',... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.'

We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case.

Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994.'"87

71. In Korea – Dairy, the Panel considered Korea's argument that there is a requirement for an economic interest to bring a matter to the Panel and that the European Communities had failed to meet that requirement:

"In EC - Bananas, the Appellate Body stated that the need for a 'legal interest' could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in the DSU any requirement for an 'economic interest'. We also note the provisions of Article 3.8 of the DSU, pursuant to which nullification and impairment is presumed once violation is established."88

(ii) **Right to bring claims under Article 17.4 of the Anti-Dumping Agreement.**

72. See the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the Anti-Dumping Agreement, paragraph 320.

(c) "indicate whether consultations were held"

73. In Brazil – Desiccated Coconut, the Panel examined the request of the Philippines to make a finding that Brazil's refusal to hold consultations was inconsistent with Article 4.1, 4.2 and 4.3 of the DSU. The Panel recalled that Article 6.2 of the DSU requires that a request for the establishment of a

panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Panel stated:

"The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to consult….However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult….We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference." 

89 (d) "identify the specific measure at issue"

(i) Scope of the term "measure"

Governmental action

74. In Japan – Agricultural Products II, the Appellate Body interpreted the term "measure" as within the meaning of Annex B of the SPS Agreement. According to its terms, Annex B applies to all "measures" and lists "laws, decrees and ordinances" as three examples of such measures. The Appellate Body held that this term also included "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to". In the case before it, the Appellate Body found that the Japanese "varietal testing requirement" was a "measure" within the meaning of Annex B of the SPS Agreement. See Chapter on SPS Agreement, paragraph 172.

Private action as a "measure"

75. The Panel on Japan – Film characterized the problem of classifying private action as a governmental "measure" in the following terms:

"As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measure in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this "truth" may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions." 

76. Within the context referred to in paragraph 75 above, the Panel on Japan – Film had to determine whether so-called "administrative guidance" in Japan amounted to a governmental "measure". The Panel began by considering the ordinary meaning of the term "measure":

"The ordinary meaning of measure as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable


90 Panel Report on Japan – Film, para. 10.52.
enactments. At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.

In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls "regulatory administrative guidance", which it concedes effectively substitutes for formal government action. It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged "measure" to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes.

The Panel subsequently reviewed GATT practice with respect to this subject-matter and defined "sufficient government involvement" as the decisive criterion for whether a private action may be deemed to be a governmental "measure":

"In Japan – Semi-conductors, 'Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. ... Exports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1'. However, the panel found that

'... an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs ... the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control'.

And a 1989 panel on EEC – Restrictions on Imports of Dessert Apples noted that 'the EEC internal regime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups'. That panel found that both the buying-in and withdrawal systems established for apples
under the EEC regulation could be considered to be governmental measures for the purposes of Article XI:2(c)(i).  

These past 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 to be governmental if there is sufficient government 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.”

78. In *Argentina – Hides and Leather*, the European Communities claimed that an Argentine resolution, which authorized the presence of representatives of the Argentine domestic leather tanning industry during customs clearance of exports of bovine hides, operated as a de facto export restriction in violation of Article XI:1 of *GATT 1994*. The European Communities admitted that the Argentine measure did not expressly limit exports; however, the European Communities claimed that the presence of the industry associations during the export clearance process allowed access to exporters' confidential business information, which was subsequently used – by virtue of the existence of a tanners cartel in the Argentine market – to exercise pressure on bovine hides producers not to export their products. The Panel ultimately rejected the European Communities' arguments on the basis of a lack of evidence:

"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.

... 

The European Communities acknowledges that the representatives of the tanning industry do not have the *de jure* ability to halt bovine hide exports. However, according to the European Communities, having such representatives present during the export clearance process in itself restricts exports in the context of the facts of the case. The European Communities has advanced several reasons why this might be so. The European Communities refers to the GATT dispute of *Japan – Semiconductors* for the proposition that there can be export restrictions without overt actions by the government to physically stop exports. According to the European Communities, in that case it was sufficient for the government to set up a system where peer pressure was used to discourage exports. ...

...

[I]t is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above,

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95 *(footnote original)* GATT Panel Report on EEC - Restrictions on Imports of Dessert Apples (Complaint by Chile), para. 126.

96 Panel Report on *Japan – Film*, paras. 10.55-10.56.

97 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.
it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility". $^{98}$

(ii) Standard for sufficient "identification"

Identification of measure

79. In EC – Bananas III, the Appellate Body examined whether the request for establishment of the panel made by the complaining parties satisfied the requirements under Article 6.2 of the DSU. Before considering whether the request at issue satisfied other requirements of Article 6.2 of the DSU, the Appellate Body agreed that the request sufficiently identified the specific measure at issue:

"We agree with the Panel that the request in this case, WT/DS27/6, dated 12 April 1996, which refers to 'a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime', contains sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU." $^{99}$

80. In Japan – Film, Japan requested the Panel to exclude eight measures from consideration because they were not set forth in either the request for consultations or the request for the establishment of a panel. Although the measures in question had not been "explicitly described" in the panel request, the Panel set forth the conditions under which such measures could nevertheless be considered by a panel. The Panel spelled out a "clear relationship" standard:

"To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing 'measures' is specified in a panel request, implementing 'measures' might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing 'measures'." $^{100}$

81. The Appellate Body in EC – Computer Equipment, opined that not only measures of general application, but also application of tariffs by customs authorities were "measures" within the meaning of Article 6.2:

"We consider that 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of

$^{100}$ Panel Report on Japan – Film, para. 10.8.
a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU.\textsuperscript{101}

82. In Guatemala – Cement I, the Panel concluded that it was not limited to examining the consistency with the \textit{Anti-Dumping Agreement} of one of the three specific types of "measure" identified in Article 17.4 of that Agreement, namely provisional measures, definitive anti-dumping duties and price undertakings. Specifically, the Panel held that "a claim that a Member has acted in a manner inconsistent with its obligations under the [\textit{Anti-Dumping Agreement}] may be presented to a Panel for consideration"\textsuperscript{102} even if the Panel request did not refer specifically to any of the three measures identified in Article 17.4 of the \textit{Anti-Dumping Agreement}. The Appellate Body reversed the Panel's finding. It considered the "specific measure" at issue, within the meaning of Article 6.2, and in the light of the \textit{Anti-Dumping Agreement} and 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 \textit{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":

"Where a complaining Member wishes to make any claims concerning an action taken, or not taken, in the course of an anti-dumping investigation under the provisions of the \textit{Anti-Dumping Agreement}, Article 6.2 of the DSU requires 'the specific measures at issue' to be identified in the panel request.

For disputes brought under the \textit{Anti-Dumping Agreement}, we must consider the provisions of that Agreement to determine what may constitute a 'specific measure'. We note, first of all, that Article 1 of the \textit{Anti-Dumping Agreement} makes a distinction between an 'anti-dumping measure' and 'investigations'. It provides, in part, that:

'An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement …' (emphasis added)

Furthermore, Article 17.4 of the \textit{Anti-Dumping Agreement} specifies the types of 'measure' which may be referred as part of a 'matter' to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. 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 \textit{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 \textit{Anti-Dumping Agreement}. As we have observed earlier, there is a difference between the specific measures at issue -- in the case of the \textit{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

\textsuperscript{101} Appellate Body Report on \textit{EC – Computer Equipment}, para. 65.
\textsuperscript{102} Panel Report on \textit{Guatemala – Cement I}, para. 7.27.
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.

For all of these reasons, we conclude that the Panel erred in finding that Mexico did not need to identify 'specific measures at issue' in this dispute. We find that in disputes under the Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance 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."

83. The Panel on Argentina – Footwear (EC), in a finding subsequently not addressed by the Appellate Body, had to address a situation whereby Argentina had imposed a safeguard measure on footwear and subsequently made several modifications to this measure after the European Communities' panel request had been made. The European Communities argued that the safeguard measure, as modified by the subsequent measures, fell within the Panel's term of reference, because the subsequent modifications were "part of the definitive safeguard measure".

"The panel request in this dispute clearly identified that Argentina's provisional and definitive measures on footwear are at issue in this dispute. The European Communities does not contest the obvious fact that the subsequent Resolutions which modified the definitive safeguard measure were not explicitly mentioned in the panel request. The question then becomes whether subsequent modifications of a definitive measure which are not explicitly mentioned in this request fall within the meaning of Article 6.2 of the DSU, i.e., that the specific measures at issue' must be identified in the panel request.

[I]n the European Communities - Bananas III panel request, the 'basic EC regulation at issue' was identified, and in addition, the request referred in general terms to 'subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime'. The European Communities - Bananas III panel found that for purposes of Article 6.2 this reference was sufficient to cover all EC legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were 'adequately identified', even though they were not explicitly listed. The Appellate Body agreed that the panel request 'contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2'.

In the present dispute, Argentina's procedural objections concern modifications of the definitive safeguard measure which is a situation quite similar to the 'subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime' and were found to be within that panel's terms of reference. If there is a difference between European Communities - Bananas III and the case before us, it is the fact that the EC banana regime encompassed dozens of subsequent regulations which implemented, but also supplemented and amended the original Regulation 404/93 on the common market organisation for bananas. In the

104 (footnote original) Panel Report on European Communities – Bananas III, para. 7.27.
105 (footnote original) Appellate Body Report on European Communities – Bananas III, para. 140.
case before us, however, the subsequent resolutions change the legal form or the form of application of the definitive safeguard measure, while the safeguard investigation made at the outset, which remains the basis for the definitive safeguard measures, has not changed.

We further recall that the Japan - Film panel\textsuperscript{106} considered certain measures which had not been listed in the panel request to be within its terms of reference because they were 'implementing measures' based on a basic framework law, specifically identified in the panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. From this we infer that a legal act not explicitly listed in a panel request but which has a direct relationship to a measure that is specifically described therein, can be said to be sufficiently identified to satisfy the requirements of Article 6.2. In this respect, we agree with the Japan - Film panel's statement that the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.\textsuperscript{107}

84. The Panel on Argentina – Footwear (EC) also stated that "it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference". The Panel then also linked the issue before it to Article 3.3 of the DSU and saw the risk that "Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB":

"[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the Guatemala – Cement case.

[A]n interpretation whereby these subsequent Resolutions are considered to be measures separate and independent from the definitive safeguard measure, and thus outside our terms of reference, could be contrary to Article 3.3 of the DSU. Such an interpretation could allow a situation where a matter brought to the DSB for prompt settlement is not resolved when the defendant changes the legal form of the measure through a separate but closely related instrument, while the measure in dispute remains essentially the same in substance. In this way, Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB.\textsuperscript{109}


\textsuperscript{107} (footnote original) Panel Report on Japan – Film, paras. 10.10.

\textsuperscript{108} Panel Report on Argentina – Footwear (EC), paras. 8.31, 8.33-8.35.

\textsuperscript{109} Panel Report on Argentina – Footwear (EC), paras. 8.40-8.41.
Identification of products

85. The Appellate Body in EC – Computer Equipment considered whether the measures in dispute and the products affected by such measures were identified with sufficient specificity by the United States in its request for the establishment of a panel. The United States' request for the establishment of panel referred to "all types of LAN equipment" and "PCs with multimedia capability". The Appellate Body considered whether these terms sufficiently defined the products at issue:

"… Article 6.2 of the DSU does not explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute.

LAN equipment and PCs with multimedia capacity are both generic terms. Whether these terms are sufficiently precise to 'identify the specific measure at issue' under Article 6.2 of the DSU depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.

…

The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU. We note, however, that the European Communities does not contest that the term, LAN equipment, is a commercial term which is readily understandable in the trade. The disagreement between the European Communities and the United States concerns its exact definition and its precise product coverage. We also note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel and, in particular, in an 'Information Fiche' provided by the European Communities to the United States during informal consultations in Geneva in March 1997. We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities in the course of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."110

86. In US – FSC, the United States argued that the European Communities request for the establishment of a panel failed to identify specific measures at issue because the European Communities did not identify the specific products in question as "the nature of export subsidy obligations imposed by the Agreement on Agriculture differ depending on the products at issue and commitments made by the United States thereunder."111 The Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the DSU and stated:

"In its request for establishment of a panel, the European Communities states that in its view the FSC is an export subsidy and that 'the United States has declared that the [FSC] Scheme is not taken into account for the purpose of compliance with their commitments under the AA ... '. Accordingly, given the inherently all-encompassing nature of this claim, it constitutes a claim that the FSC could give rise to violations of the Agreement on Agriculture with respect to any agricultural product.

Consequently, and in the absence of any specification as to the products at issue, this request puts the United States and third parties on notice that the European Communities asserts the existence of violations of the Agreement on Agriculture with respect to all agricultural products.\footnote{112} Identification of industry

87. In \textit{Canada – Aircraft}, Canada asserted before the Panel that the term "civil aircraft industry" was too broad for the purposes of Article 6.2 of the \textit{DSU} because "[i]t includes firms ranging from machine shops and metal treatment facilities to those involved in advanced instrumentation and communications equipment."\footnote{113} The Panel ruled:

\begin{quote}
"We do not consider that the mere fact that the scope of a measure is identified in the request for establishment by reference to a broad product or industry grouping necessarily renders that request for establishment inconsistent with Article 6.2 of the DSU. We believe that the Appellate Body was of a similar opinion in \textit{LAN Equipment}, where it shared the US concern that:

'if the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by grouping, but not spelled out in 'sufficient' detail.'
\end{quote}

Although the Appellate Body's remarks were made in the context of a reference to a broad product grouping in the complaining party's request for establishment, we can see no basis for not adopting a similar approach when the request for establishment refers to a broad industry sector, such as the 'civil aircraft industry'. If a complaining party believes that a measure affects a broad industry sector, in our view that complaining party should be entitled to challenge that measure insofar as it affects the totality of the industry concerned, without having to spell out the individual components of that industry, and without running afoul of Article 6.2 of the DSU.\footnote{114}

(iii) Terminated measures

88. The Panel on \textit{Japan – Film} gave the following overview of the treatment of terminated measures in GATT/WTO dispute settlement practice:

"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.\footnote{115} 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.\textsuperscript{116,117}

89. The Panel on US – Gasoline, in a finding not addressed by the Appellate Body, analysed the question of terminated measures with respect to the "agreement on the panel's terms of reference". The Panel addressed a particular aspect of the United States' measure at issue and noted that "the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference." The Panel also mentioned that the measure was not "likely to be renewed" and also found that its findings on the WTO-inconsistency of other aspects of the measure would in any case have made unnecessary the examination of that specific aspect of the measure.

"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. In the 1978 Animal Feed Protein case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the panel's terms of reference.\textsuperscript{118} In the 1980 Chile Apples case, the panel ruled on a measure terminated before agreement on the panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction.\textsuperscript{119} In the present case, the Panel's terms of reference were established after the 75 percent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 percent rule was a measure that, although currently not in force, was likely to be renewed. Finally, the Panel considered that its 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. The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement.\textsuperscript{120}

90. In US – Gasoline, the Panel, in a finding not addressed by the Appellate Body, relied on the point in time when the terms of reference had been established in order to decide whether it was going to address one specific (terminated) aspect of the measure at issue. See paragraph 89 above. In US – Wool Shirts and Blouses, the United States withdrew the measure at issue shortly before the Panel's

\textsuperscript{116} (footnote original) See, e.g., Panel Report on US - Wool Shirts and Blouses, WT/DS33/R, upheld by the Appellate Body, WT/DS33/AB/R, 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, adopted on 14 March 1992, BISD 25S/49, 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, adopted on 22 February 1982, BISD 29S/91, 106, 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, adopted on 10 November 1980, BISD 27S/98, 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.

\textsuperscript{117} Panel Report on Japan – Film, para. 10.58.


\textsuperscript{119} (footnote original) "EEC - Restrictions on Imports of Apples from Chile", BISD 27S/98, (adopted on 10 November 1980).

\textsuperscript{120} Panel Report on US – Gasoline, para. 6.19.
91. In *Argentina – Textiles and Apparel*, one of the measures at issue was specific duties on footwear. These duties were included in the Panel's terms of reference, but were withdrawn by Argentina between the request for consultation and the establishment of the Panel. The Panel declined to make a preliminary determination on this matter and made the respective findings in its final Report. In the final Report, the Panel decided not to examine these specific duties on footwear, reasoning:

"Panels and their terms of reference are established by the DSB and panels are not authorized to amend unilaterally their mandate. On the other hand, panels have often been required to determine their jurisdiction over a matter (See for instance *United States - Standards for Reformulated and Conventional Gasoline*, *Japan - Taxes on Alcoholic Beverages*, *Brazil - Measures Affecting Desiccated Coconut*, and *EC - Regime for the Importation, Sale and Distribution of Bananas* (**"Bananas III"**) …

On several occasions, panels have considered measures that were no longer in force. It appears that in each of those cases, however, there was no objection raised by either party to the panel's consideration of the expired measure. …

The Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudication process. The *Gasoline* panel report would argue in favour of not considering the

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124 (footnote original) Panel and Appellate Body Reports adopted on 20 May 1996, WT/DS2/AB/R.

125 (footnote original) Panel and Appellate Body Reports adopted on 1 November 1996, WT/DS/8, 10, 11/R and WT/DS8, 10, 11/AB/R.

126 (footnote original) Panel and Appellate Body Reports adopted on 20 March 1997, WT/DS22/AB/R.


Argentine specific duties on footwear. Moreover, as noted by the Appellate Body in the *Shirts and Blouses*\textsuperscript{129} case, the aim of dispute settlement is not

>'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'.\textsuperscript{130}

92. The Panel on *Argentina – Textiles and Apparel* also held that it would not make a finding on the terminated Argentine measure solely because there might be a possibility of a re-introduction of the terminated measure:

"[T]he United States claims that there is a serious threat of recurrence since Argentina could easily reintroduce the previous import measures, and the United States suggests that Argentina is likely to do so because there is only a weak justification for its safeguard measure on footwear. We cannot evaluate the justification or likely duration of that safeguard measure. Moreover, in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law.\textsuperscript{131} We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced.\textsuperscript{132}

93. While it ultimately decided that it would not examine the measure withdrawn by Argentina before the establishment of the Panel, the Panel on *Argentina – Textiles and Apparel* nevertheless reserved the right to "refer to some examples of transactions" under the terminated measure:

"Consequently, we will not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked. However, since these specific duties on footwear were in force for a long period until 14 February 1997, and for our understanding of the type of duties used by Argentina, we may, when reviewing the import regime applied to textiles and apparel, refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same."\textsuperscript{133}

94. In *EC – Poultry*, Brazil claimed that the allocation by the European Communities of import licences on the basis of export performance was inconsistent with certain provisions of the *Licensing Agreement*. The European Communities responded, *inter alia*, that the alleged measure was no longer in place. The Panel, in a statement not addressed by the Appellate Body, noted that "Brazil claims that there are certain lingering effects. Therefore, we do not reject this claim on the grounds of mootness."\textsuperscript{134}


\textsuperscript{130} Panel Report on *Argentina – Textiles and Apparel*, paras. 6.11-6.13.

\textsuperscript{131} (footnote original) See Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties (*Pacta Sunt Servanda*).

\textsuperscript{132} Panel Report on *Argentina – Textiles and Apparel*, paras. 250-252.
95. In *US – 1916 Act (EC)*, the United States argued, *inter alia*, that, according to established GATT practice, the measure at issue, the so-called 1916 Act, could not be challenged "as such", i.e. independently of its application in a specific case, because it was "discretionary legislation". Specifically, the United States argued that the 1916 Act was non-mandatory because "(i) with respect to both civil and criminal proceedings, United States' courts had in the past interpreted and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the United States Department of Justice had discretion whether to initiate criminal proceedings under the 1916 Act."\(^{135}\) The Appellate Body recalled GATT practice in respect of this subject-matter:

"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.\(^{136}\) 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.\(^{137}\)

96. Referring to the GATT Panel Report on *US – Tobacco*, the Appellate Body in *US – 1916 Act* emphasized that the type of discretion relevant for the distinction between discretionary and mandatory legislation was discretion vested with the executive branch. Also, the Appellate Body agreed with the Panel in *US – 1916 Act* in rejecting the argument that the United States Department of Justice enjoyed discretion within the meaning of established GATT practice:

"The practice of GATT panels was summed up in *United States – Tobacco*\(^{138}\) as follows:

'... panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the

\(^{135}\) Panel Report on *US – 1916 Act (EC)*, para. 6.82. See also Panel Report on *US – 1916 Act (Japan)*, para. 6.95.


\(^{138}\) (footnote original) GATT Panel Report on *US – Tobacco*, fn. 16.
actual application of such legislation inconsistent with the General Agreement could be subject to challenge.\footnote{139} (emphasis added)

Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the \textit{executive branch} of government.

The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion accorded to the executive branch of the United States' government with respect to such action. These civil actions are brought by private parties. A judge faced with such proceedings must simply \textit{apply} the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation.

The Panel, however, examined that part of the 1916 Act that provides for criminal prosecutions, and found that the discretion enjoyed by the United States Department of Justice to initiate or not to initiate criminal proceedings does not mean that the 1916 Act is a discretionary law. In light of the case law developing and applying the distinction between mandatory and discretionary legislation\footnote{140}, we believe that the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation, as this term has been understood for purposes of distinguishing between mandatory and discretionary legislation. We, therefore, agree with the Panel's finding on this point.\footnote{141}

97. The Panel on \textit{Turkey – Textiles} considered, \textit{inter alia}, whether the measures involving quantitative restrictions on imports from India should be properly regarded as measures imposed by Turkey or rather as measures taken collectively by the customs union between the European Communities and Turkey. In its analysis, the Panel made the following statement:

"We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied\footnote{142}, can be challenged by another WTO Member.\footnote{143}"


\footnote{140} (footnote original) See, in particular the reasoning in the Panel Report, \textit{United States – Malt Beverages, supra}, footnote 34, para. 5.60.


98. 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."  

99. In *Canada – Aircraft*, Brazil argued that a programme of the so-called Export Development Corporation (EDC) mandated the grant of subsidies and challenged the programme as such, rather than merely specific applications of this programme. The Panel noted the fact that Brazil had claimed that the EDC programme had been interpreted so as to grant export subsidies and rejected Brazil's claim:

"[W]e find nothing in Brazil's various submissions in support of this argument. The only factual evidence proffered by Brazil in support of its argument is the quote from EDC's mandate that EDC was established 'for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.' This statement by itself clearly cannot be viewed as a requirement to provide prohibited export subsidies. Nor has Brazil demonstrated otherwise that such support and development necessarily involves subsidization. Although such support and development might conceivably take the form of subsidization, there is nothing to suggest that this will necessarily be the case. In our view, a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety of ways.

We consider that Brazil effectively concedes that the EDC mandate does not require the grant of export subsidies when it states that the EDC mandate has been interpreted to require the EDC to fund projects that give 'Canadian exporters an edge when they bid on overseas projects.' For Brazil, this 'edge' necessarily refers to subsidization. Even if the grant of an 'edge' did imply the grant of subsidies, and even if in practice the EDC programme were applied so as to grant subsidies, this would not mean that, in law, the EDC mandate requires the grant of subsidies. Rather,

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such circumstances the grant of subsidies would be the result of the exercise of the administering authority's discretion in interpreting its mandate. We again recall that the panel in *US – Tobacco* recollected 'that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such...'

For these reasons, we find that Brazil has failed to demonstrate that the EDC programme as such mandates the grant of subsidies. Rather, the EDC programme constitutes discretionary legislation. In light of the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation, we find that we may not make any findings on the EDC programme per se. We therefore confine our analysis to Brazil's claims concerning the actual application of the EDC programme in the regional aircraft sector."

100. The Panel on *US – Section 301 Trade Act* did not accept the distinction between discretionary and mandatory legislation as spelled out in the findings referenced in paragraphs 95-98 above. In that case, the United States was defending the measure at issue with reference to the traditional doctrine that only mandatory laws can violate GATT law "as such". In contrast, the European Communities argued that certain discretionary legislation could also violate GATT law "as such". The Panel did not accept the United States' argument:

"[W]e believe that resolving the dispute as to which type of legislation, in abstract, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation? Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.

We can express this view in a different way:

(a) Even if we were to operate on the legal assumption that, as argued by the US, only legislation mandating a WTO inconsistency or precluding WTO consistency, can violate WTO provisions; and

(b) confirm our earlier factual finding in paragraph 7.31(c) that the USTR enjoys full discretion to decide on the content of the determination,

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146 (footnote original) Imagine, for example, legislation providing that all imports, including those from WTO Members, would be subjected to a customs inspection and that the administration would enjoy the right, at its discretion, to impose on all such goods tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned. Would the fact that under such legislation the national administration would not be mandated to impose tariffs in excess of the WTO obligation, in and of itself exonerate the legislation in question? Would such a conclusion not depend on a careful examination of the obligations contained in specific WTO provisions, say, Article II of GATT and specific schedule of concessions?
we would still disagree with the US that the combination of (a) and (b) necessarily renders Section 304 compatible with Article 23, since Article 23 may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. In other words, rejecting, as we have, the presumption implicit in the US argument that no WTO provision ever prohibits discretionary legislation does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions.\(^{147}\) Indeed that is the very test we shall apply in our analysis. It simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language of Section 304 would presumptively preclude WTO consistency.\(^{148}\)

101. In *US – Export Restraints*, the question arose whether the Panel should first determine whether the measure at issue was mandatory or discretionary, and then make a substantive finding only if it found the measure to be mandatory. The Panel declined to consider the mandatory/discretionary distinction as a threshold question. In its analysis the Panel referred to the test developed by the GATT Panel on *US – Tobacco*:

"While Canada does not challenge the classical test, it considers that whether or in what degree a challenged measure is discretionary with respect to an alleged violation of WTO rules is not properly characterised as a general procedural or jurisdictional issue. Canada's view is that, rather, the Appellate Body has confirmed, in *1916 Act*, that this is an issue that may arise as part of a panel's examination of the legal claims made in a particular case. The United States, on the other hand, argues that any substantive ruling on the meaning of WTO provisions, where legislation is eventually found to be discretionary, would constitute an inappropriate or impermissible "advisory opinion".\(^{149}\) It therefore contends that we must address whether the US law is mandatory or discretionary before considering the meaning of Article 1.

We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary before examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered in light of those *findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied in a given substantive context.\(^{150}\)

\(^{147}\) (footnote original) See paras. 4.173 ff. and 7.51 of this Report.

\(^{148}\) Panel Report on *US – Section 301 Trade Act*, paras. 7.53-7.54.

\(^{149}\) Request for Preliminary Rulings by the United States, para. 55.

\(^{150}\) (footnote original) See, e. g., *United States – Superfund*: The scheme in question involved, *inter alia*, a discriminatory penalty tax that would be imposed if required information was not submitted by the importer. The Panel first found that such a penalty tax, if imposed, would violate Article III:2, then went on to find that the Superfund Act did not in fact require imposition of the tax, as the law foresaw the possibility for the United States to adopt regulations that would eliminate the need to impose it (*United States – Taxes on Petroleum and Certain Imported Substances* ("Superfund"), Report of the Panel, adopted 17 June 1987, BISD 34S/136, para. 5.2.9); *Thailand – Cigarettes*: After finding that the discriminatory tax rates provided for under the law would violate GATT rules, the Panel went on to find that the Thai authorities both had sufficient
We consider such an approach to be appropriate in this case. In particular, identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.

Finally, we note that, whether or not a panel sees the mandatory/discretionary question as a necessarily threshold issue or, as suggested by Canada, as an issue that may arise as part of a panel's examination of the legal claims, it remains true – at least under the classical test which we shall be employing – that legislation as such cannot be found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. Thus, in any event, the order in which the two issues – the question of the type of legislation and the substance of the case – are addressed would not alter any eventual finding of consistency or lack thereof.¹⁵¹

(e) "a brief summary of the legal basis of the complaint"

102. In EC – Bananas III, the Panel held that "the request [for the establishment of the panel] is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU", if it lists the provisions of the specific agreements which the complaining party alleges to have been violated. The Appellate Body agreed:

"We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, the rebuttal submissions and the first and second panel meetings with the parties."¹⁵²

103. In India – Patents (US), India argued that the Panel exceeded its authority under the DSU by ruling on the United States' subsidiary claim under Article 63 of the TRIPS Agreement after having first accepted the principal claim by the United States of a violation of Article 70.8 of the TRIPS Agreement. The request for the establishment of the panel by the United States reads in pertinent part: "India's legal regime appears to be inconsistent with the obligations of the TRIPS Agreement, including but not necessarily limited to Articles 27, 65 and 70." The Appellate Body accepted India's claim that the phrase "including but not necessarily limited to" could not "identify the specific measures at issue", as required by Article 6.2 of the DSU:

regulatory discretion to implement the law consistent with the GATT, and had actually exercised that discretion in that way (Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel, adopted 7 November 1990, BISD 37S/200, para. 84); United States – Tobacco: The US statute mandated that the US Department of Agriculture assess "comparable" inspection fees for imported and domestic tobacco, and the Panel first considered the meaning of the word "comparable" in light of the relevant GATT requirement that such fees be "commensurate" with the cost of services rendered to imported tobacco. The Panel then concluded that the United States had the discretion to interpret "comparable" as "commensurate" (and in practice had done so), i.e., that the legislation did not require a violation (United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco, Report of the Panel, adopted 4 October 1994, BISD 41S/131, para. 123).

"[A] claim must be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case.

With respect to Article 63, the convenient phrase, 'including but not necessarily limited to', is simply not adequate 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' as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what Article of the TRIPS Agreement does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel.

104. In Korea – Dairy, Korea argued before the Appellate Body in its appeal that the mere listing of four articles of the Agreement on Safeguards alleged to have been breached does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body confirmed its finding in EC – Bananas III, but augmented it by establishing the standard of whether "the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated". In its analysis, the Appellate Body first identified four requirements contained in Article 6.2:

"When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."

105. The Appellate Body in Korea – Dairy subsequently confirmed its finding in EC – Bananas III, but cautioned that this finding represented only the minimum requirements under Article 6.2 and that the "mere listing of the articles of an agreement alleged to have been breached" may not necessarily be sufficient for the purposes of Article 6.2. The Appellate Body opined that the latter case may arise "where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2". Ultimately, the Appellate Body set forth the standard of "ability of the respondent to defend itself":

"[W]e did not purport in European Communities – Bananas to establish the mere listing of the articles of an agreement alleged to have been breached as a standard of precision, observance of which would always constitute sufficient compliance with the requirements of Article 6.2, in each and every case, without regard to the particular circumstances of such cases. If we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel 'very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU'. Close scrutiny of what we in fact said in European Communities – Bananas shows that we, firstly, restated the reasons why precision is necessary in a request for a panel; secondly, we stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and thirdly, we agreed with the conclusion of the panel that, in that case, the listing of the articles of

154 Appellate Body Report on Korea – Dairy, para. 120.
the agreements claimed to have been violated satisfied the minimum requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.

Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

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… we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated. \(^{(f)}\)

(f) Distinction between "claims" and "arguments"

106. After agreeing with the Panel that the request for the establishment of the panel, contained sufficient identification of the specific measures at issue to fulfill the requirements of Article 6.2 of the DSU, the Appellate Body in \(\text{EC – Bananas III}\) set out the difference between claims and arguments, and furthermore rejected the notion of "curing" of a faulty panel request, where claims had not been included in the panel request:

"In our view, there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

Article 6.2 of the DSU requires that the claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its

\(^{(f)\text{ (footnote original) See Appellate Body Reports on Brazil – Desiccated Coconut, p. 22; EC – Bananas III, paras. 145 and 147; and India – Patents, paras. 89, 92 and 93.}}\)

\(^{(156)}\text{ Appellate Body Report on Korea - Dairy, paras. 123-124 and 127.}\)
107. In *EC – Hormones*, the European Communities argued on appeal that since the Panel was not entitled to make findings beyond what has been requested by the parties, it had erred by basing the main part of its reasoning on Article 5.5 of the *SPS Agreement* on a claim that the complainants had not made. The Appellate Body rejected the European Communities' argument and emphasized the distinction between claims and arguments:

"Considering that in its request for the establishment of a panel in the proceeding initiated by the United States, as well as in the proceeding started by Canada, both complainants have included a claim that the European Communities ban is inconsistent with Article 5 of the *SPS Agreement*, we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by the complainant to sustain its legal claims…. 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 own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the *DSU*, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the European Communities measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties."  

108. In *India – Patents (US)*, on the issue of claims and arguments, the Appellate Body stated:

"[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the *DSU*, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as a case proceeds."

109. In *Korea – Dairy*, Korea argued in its appeal that the Panel had erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at, or subsequent to, the rebuttal stage. The Appellate Body stated:

"[W]e agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request. By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed

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157 Appellate Body Report on *EC – Bananas III*, paras. 141-143. See also Appellate Body Report on *US – Lead and Bismuth II*, paras. 72 and 73.
158 Appellate Body Report on *EC – Hormones*, para. 156.
159 Appellate Body Report on *India – Patents (US)*, para. 88.
infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. In European Communities – Hormones, we emphasized the substantial latitude enjoyed by panels in treating the arguments presented by either of the parties and said:

'... 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 own findings and conclusions on the matter under its consideration."

Both 'claims' and 'arguments' are distinct from the 'evidence' which the complainant or respondent presents to support its assertions of fact and arguments.

(g) Relationship between the request for consultations and request for the establishment of a panel with respect to specific measures

110. In response to Brazil’s argument that a request for the establishment of a panel must include only measures that were either identified in the request for consultations or raised subsequently during the consultations, the Appellate Body in Brazil – Aircraft stated:

"We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.'"

(h) Relationship between Article 6.2 of the DSU and Article 17 of the Anti-Dumping Agreement

(i) The term "matter" under paragraphs 4 and 5 of Article 17

111. The Appellate Body in Guatemala – Cement I held that "[Article 1.2 of the DSU] states … that … 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". As a result, the Appellate Body considered whether there is inconsistency between Article 6.2 of the DSU and Article 17.5 of the Anti-Dumping Agreement. The Appellate Body stated:

"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,

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161 (footnote original) See also Appellate Body Report on India – Patents I, para. 88; and EC – Hormones, para. 156.
164 Appellate Body Report on Korea – Dairy, para. 139.
165 Appellate Body Report on Brazil – Aircraft, para. 132. In this connection, the Panel in Brazil – Aircraft stated "...to limit the scope of the panel proceedings to the identical matter with respect to which consultations were held could undermine the effectiveness of the panel process."
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.\textsuperscript{166}

(ii) Legal basis for claims under Article 17

112. Article 17 of the *Anti-Dumping Agreement* provides for the dispute settlement procedures for matters under the *Anti-Dumping Agreement*. With respect to the legal basis for claims under the *Anti-Dumping Agreement*, see the Chapter on the *Anti-Dumping Agreement*, paragraph 312.

(i) Multiple panels involving the same parties and same claims

113. In *Australia – Automotive Leather I*, pursuant to a request made by the United States, a panel was established on 22 January 1998 (WT/DS106/2) and 22 June 1998 (WT/DS126/2) regarding the same matter. In the latter request for the establishment of a panel, the United States asked that its earlier request be withdrawn. At the DSB meeting held on 22 June 1998, the United States representative said that it had terminated the panel that had been established on 22 January 1998. Australia argued that the United States did not have the right to have a second panel established at the DSB meeting on 22 June 1998 and the DSB did not have the right under the DSU to establish such a panel against the wishes of Australia. Australia argued that the Panel was not properly established and, that therefore, the Panel should terminate its work immediately. The Panel examined Australia's arguments and stated:

"The establishment of a panel is the task of the DSB. It is by no means clear that, once the DSB has established a panel, as it did in this case at its meeting of 22 June 1998, the panel so established has the authority to rule on the propriety of its own establishment. Nothing in our terms of reference expressly authorizes us to consider whether the DSB acted correctly in establishing this Panel.

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In our view, Australia is asking this Panel to read into the DSU an implicit prohibition on multiple panels between the same parties regarding the same matter that does not exist in the text of the DSU. Australia's arguments in support of its position arise out of policy considerations and address the object and purpose of the DSU. In light of the fundamental importance in the WTO dispute settlement system of the right to have a panel established to examine a matter, in the absence of a consensus not to do so, we do not consider it appropriate in this dispute to read such an implicit prohibition into the DSU. This is particularly true given that the policy concerns expressed by Australia are purely theoretical and do not arise in this case. Specifically, this is not a case where a complainant is actively pursuing two proceedings with respect to the same matter -- the United States has made it very clear that it is not pursuing the first dispute. To the contrary, the United States has sought to terminate the first dispute, and it is Australia which has sought to prevent that result. Nor is this a case where a complainant has sought a second panel before a first panel has completed its work with respect to the same matter because it was dissatisfied with developments in the first panel. Although the first panel in this case was established, it was never composed and thus never began its work.

\textsuperscript{166} Appellate Body Report on *Guatemala – Cement I*, para. 75.
For the foregoing reasons, we deny Australia's request to terminate this Panel, and will continue our work in accordance with our terms of reference.\textsuperscript{167}

VII. ARTICLE 7

A. TEXT OF ARTICLE 7

\textit{Article 7}

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

1. Function of the terms of reference

114. The Appellate Body in \textit{Brazil – Dessicated Coconut} explained the importance of the terms of reference in the following terms:

"A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.\textsuperscript{168}

2. Relationship between terms of reference and submissions

115. In \textit{EC – Bananas III}, the Panel held that certain claims under \textit{GATS} made by Guatemala, Honduras and Mexico were not to be included within the scope of the case. While these claims had been included in the panel request, the Panel decided not to address them because they had not been elaborated in the three parties' first written submission.\textsuperscript{169} The Appellate Body in \textit{EC – Bananas III} reversed the Panel's conclusion, holding that nothing in the \textit{DSU} or GATT practice suggested that all claims be set out in a complaining party's first written submission:

"There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by


\textsuperscript{168} Appellate Body Report on \textit{Brazil – Dessicated Coconut}, p. 21.

\textsuperscript{169} Panel Report on \textit{EC – Bananas III}, paras. 7.57-7.58.
Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.

...

We do not agree with the Panel's statement that a 'failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants'. Pursuant to Articles 6.2 and 7.1 of the DSU, the terms of reference of the Panel in this case were established in the request for the establishment of the panel, WT/DS27/6, in which the claims specified under the GATS were made by all five Complaining Parties jointly.\textsuperscript{170}

3. Article 7.1

(a) "the matter referred to the DSB"

116. In Guatemala – Cement I, the Appellate Body addressed the term "matter" and held that "[t]he 'matter referred to the DSB' … consists of two elements: the specific measures at issue and 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….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)."\textsuperscript{171}

117. In Brazil – Dessicated Coconut, Brazil argued that the issue of consistency of its countervailing duty measures with Articles I and II of GATT 1994 was not within the terms of reference of the Panel, and, therefore, should not have been addressed by the Panel. The parties to the dispute, the Philippines and Brazil, had agreed on the following special terms of reference pursuant to Article 7.3 of the DSU:

"To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on

\textsuperscript{170} Appellate Body Report on EC – Bananas III, paras. 145-147.
\textsuperscript{171} Appellate Body Report on Guatemala – Cement I, para. 72. See also Appellate Body Report on Guatemala – Cement I, para. 76 which states "the 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."
21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.”

118. The Appellate Body ultimately found that Articles I and II of GATT 1994 did not apply to the dispute before it, and as a result declined to make a finding on whether claims relating to these provisions were included in the Panel's terms of reference. However, the Appellate Body made the following general statement concerning this issue:

"We agree, furthermore, with the conclusions expressed by previous panels under the GATT 1947, as well as under the Tokyo Round SCM Code and the Tokyo Round Anti-dumping Code, 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. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference."

119. In Australia – Automotive Leather II (Article 21.5 – US), Australia argued that a certain loan granted by the Australian Government to a domestic enterprise (the "1999 loan") was not within the scope of the panel's terms of reference. Australia argued that the 1999 loan was not part of the implementation of the DSB's ruling and recommendation in the original case. With respect to the concept of "measures taken to comply" see paragraphs 264-266 below and the Chapter on the SCM Agreement, paragraphs 82-87. The Panel stated:

"A 'matter' before a panel consists of the 'measure(s)' at issue, and the claims relating to those measures, as set out in the request for establishment. In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the measures at issue. For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling.

The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference."

4. Terms of reference as a panel's scope of jurisdiction

120. In consideration of the United States claim under Article 63 of the TRIPS Agreement which had not been included in the request for the establishment of the panel, the Appellate Body in India – Patents (US) stated:

"The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume
jurisdiction that it does not have. In this case, Article 63 was not within the Panel's jurisdiction, as defined by its terms of reference. Therefore, the Panel had no authority to consider the alternative claim by the United States under Article 63.

The United States argues that, in the consultations between the parties to this dispute in this case, India had not disclosed the existence of any administrative instructions' for the filing of mailbox applications for pharmaceutical and agricultural chemical products. Therefore the United States asserts that it had no way of knowing that India would rely on this argument before the Panel. The United States maintains that, for this reason, it had not included a claim under Article 63 in its request for the establishment of a panel. All that said, there is, nevertheless, no basis in the DSU for a complaining party to make an additional claim, outside of the scope of a panel's terms of reference, at the first substantive meeting of the panel with the parties. A panel is bound by its terms of reference,\(^\text{175}\)

121. The Appellate Body in India – Patents (US) found the Panel's ruling that "all legal claims would be considered if they were made prior to the end of [the first substantive] meeting" inconsistent with the letter and spirit of the DSU. The Appellate Body stated:

"Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is all that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.\(^\text{176}\)

... A Panel is bound by its terms of reference.\(^\text{176}\)

122. In Australia – Salmon, the Appellate Body examined whether the Panel had interpreted correctly its terms of reference with respect to the measure and the product at issue in this dispute. Australia argued that the Panel had exceed its terms of reference both in terms of products and in terms of the measure at issue. In its request for the establishment of a panel, Canada had identified the measure and the product at issue as follows:

"The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon … and any amendments or modifications to it.\(^\text{177}\)

123. The Panel stated that the product coverage of this dispute was limited, in accordance with the request for the establishment of a panel, to "fresh, chilled or frozen salmon" and held explicitly that the product coverage "does exclude heat-treated product"\(^\text{178}\) and that "heat-treated product falls outside the product coverage of this dispute".\(^\text{179}\) As a result, the Appellate Body rejected Australia's

\(^{175}\) Appellate Body Report on India – Patents (US), paras. 92-93.
\(^{176}\) Appellate Body Report on India – Patents (US), paras. 92-93.
\(^{177}\) WT/DS18/2.
claim that the Panel had exceeded its terms of reference with respect to the product at issue. However, the Appellate Body reversed the Panel's conclusions with respect to the measures at issue. One of the Australian measures at issue was an import prohibition on all salmon; another measure, however, allowed imports which had been subject to "heat treatment". The Panel interpreted this latter measure to mean that the heat treatment required applied not only to smoked salmon, but also to other categories of salmon, including fresh, chilled or frozen salmon; specifically, the Panel had held that the "heat treatment" requirement was merely the corollary ("two sides of a single coin") of the import prohibition contained in another measure. The Panel had concluded that imports of fresh, chilled or frozen salmon were prohibited under one measure, unless they received the required "heat treatment" provided for in another measure:

"We recall that the Panel stated that the measure at issue in this dispute 'is QP86A as implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision, and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon'. As indicated above, the Panel interpreted its terms of reference to include the 1988 Conditions, by considering them to constitute a measure 'prohibiting the importation of fresh, chilled or frozen salmon' unless heat-treated as prescribed. We recall that in the context of its examination of whether Australia's measure was consistent with Article 5.1, the Panel treated the import prohibition and the heat-treatment requirement as 'two sides of a single coin'. It said that a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled or frozen salmon are prohibited.

We do not share the Panel's position. 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."

5. Terminated measures

124. The Panel on US – Gasoline, in a finding not reviewed by the Appellate Body, relied on the point in time at which its terms of reference had been agreed upon in deciding whether to address a particular (terminated) aspect of the measure at issue. See paragraph 89 above.

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments\(^6\) are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

\(^6\)In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 8**

1. **Article 8.4 – selection of panelists**

   (a) Indicative list of governmental and non-governmental panelists

125. On 27 September 1995, the DSB approved the names of candidates for panelists contained in WT/DSB/W/7.  

IX. **ARTICLE 9**

A. **TEXT OF ARTICLE 9**

   *[Article 9]*

   **Procedures for Multiple Complainants**

   1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

   2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

   3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 9**

1. **Article 9.3**

126. In *EC – Hormones*, the European Communities argued that the Panel had made decisions that granted certain additional third party rights to Canada and the United States that were not justifiable under Article 9.3 of the DSU. More specifically, the European Communities appealed the Panel's decision to hold a joint meeting with scientific experts, to give the United States and Canada access to all information submitted in both proceedings and to invite the United States to participate and make a statement at the second substantive meeting in the proceeding where Canada was the complaining party. The Appellate Body rejected the European Communities' arguments and upheld each of the Panel's decisions in this respect. In relation to holding one joint meeting with scientific experts, the Appellate Body stated:

   "We consider the explanation of the Panel quite reasonable, and its decision to hold a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested European Communities measures. We do not believe that the Panel has erred by addressing the European Communities procedural objections only where the European Communities could...

182 WT/DSB/M/7, section 3. See also WT/DSB/M/9, section 3.
make a precise claim of prejudice. It is evident to us that a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.

... Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU.  

127. The Appellate Body in **EC – Hormones** also considered reasonable the Panel's decision to grant the United States access to all information in the proceedings initiated by Canada and to grant Canada access to all information in the proceedings initiated by the United States and saw a link between granting such access and the attempt to "harmonize" timetables in multiple panel proceedings:

"The decision of the Panel to use and provide all information to the parties in both disputes was taken in view of its previous decision to hold a joint meeting with the experts. The European Communities asserts that it cannot see how providing information in one of the proceedings to a party in the other helps to harmonize timetables. We can see a relation between timetable harmonization within the meaning of Article 9.3 of the DSU and economy of effort. In disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding. Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU. Indeed, as noted earlier, despite the fact that the Canadian proceeding was initiated several months later than that of the United States, the Panel managed to finish both Panel Reports at the same time."

128. Regarding the participation of the United States in the second substantive meeting of the Panel, as requested by Canada, the Appellate Body in **EC – Hormones** recalled the Panel's findings and agreed:

"[The Panel held:]

'This decision was, *inter alia*, based on the fact that our second meeting was held the day after our joint meeting with the scientific experts and that the parties to this dispute would, therefore, most likely comment on, and draw conclusions from, the evidence submitted by these experts to be considered in both cases. Since in

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the panel requested by the United States the second meeting was held before the joint meeting with scientific experts, we considered it appropriate, in order to safeguard the rights of the United States in the proceeding it requested, to grant the United States the opportunity to observe our second meeting in this case and to make a brief statement at the end of that meeting.184

The explanation of the Panel appears reasonable to us. If the Panel had not given the United States an opportunity to participate in the second substantive meeting of the proceedings initiated by Canada, the United States would not have had the same degree of opportunity to comment on the views expressed by the scientific experts that the European Communities and Canada enjoyed. Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. In this regard, we note that in European Communities - Bananas, the panel considered that particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU. We conclude that, in the case before us, circumstances justified the Panel's decision to allow the United States to participate in the second substantive meeting of the proceedings initiated by Canada.”

129. In US – 1916 Act, the Appellate Body held that issues of third party rights were not addressed by Article 9 of the DSU. See also paragraph 136 below. The Appellate Body stated:

"Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures." 187

X. ARTICLE 10

A. TEXT OF ARTICLE 10

*Article 10*

**Third Parties**

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal

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184 (footnote original) Canada Panel Report, para. 8.20.
185 (footnote original) Adopted 25 September 1997, WT/DS27/AB/R.
dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 10**

1. **Article 10.1**

(a) "Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel"

130. In *Australia – Automotive Leather (Article 21.5 – US)*, the European Communities, a third party in this case, argued that because only one meeting of the panel would be held to address both the first and rebuttal submissions of each party, the European Communities should, in accordance with Article 10.3 of the *DSU*, receive all of the parties' submissions. The Panel rejected this request:

"[I]f [the Panel] had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the *DSU*, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the *DSU* in a case where the Panel holds only one meeting."^{188}

2. **Article 10.2**

(a) Enhanced third party rights

131. The Panel on *EC – Bananas III* considered requests by Members to be allowed to participate more broadly in the Panel proceedings than provided for under the relevant provisions of the *DSU*. More specifically, these Members requested that they be granted the right of presence at all meetings of the Panel with the parties and the right to make statements at all such meetings. Furthermore, these Members also demanded the right to receive copies of all submissions and other materials and to be granted permission to make written submissions to both meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.^{189} Several of these countries later confirmed their requests in letters addressed to the Chairman of the DSB. The Panel began by considering the provisions of the *DSU* and GATT practice:

"The rights of third parties are dealt with in Article 10 and Appendix 3 of the Dispute Settlement Understanding. Article 10 provides that third parties "shall have an opportunity to be heard by the panel and to make written submissions to the panel". It also provides that third parties are entitled to receive the submissions of the parties made to the first substantive panel meeting. Paragraph 6 of Appendix 3 specifies that third parties shall be invited "to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session". Under prior GATT practice, more expansive rights were granted to third parties in several disputes, including the two prior disputes involving bananas and in the *Semiconductors* case.^{190} In those cases,
however, the extension of such rights had been the subject of agreement between the parties at that time. No such agreement existed between the parties in the present dispute."^{191}

132. After the first substantive meeting, the Panel made the following ruling:

"We thereafter ruled as follows:

(a) The Panel has decided, after consultations with the parties in conformity with DSU Article 12.1, that members of governments of third parties will be permitted to observe the second substantive meeting of the Panel with the parties. The Panel envisages that the observers will have the opportunity also to make a brief statement at a suitable moment during the second meeting. The Panel does not expect them to submit additional written material beyond responses to the questions already posed during the first meeting.

(b) The Panel based its decision, *inter alia*, on the following considerations:

(i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;

(ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;

(iii) past practice in panel proceedings involving the banana regimes of the EC and its member States; and

(iv) the parties to the dispute could not agree on the issue.

As a consequence of our ruling, the third parties in these proceedings enjoyed broader participatory rights than are granted to third parties under the DSU."^{192}

133. After granting certain enhanced third-party rights, the Panel declined to grant further such rights, including participation in the interim review process:

"Following the second substantive meeting of the Panel with the parties, several of the third parties asked for further participatory rights, including participation in the interim review process. We consulted the parties and found that, as before, they had diverging views on the appropriateness of granting this request. We decided that no further participatory rights should be extended to third parties, except, in accord with normal practice, to permit them to review the draft of the summary of their arguments in the Descriptive Part. In this regard, we noted that Article 15 of the DSU, which deals with the interim review process, refers only to parties as participants in that process. In our view, to give third parties all of the rights of parties would

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^{191} Panel Report on *EC – Bananas III*, para. 7.5.

^{192} Panel Report on *EC – Bananas III*, para. 7.8.
inappropriately blur the distinction drawn in the DSU between parties and third parties.”¹⁹³

134. In *EC – Hormones*, the Appellate Body upheld the Panel’s decisions to grant additional participatory rights to the United States and Canada, specifically to have access to all information from the proceedings initiated by the other country, respectively, and for the United States to observe and to make a statement at the second substantive meeting in the proceeding initiated by Canada. See paragraphs 126-128 above.

135. In contrast to the *EC – Hormones* dispute, the Panel on *US – 1916 Act* refused to grant the European Communities and Japan enhanced third party rights in each other’s case. The Panel, in a finding subsequently upheld by the Appellate Body held:¹⁹⁴

"We conclude from the reports in the *EC – Hormones* cases that enhanced third party rights were granted primarily because of the specific circumstances in those cases.

We find that no similar circumstances exist in the present matter, which does not involve the consideration of complex facts or scientific evidence. Moreover, none of the parties requested that the panels harmonise their timetables or hold concurrent deliberations in the two procedures (WT/DS136 and WT/DS162). In fact, the European Communities was not in favour of delaying the proceedings in WT/DS136 and the United States objected to concurrent deliberations."¹⁹⁵

136. The Appellate Body confirmed its finding in the *EC – Hormones* case that the grant of additional third party rights is within “the sound discretion” of a Panel and rejected the arguments by the European Communities and Japan:

"The rules relating to the participation of third parties in panel proceedings are set out in Article 10 of the DSU, and, in particular, paragraphs 2 and 3 thereof, and in paragraph 6 of Appendix 3 to the DSU.

..."

Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures.

Under the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3.

..."

Pursuant to Article 12.1, a panel is required to follow the Working Procedures in Appendix 3, unless it decides otherwise after consulting the parties to the dispute.

In support of their argument that the Panel should have granted them "enhanced" third party rights, the European Communities and Japan refer to the considerations that led the panel in *European Communities – Hormones* to grant third parties

¹⁹³ Panel Report on *EC – Bananas III*, para. 7.9.
¹⁹⁴ Appellate Body Report on *US – 1916 Act*, para. 150. See also para. 126 of this Chapter.
¹⁹⁵ Panel Report on *US – 1916 Act (EC)*, paras. 6.33-6.34. See also Panel Report on *US – 1916 Act (Japan)*, paras. 6.33-6.34.
"enhanced" participatory rights, and stress the similarity between European Communities – Hormones and the present cases.

... 
In our Report in European Communities – Hormones, we stated:

Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant ... ["enhanced" third party rights] to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. 196

A panel's decision whether to grant "enhanced" participatory rights to third parties is thus a matter that falls within the discretionary authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process. In the present cases, however, the European Communities and Japan have not shown that the Panel exceeded the limits of its discretionary authority. We, therefore, consider that there is no legal basis for concluding that the Panel erred in refusing to grant "enhanced" third party rights to Japan or the European Communities." 197

(b) "Substantial interest"

137. The Appellate Body referred briefly to Article 10.2 in its finding in EC – Bananas III that no "legal interest" is required for a Member to bring a case under the DSU. See paragraph 69 above.

3. Third party rights under Article 22.6 of the DSU

138. With respect to third party rights under Article 22.6 of the DSU, see the excerpts from the reports of the decisions by the arbitrator referenced in paragraph 284 below.

4. Authority of the panel to direct a Member to be a third party

139. In Turkey – Textiles, Turkey argued that the European Communities should be a party to the dispute because the measure taken by Turkey was done so pursuant to a regional trade agreement between Turkey and the European Communities. The Panel ruled:

"In the absence of any relevant provision in the DSU, in light of international practice" 198, and noting the position of the EC to this point, we consider that we do not have the authority to direct that a WTO Member be made third-party or that it otherwise participate throughout the panel process. 199

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196 (footnote original) Appellate Body Report [on EC – Hormones], para. 154.
198 (footnote original) The Panel examined relevant principles of international law, including the practice of the International Court of Justice in the Military and Paramilitary Activities in and Against Nicaragua case ([1984], ICJ Reports, pp. 430-431) and the Phosphate Lands in Nauru case ([1992], ICJ Reports, p. 259-262) cases (preliminary objections).
199 Panel Report on Turkey – Textiles, para. 9.5.
5. "Essential parties"

140. In Turkey – Textiles, Turkey claimed that the Panel should dismiss India's claims because the measures were taken pursuant to a regional trade agreement between Turkey and the European Communities and the latter therefore should have been a party to the dispute. The Panel addressed the concept of "essential parties" first by referring to the case of law of the International Court of Justice (ICJ), more specifically to the Military and Paramilitary Activities in and Against Nicaragua and the Phosphate Lands in Nauru cases: 200

"The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement." 201

141. After analysing the practice of the ICJ with respect to the "essential parties" concept, the Panel on Turkey – Textiles noted:

"[T]here is no WTO concept of 'essential parties'. Based on our terms of reference and the fact that we have decided (as further discussed hereafter) not to examine the GATT/WTO compatibility of the Turkey-EC customs union, we consider that the European Communities was not an essential party to this dispute; the European Communities, had it so wished, could have availed itself of the provisions of the DSU, which we note have been interpreted with a degree of flexibility by previous panels 202, in order to represent its interests. We recall in this context that Panel and Appellate Body reports are binding on the parties only. 203

Under WTO rules, the European Communities and Turkey are Members with equal and independent rights and obligations. For Turkey, it is not at all inconceivable that it adopted the measures in question in order to have its own policy coincide with that of the European Communities. However, in doing so, it should have been aware, in respect of the measures it has chosen, that its circumstances were different from those of the European Communities in relation to the Agreement on Textiles and Clothing ('ATC') and thus could reasonably have been anticipated to give rise to responses which focussed on that distinction. 204

XI. ARTICLE 11

A. TEXT OF ARTICLE 11

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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

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201 Panel Report on Turkey – Textiles, para. 9.10.
202 (footnote original) See for instance the Panel Reports on EC – Bananas III, paras. 7.4-7.9; and EC – Hormones, paras. 8.12-8.15.
the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

B. INTERPRETATION AND APPLICATION OF ARTICLE 11

1. "objective assessment of the matter before it, including an objective assessment of the facts"

142. In EC – Hormones, the European Communities argued in its appeal that the Panel had disregarded or distorted the evidence submitted by the European Communities as well as the expert testimony provided by the experts advising the Panel. The European Communities claimed that the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU. The Appellate Body disagreed with the European Communities and set forth the standard, for a violation of Article 11, of "an egregious error that calls into question the good faith of a panel." The Appellate Body concluded by holding that "[a] claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice":

"Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

…

… it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings.

…
The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly.\textsuperscript{205}

143. In \textit{EC – Poultry}, Brazil argued in its appeal that the Panel had not made "an objective assessment of the matter before it" because, in Brazil's view, the Panel had failed to consider various arguments made by Brazil regarding GATT/WTO jurisprudence. The Appellate Body rejected this argument:

"An allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself."

...  

In \textit{United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India}, we stated that nothing in Article 11 'or in previous GATT practice requires a panel to examine all legal claims made by the complaining party', and that '[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.' Just as a panel has the discretion to address only those \textit{claims} which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those \textit{arguments} it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that the panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU."\textsuperscript{206}

144. For these reasons, the Appellate Body concluded "that the Panel had not failed to make and 'objective assessment of the matter before it'\textsuperscript{207} as required by Article 11 of the DSU.

145. In \textit{Australia – Salmon}, Australia argued in its appeal that the Panel had failed to make an objective assessment of the matter before it and had not applied the appropriate standard of review pursuant to Article 11 of the DSU. The Appellate Body noted Australia's argument that the Panel "partially or wholly ignored relevant evidence placed before it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed to it, but constituted an egregious error amounting to an error of law." The Appellate Body stated:

"[I]n response to Australia's contention that the Panel failed to accord 'due deference' to matters of fact it put forward, we note that Article 11 of the DSU calls upon panels to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Therefore, the function of this Panel was to assess the facts in a manner consistent with its obligation to make such an 'objective assessment of the matter before it'. We believe the Panel has done so in this case. Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."\textsuperscript{208}


\textsuperscript{206} Appellate Body Report on \textit{EC – Poultry}, paras. 133 and 135.


\textsuperscript{208} Appellate Body Report on \textit{Australia – Salmon}, para. 267.
146. In *Korea – Alcoholic Beverages*, Korea argued in its appeal that the Panel breached its obligation under Article 11 of the DSU by applying a "double standard" in assessing the evidence before it. The Appellate Body again referred to the "egregious error" standard:

"We are bound to conclude that Korea has not succeeded in showing that the Panel has committed any egregious errors that can be characterized as a failure to make an objective assessment of the matter before it. Korea's arguments, when read together with the Panel Report and the record of the Panel proceedings, do not disclose that the Panel has distorted, misrepresented or disregarded evidence, or has applied a 'double standard' of proof in this case. It is not an error, let alone an egregious error, for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."

147. In *Japan – Agricultural Products II*, the Appellate Body examined Japan's claim that the Panel did not comply with Article 11 of the DSU when it made a finding under Article 2.2 of the SPS Agreement concerning the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. More specifically, Japan claimed the Panel had not properly examined evidence, treated expert views in an arbitrary manner and did not properly evaluate the evidence before it. The Appellate Body held:

"As we stated in our Report in *European Communities – Hormones*, not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU. Only egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU.

In our view, Japan has not demonstrated that the Panel, in its examination of the consistency of the varietal testing requirement with Article 2.2, has made errors of the gravity required to find a violation of Article 11 of the DSU. We, therefore, conclude that the Panel did not abuse its discretion contrary to the requirements of Article 11 of the DSU."

148. In *India – Quantitative Restrictions*, India argued in its appeal that the Panel had acted inconsistently with Article 11 of the DSU because it had delegated to the IMF its duty to make an objective assessment. The Appellate Body stated:

"The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.

..."

We conclude that the Panel made an objective assessment of the matter before it. Therefore, we do not agree with India that the Panel acted inconsistently with Article 11 of the DSU.

\(^{209}\) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 164.
\(^{210}\) Appellate Body Report on *Japan – Agricultural Products II*, paras. 141-142.
\(^{211}\) Appellate Body Report on *India – Quantitative Restrictions*, paras. 149 and 151.
149. In Korea – Dairy, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a prima facie case. The Appellate Body disagreed and stated, inter alia: "In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."[212] With respect to the burden of proof issue in this context, see also paragraph 170 below.

150. In Argentina – Footwear (EC), the Appellate Body considered Argentina's argument that "the Panel violated Article 7.2 of the DSU and exceeded its terms of reference, because the Panel not only considered, but also relied on, alleged violations of Article 3 of the Agreement on Safeguards even though the request for the establishment of a Panel submitted by the European Communities only alleged violations of Articles 2 and 4 of the Agreement on Safeguards."[213] The Appellate Body noted Argentina's argument that "the Panel's references to Article 3 contained in paragraphs 8.205, 8.207, 8.218 and 8.238 of the Panel Report demonstrate that the Panel relied on obligations contained in Article 3 in reaching its conclusion that Argentina did not act in compliance with its obligations under Article 4.2(c) of the Agreement on Safeguards." The Appellate Body stated:

"We note that the very terms of Article 4.2(c) of the Agreement on Safeguards expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the Agreement on Safeguards. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the Agreement on Safeguards. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) without taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."[214]

151. In Australia – Automotive Leather II (Article 21.5 – US), both parties argued that the task of the Panel was to choose between the position articulated by each party and conclude either that Australia had not fully complied with the DSB ruling or conclude that because Australia had not withdrawn the sum that the United States calculated should have been withdrawn, that it had failed to comply with the DSB ruling. The Panel stated:

"That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute."[215]

2. Admission of evidence

152. In Argentina – Textiles, Argentina argued that the Panel had acted inconsistently with Article 11 of the DSU by allowing certain evidence offered by the United States two days before the second substantive meeting of the Panel with the parties. The Appellate Body noted that "the

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Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence and, accordingly, did not find a violation of Article 11:

"Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute. It is true that the Working Procedures "do not prohibit" submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. …

Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties.

As noted above, however, the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.

While another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU."

153. With respect to the issue of whether information obtained during consultations may be used in the subsequent panel proceedings, see 58-60 above.

3. "make such other findings"

154. In Canada – Aircraft, Canada asked the Panel to make a ruling on the Panel's jurisdiction before the deadline set for the submission of the written submission of the parties. The Panel stated:

\[^{216}\text{footnote original}\] As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See European Communities - Regime for the Importation, Sale and Distribution of Bananas, adopted 25 September 1997, WT/DS27/AB/R, para. 144; India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, adopted 16 January 1998, WT/DS50/AB/R, para. 95.

\[^{217}\text{Appellate Body Report on Argentina – Textiles and Apparel, paras. 79-81.}\]
"In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling."\textsuperscript{218}

155. The Appellate Body has relied on the phrase "make such other findings" in order to confirm the ability of panels to exercise judicial economy. See paragraph 183 below.

4. Burden of proof

(a) Purpose of allocating the burden of proof

156. In US – Section 301 Trade Act, the Panel clarified, in the light of the allocation of the burden of proof, what the result would be in case of uncertainty (i.e. in case all evidence and arguments were to remain in "equipoise"):

"Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party."\textsuperscript{219}

(b) General

157. In US – Wool Shirts and Blouses, the Appellate Body made the following statement on the issue of burden of proof:

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.\textsuperscript{220} Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."\textsuperscript{221}

\textsuperscript{218} Panel Report on Canada – Aircraft, para. 9.15.
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.\(^{222}\)

158. The Panel in *Turkey – Textiles*, in a finding not addressed by the Appellate Body, summed up the rules on burden of proof under WTO jurisprudence as follows:

"(a) it is for the complaining party to establish the violation it alleges;

(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.\(^{223}\)

159. In *EC – Hormones*, the Appellate Body discussed the allocation of the burden of proof in the context of the *SPS Agreement*, but referred to its statement in *US – Wool Shirts and Blouses* and stated that this rule "embodies a rule applicable in any adversarial proceedings":

"The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*\(^{224}\), which the Panel invokes and which embodies a rule applicable in any adversarial proceedings." \(^{225}\)

160. In *EC – Hormones*, the Appellate Body examined whether the Panel correctly allocated the burden of proof under the *SPS Agreement*. The Appellate Body noted that the Panel made an interpretative ruling that "the *SPS Agreement* allocates the 'evidentiary burden' to the Members imposing an SPS measure" on the basis of, *inter alia*, Article 3.2 of the *SPS Agreement*. The Appellate Body noted that the Panel drew a reverse inference from Article 3.2 of the *SPS Agreement* to the effect that "if a measure does not conform to international standards, the Member imposing such a measure must bear the burden of proof in any complaint of inconsistency with the provisions of the *SPS Agreement*." The Appellate Body reversed the Panel's ruling and stated:

"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

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\(^{225}\) Appellate Body Report on *EC – Hormones*, para. 98.
special or generalized burden of proof upon that Member, which may, more often than not, amount to a penalty.

... The Panel relies on two interpretative points in reaching its above finding. First, the Panel posits the existence of a 'general rule - exception' relationship between Article 3.1 (the general obligation) and Article 3.3 (an exception) and applies to the SPS Agreement what it calls 'established practice under GATT 1947 and GATT 1994' to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party. 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. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding requiring a complaining party to establish a prima facie case of inconsistency with a provision of the SPS Agreement before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an 'exception'. In much the same way, 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. It is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.\footnote{Appellate Body Report on EC – Hormones, paras. 102 and 104. See also Panel Report on Brazil – Aircraft (Article 21.5 – Canada), para. 6.22.}

161. In Brazil – Aircraft, Canada appealed the Panel's finding that, in a case involving a claim of violation of Article 3.1(a) against a developing country Member, the complaining party has the burden of proving that the developing country Member in question has not complied with at least one of the elements set out in Article 27.4 of the SCM Agreement. Canada argued that since Article 27.4 of the SCM Agreement is in the nature of a conditional exception or an affirmative, the respondent developing country Member has the burden of proof whereas Brazil submitted that since Article 27 is a transitional provision that contains a set of special and differential rights and obligations for developing country Members, the complaining party, namely Canada, has the burden of proving that the developing country Member is not in compliance with Article 27.4 of the SCM Agreement. The Appellate Body stated:

"On reading paragraphs 2(b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are positive obligations for developing country Members, not affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply. However, if that developing country Member does not comply with those obligations, Article 3.1(a) does apply."
For these reasons, we agree with the Panel that the burden is on the complaining party (in casu Canada) to demonstrate that the developing country Member (in casu Brazil) is not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance is demonstrated, then, and only then, does the prohibition of Article 3.1(a) apply to that developing country Member.\(^\text{227}\)

162. In Canada – Aircraft, Canada justified its refusal to provide information on the disputed financing of the transaction at issue on the grounds that Brazil had not established a prima facie case that such financing constituted a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. The Appellate Body stated:

"A prima facie case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case. There is, as noted earlier, nothing in either the DSU or the SCM Agreement to support Canada's assumption. To the contrary, a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a prima facie basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a prima facie case or defence. Furthermore, a refusal to provide information requested on the basis that a prima facie case has not been made implies that the Member concerned believes that it is able to judge for itself whether the other party has made a prima facie case. However, no Member is free to determine for itself whether a prima facie case or defence has been established by the other party. That competence is necessarily vested in the panel under the DSU, and not in the Members that are parties to the dispute."\(^\text{228}\)

163. In India – Patents (US), India challenged the application of the burden of proof by the Panel, arguing that the Panel erroneously required the United States, the complaining party, merely to raise "reasonable doubts" suggesting a violation of Article 70.8 of the TRIPS Agreement, and subsequently placed the burden on India to dispel such doubts. The Appellate Body recalled the finding of the Panel and rejected India's claim:

"India raises the additional argument that the Panel erred in its application of the burden of proof in assessing Indian municipal law. In particular, India alleges that the Panel, after having required the United States merely to raise "reasonable doubts" suggesting a violation of Article 70.8, placed the burden on India to dispel such doubts.\(^\text{229}\)

The Panel states:

As the Appellate Body report on Shirts and Blouses points out, "a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim". In this case, it is the United States that claims a violation by India of Article 70.8 of

\(^{227}\) Appellate Body Report on Brazil – Aircraft, paras. 140-141.


\(^{229}\) (footnote original) India's appellant's submission, p. 12.
the *TRIPS Agreement*. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, ... the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so (footnotes deleted).²³⁰

This statement of the Panel is a legally correct characterization of the approach to burden of proof that we set out in *United States - Shirts and Blouses*.²³¹ However, it is not sufficient for a panel to enunciate the correct approach to burden of proof; a panel must also apply the burden of proof correctly. A careful reading of paragraphs 7.35 and 7.37 of the Panel Report reveals that the Panel has done so in this case. These paragraphs show that the United States put forward evidence and arguments that India's "administrative instructions" pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward rebuttal evidence and arguments. India misinterprets what the Panel said about "reasonable doubts". The Panel did not require the United States merely to raise "reasonable doubts" before the burden shifted to India. Rather, after properly requiring the United States to establish a prima facie case and after hearing India's rebuttal evidence and arguments, the Panel concluded that it had "reasonable doubts" that the "administrative instructions" would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court.

For these reasons, we conclude that the Panel applied the burden of proof correctly in assessing the compliance of India's domestic law with Article 70.8(a) of the *TRIPS Agreement*.²³²

164. In *India - Quantitative Restrictions*, India argued in its appeal that the Panel erred in finding that the proviso to Article XVIII:11 of *GATT 1994* was to be properly characterized as an affirmative defence and that India, therefore, bears the burden of proof in respect thereof. The Appellate Body upheld the finding of the Panel:

"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."²³³

165. In *India - Quantitative Restrictions*, India argued on appeal that the Panel did not apply the rules on burden of proof correctly. India claimed that the Panel failed to analyse whether the United States made a prima facie case prior to considering the answers provided by the IMF to the Panel's questions and prior to shifting the burden of proof to India. India also argued that the evidence introduced by the United States could not, as a matter of law, have constituted a prima facie case that

²³⁰ (footnote original) Panel Report, para. 7.40.
²³² Appellate Body Report on *India - Patents (US)*, paras. 73-75.
India's balance-of-payments restrictions were not justified under the Ad Note. The Appellate Body stated that a Panel was not required to make an explicit statement that a prima facie case has been made:

"In support of its argument, India refers to the Appellate Body Report in *European Communities – Hormones*, where the Appellate Body stated:

>'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.'

We do not interpret the above 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. We, therefore, are not of the opinion that the Panel erred in law in proceeding as it did." 234

The Appellate Body then rejected India's appeal to the effect that "that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case". The Appellate Body recalled its previous findings in this respect and held that the "weighing and assessing of the evidence" was outside the scope of review.

"As to the second alleged mistake, namely, that the evidence introduced by the United States could not, as a matter of law, have constituted a *prima facie* case that India's balance-of-payments restrictions were not justified under the Ad Note, we recall that in *European Communities – Hormones*, the Appellate Body stated:

>'Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts …'

Similarly, in *Korea – Taxes on Alcoholic Beverages*, the Appellate Body stated:

>'The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. …'

We believe that this second mistake alleged by India relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review.”

167. With respect to the burden of proof in Article 21.5 proceedings, see 267 below. With respect to the burden of proof in Article 21.3(c) proceedings, see paragraphs 258-260 below. With respect to the burden of proof under Article 22.6 proceedings, see paragraph 282 below.

168. With respect to the burden of proof in relation to Article 10.3 of the Agreement on Agriculture, see the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the Agreement on Agriculture, paragraph 39.

(c) Necessary collaboration of the parties

169. In Argentina – Textiles and Apparel, the Panel, in a finding not addressed by the Appellate Body, made the following statement regarding burden of proof and the requirement of collaboration of the parties in presenting facts and evidence to the panel:

"Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some prima facie evidence in support of its case. It should be stressed, however, that "discovery' of documents, in its common-law system sense, is not available in international procedures'."

… Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession.

(d) Source of evidence for a prima facie case

170. In Korea – Dairy, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a prima facie case. The Appellate Body disagreed and stated, inter alia: " In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof." As a result, the Appellate Body rejected the argument that a panel, in determining whether the complaining party has met the requirement of making a prima facie case of inconsistency, may consider exclusively evidence submitted by that complaining party:

"Korea appears to suggest that the Panel, in evaluating Korea's actions leading up to the adoption of its safeguard measure, should have looked solely to the evidence submitted by the European Communities as complaining party. We do not agree with Korea in this respect. It is, of course, true that the European Communities has the onus of establishing its claim that Korea's safeguard measure is inconsistent with the requirements of Article 4.2 of the Agreement on Safeguards. However, under

\[235\] Appellate Body Report on India – Quantitative Restrictions, paras. 143-144.

Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. … The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.

We note that in examining the [Report of the Korean Authority], the Panel did not do anything out of the ordinary. The European Communities' claim was that Korea had disregarded certain requirements of Article 4.2 of the Agreement on Safeguards in its actions preceding and accompanying the adoption of its safeguard measure. The [Report of the Korean Authority] was issued by the Korean authorities which, inter alia, investigated and evaluated the assertions of serious injury to the domestic industry involved. Thus, that Report was clearly relevant to the task of the Panel to determine the facts, and the Panel was within its discretionary authority in deciding whether or not, or to what extent, it should rely upon the Report in ascertaining the facts relating to Korea's injury determination.\(^\text{237}\)

(e) No need to state explicitly that a prima facie case has been made.

171. The Appellate Body has held on several occasions that a Panel was not obliged to make an explicit finding that a party has met its burden of proof in making a prima facie case. See paragraph 165 above. Further, in Thailand – H-Beams, the Appellate Body stated:

"In our view, a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a prima facie case. Thus, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof."\(^\text{238}\)

172. In Korea – Dairy, Korea argued in its appeal that "as a threshold matter,' a panel must evaluate and make a finding on whether the complaining Member (i.e., the Member with the burden of proof) has established a prima facie case of a violation', before requiring the respondent to submit evidence of its own case or defence." By ignoring this step, the Panel "did not consider and a fortiori did not find that the European Communities made a prima facie case that justified its proceeding to examine the evidence and arguments' of Korea."\(^\text{239}\) The Appellate Body stated:

"We find no provision in the DSU or in the Agreement on Safeguards that requires a panel to make an explicit ruling on whether the complainant has established a prima facie case of violation before a panel may proceed to examine the respondent's defence and evidence."\(^\text{240}\)

(f) Relationship between the burden of proof and a panel's fact-finding mandate

173. In Japan – Agricultural Products II, the Appellate Body held that while a panel had a broad and "comprehensive authority" to engage in fact-finding under Article 13 of the DSU, it could not use


\(^{239}\) Appellate Body Report on Korea – Dairy, para. 144.

\(^{240}\) Appellate Body Report on Korea – Dairy, para. 145.
this authority so as to effectively relieve the complaining party of making a prima facie case of inconsistency:

"Article 13 of the DSU allows a panel to seek information from any relevant source and to consult individual experts or expert bodies to obtain their opinion on certain aspects of the matter before it. In our Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products (‘United States – Shrimp’), we noted the 'comprehensive nature' of this authority, and stated that this authority is 'indispensably necessary' to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements …".'

Furthermore, we note that the present dispute is a dispute under the SPS Agreement. Article 11.2 of the SPS Agreement explicitly instructs panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'.

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.

In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a prima facie case of inconsistency with Article 5.6 based on claims relating to the 'determination of sorption levels'. The United States did not even argue that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6."241

5. Standard of review

(a) Standard of review under the DSU

174. The Panel on US – Underwear examined the standard of review to be applied in cases involving the Agreement on Textiles and Clothing and noted that Article 11 of the DSU is the relevant provision. In a finding not reviewed by the Appellate Body, the Panel held that "the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States": The Panel went on to state:

"[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.

...

[T]he Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review.\(^{242}\) In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. In our view, the task of the Panel is to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States. Consequently, the ATC constitutes, in our view, the relevant legal framework in this matter.

We have therefore decided, in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities on 23 March 1995 (the 'March Statement) which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. In our view, an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), 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 the United States.\(^n\)\(^{243}\)

175. In *US – Wool Shirts and Blouses*, the Panel examined whether a certain transitional safeguard measure imposed by the United States was consistent with Article 6. India, the complainant, claimed that the Panel should examine whether the United States had acted reasonably, while the United States argued that it should be "entitled to the benefit of reasonable doubt", as it had been so entitled in certain GATT case. The Panel responded as follows:

"[A]lthough the DSU does not contain any specific reference to standards of review, we consider that Article 11 of the DSU … is relevant here[.]"

... Pursuant to Article 11 of the DSU, we must determine what is 'the matter before [the Panel]'. This Panel was established pursuant to Article 8.10 of the ATC and Article 6 of the DSU. …

... The only restraint discussed under Article 6 of the ATC is the proposed restraint by the importing Member. Therefore, pursuant to Article 11 of the DSU, the function of this Panel, established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is limited to making an objective assessment of the facts surrounding the application


of the specific restraint by the United States (and contested by India) and of the
conformity of such restraint with the relevant WTO agreements."  \(^{244}\)

176. In support of the proposition referenced in paragraph 175 above, the Panel referred to "an
important distinction between the role of panels under the DSU and the role of the TMB under the
ATC as regards safeguard actions."  \(^{245}\)

177. In *EC – Hormones*, the European Communities argued in its appeal that the Panel failed to
apply an appropriate standard of review in assessing certain acts of, and scientific evidentiary material
submitted by, the European Communities. The Appellate Body held that the applicable standard of
review under Article 11 of the *DSU* is neither *de novo* review, nor "total deference", but rather the
"objective assessment of facts:

"The standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.\(^{246}\) To adopt a
standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.

… Article 11 of the DSU bears directly on [the] matter [of standard of review] and, in
effect, articulates with great succinctness but with sufficient clarity the appropriate
standard of review for panels in respect of both the ascertainment of facts and the
legal characterization of such facts under the relevant agreements.

So far as fact-finding by panels is concerned, their activities are always constrained
by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo*
review as such, nor 'total deference', but rather the 'objective assessment of the
facts'."  \(^{247}\)

(b) Standard of review in trade remedy cases

(i) Agreement on Safeguards

178. In *Argentina – Footwear (EC)*, Argentina argued in its appeal that the Panel correctly
articulated the standard of review but alleged that the Panel erred in applying that standard of review
by conducting a "*de facto de novo* review" of the findings and conclusions of the Argentine
authorities. The Appellate Body rejected Argentina's argument, stating as follows:

"We have stated, on more than one occasion, that, for all but one of the covered
agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.

…

\(^{244}\) Panel Report on *US – Wool Shirts and Blouses*, paras. 7.16-7.17.
\(^{245}\) Panel Report on *US – Wool Shirts and Blouses*, para. 7.18.
\(^{246}\) (footnote original) See, for example, S.P. Croley and J.H. Jackson, "WTO Dispute Panel Deference to
National Government Decisions, The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine", in
185, p. 189; P.A. Akakwam, "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role
Trade* 277, pp. 295-296.
\(^{247}\) Appellate Body Report on *EC – Hormones*, paras. 115-117.
Based on our review of the Panel's reasoning, we find that the Panel correctly stated
the appropriate standard of review, as set forth in Article 11 of the DSU. And, with
respect to its application of the standard of review, we do not believe that the Panel
conducted a de novo review of the evidence, or that it substituted its analysis and
judgement for that of the Argentine authorities. Rather, the Panel examined whether,
as required by Article 4 of the Agreement on Safeguards, the Argentine authorities
had considered all the relevant facts and had adequately explained how the facts
supported the determinations that were made. Indeed, far from departing from its
responsibility, in our view, the Panel was simply fulfilling its responsibility under
Article 11 of the DSU in taking the approach it did. To determine whether the
safeguard investigation and the resulting safeguard measure applied by Argentina
were consistent with Article 4 of the Agreement on Safeguards, the Panel was
obliged, by the very terms of Article 4, to assess whether the Argentine authorities
had examined all the relevant facts and had provided a reasoned explanation of how
the facts supported their determination.\textsuperscript{248}

In Korea – Dairy, the Panel considered Korea's request for the Panel not to engage in a de
novo review of its national authorities' determination to impose a safeguard. More specifically, Korea
argued that the standard of review of Article 11 implies that the function of the Panel is to assess
whether Korea (i) examined the relevant facts before it at the time of the investigation; and (ii)
provided an adequate explanation of how the facts before it as a whole supported the determination
made. Furthermore, Korea claimed that a certain deference or latitude should be left to the national
authorities in this respect. The Panel held that it could not grant "total deference" to the national
authorities but agreed that it could not substitute its assessment for that of the national authority:

"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\textsuperscript{249}. 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 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.\textsuperscript{9} \textsuperscript{250}

\textbf{(ii) Agreement on Textiles and Clothing}

180. See the excerpts from the reports of the panels and Appellate Body referenced in paragraphs
174-176 above.

\textsuperscript{248} Appellate Body Report on Argentina – Footwear (EC), paras. 118 and 121.
\textsuperscript{249} We recall that in US – Underwear, paras. 7.53-54, a case dealing with a
safeguard action under the ATC, the panel reached the conclusions that the standard of review was that
established in Article 11 of the DSU and commented on the implications of such standard of review for
safeguard measures. See also the Panel Report in Brazil – Countervailing Duty Proceeding Concerning Imports
of Milk Powder from the European Community, SCM/179: "It was incumbent upon the investigating authorities
to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.
\textsuperscript{250} Panel Report on Korea – Dairy, para. 7.30.
Anti-Dumping Agreement

181. See the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the Anti-Dumping Agreement, paragraph 334.

SCM Agreement

182. The Appellate Body in US – Lead and Bismuth II rejected the argument that, "by virtue of the Declaration, the standard of review specified in Article 17.6 of the Anti-Dumping Agreement also applies to disputes involving countervailing duty measures under Part V of the SCM Agreement."\(^{251}\) The Appellate Body emphasized the hortatory language of the Declaration and the fact that the Declaration does not provide for the application of any particular standards of review to be applied:

"By its own terms, the Declaration does not impose an obligation to apply the standard of review contained in Article 17.6 of the Anti-Dumping Agreement to disputes involving countervailing duty measures under Part V of the SCM Agreement. The Declaration is couched in hortatory language; it uses the words 'Ministers recognize'. Furthermore, the Declaration merely acknowledges 'the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.' It does not specify any specific action to be taken. In particular, it does not prescribe a standard of review to be applied.

This Decision provides for review of the standard of review in Article 17.6 of the Anti-Dumping Agreement to determine if it is 'capable of general application' to other covered agreements, including the SCM Agreement. By implication, this Decision supports our conclusion that the Article 17.6 standard applies only to disputes arising under the Anti-Dumping Agreement, and not to disputes arising under other covered agreements, such as the SCM Agreement. To date, the DSB has not conducted the review contemplated in this Decision.\(^{252}\)

6. Judicial economy

(a) Legal basis for the exercise of judicial economy

183. The Panel on US – Wool Shirts and Blouses decided to exercise judicial economy with respect to some of the Indian claims in that dispute, stating "India is entitled to have the dispute over the contested "measure" resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute." The Appellate Body upheld the finding of the Panel and discussed the legal basis for judicial economy. The Appellate Body began by noting the function of panels, as defined under Article 11 of the DSU:

"The function of panels is expressly defined in Article 11 of the DSU, which reads as follows:

'The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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

\(^{251}\) Appellate Body Report on US – Lead and Bismuth II, para. 48.

\(^{252}\) Appellate Body Report on US – Lead and Bismuth II, paras. 49-50.
the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements ... (emphasis added).

Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.

Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the DSU that requires panels to do so.

184. The Appellate Body in US – Wool Shirts and Blouses also referred to Article 3.7 of the DSU and emphasized that a requirement to address all legal claims raised by a party is inconsistent with the basic aim of dispute settlement, namely to settle disputes:

"Furthermore, such a requirement [to address all legal claims] is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the DSU explicitly states:

'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to
a dispute and consistent with the covered agreements is clearly to be preferred.'

Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the DSU. Article 3.4, for example, stipulates:

'Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.'

185. Finally, the Appellate Body in US – Wool Shirts and Blouses rejected the argument by India that, pursuant to Article 3.2, panels were obliged to address all legal claims raised by the parties:

"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.

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. This is explicitly recognized in Article 3.9 of the DSU, which provides:

'The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.'

In the light of the above, we believe that the Panel's finding in paragraph 7.20 of the Panel Report is consistent with the DSU as well as with practice under the GATT 1947 and the WTO Agreement."

186. The Appellate Body confirmed its approach to judicial economy in India – Patents (US):

'[A] panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties -- provided that those claims are within that panel's terms of reference.'

258 (footnote original) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the DSU.
(b) Exercise of judicial economy with respect to arguments

187. While the Appellate Body has, on several occasions, reiterated that panels are not obliged to address every legal claim made by a party – i.e. the ability of panels to exercise judicial economy – in EC – Poultry it held that a panel also had the discretion to decide which arguments made by the parties it was going to address in its analysis. See paragraph 143 above.

(c) No obligation to exercise judicial economy

188. In US – Lead and Bismuth II, the United States, the defending party, argued that the Panel was required to exercise judicial economy and not address issues which did not need to be addressed for resolving the dispute at hand. The Appellate Body rejected the argument and emphasized that the exercise of judicial economy was within the discretion of a Panel, but that a Panel was never required to exercise judicial economy:

"The United States seems to consider that our Report in United States – Shirts and Blouses sets forth a general principle that panels may not address any issues that need not be addressed in order to resolve the dispute between the parties. We do not agree with this characterization of our findings. In that appeal, India had argued that it was entitled to a finding by the Panel on each of the legal claims that it had made. We, however, found that the principle of judicial economy allows a panel to decline to rule on certain claims.

... In order to resolve the claim of the European Communities, the Panel deemed it necessary to address the two principal arguments made in support of this claim. In doing so, the Panel acted within the context of resolving this particular dispute and, therefore, within the scope of its mandate under the DSU." \(^{261}\)

189. In Argentina – Footwear (EC), the Appellate Body expressed its "surprise" that the Panel had made a certain finding under the Agreement on Safeguards:

"We are somewhat surprised that the Panel, having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the Agreement on Safeguards." \(^{262}\)

(d) Requirement to exercise judicial economy explicitly

190. In Canada – Autos, the Appellate Body admonished the Panel for not stating explicitly that it was exercising judicial economy, when it did not address a particular claim:

"In our view, it was not necessary for the Panel to make a determination on the European Communities' alternative claim relating to the CVA requirements under Article 3.1(a) of the SCM Agreement in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these

\(^{261}\) Appellate Body Report on US – Lead and Bismuth II, paras. 71 and 73.
\(^{262}\) Appellate Body Report on Argentina – Footwear (EC), para. 145.
findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the alternative claim of the European Communities that the CVA requirements are inconsistent with Article 3.1(a) of the SCM Agreement.

We are bound to add that, for purposes of transparency and fairness to the parties, a panel should, however, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy. Silence does not suffice for these purposes." ¹²⁶³

(e) "False" judicial economy

191. In Australia – Salmon, the Appellate Body held that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'" ¹²⁶⁴

192. In Japan – Agricultural Products, the Appellate Body found an error of law in the Panel's exercise of judicial economy. Similarly to the Australia – Salmon dispute, the Appellate Body found that the Panel had exercised "false" judicial economy and had provided only a partial resolution of the dispute before it:

"We note that there is an error of logic in the Panel's finding in paragraph 8.63. The Panel stated that it had found earlier in its Report that the varietal testing requirement violates Article 2.2, and that there was, therefore, no need to examine whether the measure at issue was based on a risk assessment in accordance with Articles 5.1 and 5.2 of the SPS Agreement. We note, however, that the Panel's finding of inconsistency with Article 2.2 only concerned the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel found that there was insufficient evidence before it to conclude that this measure was inconsistent with Article 2.2. The Panel, therefore, made an error of logic when it stated, in general terms, that there was no need to examine whether the varietal testing requirement was consistent with Article 5.1 because this requirement had already been found to be inconsistent with Article 2.2. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, there was clearly still a need to examine whether this measure was inconsistent with Article 5.1. By not making a finding under Article 5.1 with regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel improperly applied the principle of judicial economy. We believe that a finding under Article 5.1 with respect to apricots, pears, plums and quince is necessary 'in order to ensure effective resolution' of the dispute." ¹²⁶⁵

7. Adverse inference

193. In *Canada – Aircraft*, the Appellate Body addressed the issue whether panels have the authority to draw adverse inferences from a party's refusal to provide information. In this dispute, Canada refused to provide Brazil, during consultations, with information on the financing activities of a particular agency, such information being subsequently also requested by the Panel. On appeal, Brazil submitted that the Panel erred by not drawing the inference that the information withheld by Canada was adverse to Canada and supportive of Brazil's claim that the agency's debt financing was a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. The Appellate Body held that it is within the discretion of panels to draw adverse inferences and that in this particular case the Panel, in deciding to draw adverse inferences, had not abused this discretion inconsistently with the provisions of the *DSU*:

"There is no logical reason why the Members of the WTO would, in conceiving and concluding the *SCM Agreement*, have granted panels the authority to draw inferences in cases involving actionable subsidies that *may* be illegal *if* they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.

Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.

... 

Yet, we do not believe that the record provides a sufficient basis for us to hold that the Panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. For this reason, we let the Panel's finding of *not proven* remain, and we decline Brazil's appeal on this issue."^{266}

194. In *US – Wheat Gluten*, the European Communities argued, *inter alia*, that the Panel had failed to "draw the necessary adverse inferences from the United States' refusal to submit ... requested information"; the European Communities claimed that this failure was an error of law and that the Panel consequently had violated Article 11 of the *DSU*. The Appellate Body declined the appeal; in its analysis, it made the general statement "the appellant should [when alleging that a panel should have drawn adverse inferences], at least: identify the facts on the record from which the Panel should have drawn inferences: indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the *DSU*."

"We ... characterized the drawing of inferences as a 'discretionary' task falling within a panel's duties under Article 11 of the *DSU*. In *Canada – Aircraft*, which involved a similar factual situation, the panel did not draw any inferences 'adverse' to Canada's position. On appeal, we held that there was no basis to find that the panel had

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^{266} Appellate Body Report on *Canada – Aircraft*, paras. 202-203 and 205. With respect to the drawing of adverse inferences under the *SCM Agreement*, see also Annex V in the Chapter on *SCM Agreement*. 
improperly exercised its discretion since 'the full ensemble of the facts on the record' supported the panel's conclusion.  

In its appeal, the European Communities places considerable emphasis on the failure of the Panel to draw 'adverse' inferences from the refusal of the United States to provide information requested by the Panel. As we emphasized in Canada – Aircraft, under Article 11 of the DSU, a panel must draw inferences on the basis of all of the facts of record relevant to the particular determination to be made. Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel were to ignore or disregard other relevant facts, it would fail to make an 'objective assessment' under Article 11 of the DSU. In this case, as the Panel observed, there were other facts of record that the Panel was required to include in its 'objective assessment'. Accordingly, we reject the European Communities' arguments to the extent that they suggest that the Panel erred in not drawing 'adverse' inferences simply from the refusal of the United States to provide certain information requested from it by the Panel under Article 13.1 of the DSU.

In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full ensemble of the facts, the appellant should, at least: identify the facts on the record from which the Panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU.

In this appeal, the European Communities makes, what we regard to be, broad and general statements that the Panel erred by not drawing 'adverse' inferences from the facts. Besides the fact that the United States refused to provide certain information requested by the Panel under Article 13.1 of the DSU, the European Communities does not identify, in any specific manner, which facts supported a particular inference. Nor does the European Communities identify what inferences the Panel should have drawn from those facts, other than that the inferences should have been favourable to the European Communities. Besides the simple refusal of the United States to provide information requested by the Panel, which we have already addressed, the European Communities does not offer any other specific reasons why the Panel's failure to exercise its discretion by drawing the inferences identified by the European Communities amounts to an error of law under Article 11 of the DSU. Therefore, we decline this ground of appeal.

267 (footnote original) Appellate Body Report on Canada – Aircraft, paras. 204 and 205.
268 (footnote original) Appellate Body Report on Canada – Aircraft, paras. 204 and 205.
8. **Relationship with other Articles**

(a) Articles 12 and 13 of the DSU

With respect to the relationship between Article 11, and Articles 12 and 13 of the DSU, see the excerpts from the reports of the panels and Appellate Body referenced in paragraphs 207-208.

9. **Relationship with other WTO Agreements and non-WTO law**

(a) Non-WTO law

In *EC – Bananas III*, the European Communities asserted "that the Panel should not have conducted an objective examination of the requirements of the Lomé Convention, but instead should have deferred to the 'common' EC and ACP views on the appropriate interpretation of the Lomé Convention." The Appellate Body expressly agreed with the following statement of the Panel:

"We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.”

XII. **ARTICLE 12**

A. **TEXT OF ARTICLE 12**

*Article 12*

**Panel Procedures**

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

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7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

B. INTERPRETATION AND APPLICATION OF ARTICLE 12

1. Article 12.1

(a) "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

197. In India – Patents (US), the Appellate Body examined the Panel’s decision at the outset of the first substantive meeting – "that all legal claims would be considered if they were made prior to the end of that meeting; and this ruling was accepted by both parties". The Appellate Body, in being called upon to determine whether the Panel had exceeded its terms of reference, stated:

"We do not find this statement ... consistent with the letter and the spirit of the DSU. Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the
parties to the dispute. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU.\textsuperscript{271}

2. **Article 12.6**

(a) "submissions"

198. In *US – Shrimp*, the Appellate Body considered whether panels have the right to accept so-called *amicus curiae* briefs. With respect to this issue, see also paragraphs 208-209 and 241 below. In this context, the Appellate Body made a general statement on the issue of access to the dispute settlement process of the WTO. After noting that the access is limited to the Members of the WTO, the Appellate Body stated:

"[U]nder the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlative[y], a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU.\textsuperscript{272}

3. **Article 12.7**

(a) "basic rationale behind any findings and recommendations"

199. In *Korea – Alcoholic Beverages*, Korea claimed in its appeal that the Panel had failed to comply with its obligations under Article 12.7 of the DSU to state the basic rationale behind its findings and recommendations. The Appellate Body did not define the term "basic rationale", but noted that the Panel had "set out a detailed and thorough rationale for its findings and recommendations in this case":

"In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU.\textsuperscript{273}

200. In *Chile – Alcoholic Beverages*, Chile argued in its appeal that the Panel had failed to comply with its obligations under Article 12.7 of the DSU by not providing the basic rationale behind its findings with respect to the similarity requirement of the second sentence of Article III:2. Similarly to its finding in Korea – Alcoholic Beverages, the Appellate Body rejected the argument:

\textsuperscript{271} Appellate Body Report on *India – Patents (US)*, para. 92.

\textsuperscript{272} Appellate Body Report on *US – Shrimp*, para. 101. See also Appellate Body Report on *US – Lead and Bismuth II*, paras. 40-41.

\textsuperscript{273} Appellate Body Report on *Korea – Alcoholic Beverages*, para. 168.
"A similar claim was made by Korea in Korea – *Alcoholic Beverages*. In that case the Appellate Body concluded that the Panel had provided a 'detailed and thorough' rationale for its findings. In our view, in this case, the Panel did 'set out' a 'basic rationale' for its finding and recommendation on the issue of 'not similarly taxed', as required by Article 12.7 of the DSU. The Panel identified the legal standard it applied, examined the relevant facts, and provided reasons for its conclusion that dissimilar taxation existed. Therefore, Chile's claim that the Panel failed to 'set out' a 'basic rationale' for its findings and recommendations in accordance with Article 12.7 of the DSU is denied." 274

201. In *Argentina – Footwear (EC)*, Argentina claimed that the Panel violated Article 12.7 of the *DSU* by failing to provide "basic rationale" for its findings and conclusions. The Appellate Body emphasized that the Panel had conducted "extensive factual and legal analyses of the competing claims made by the parties":

"In our reports in *Korea – Alcoholic Beverages* and *Chile – Taxes on Alcoholic Beverages*, we found that the panels in those cases had provided sufficient reasons for their findings and recommendations, and that, therefore, the requirements of Article 12.7 of the DSU were fulfilled. In this case, the Panel conducted extensive factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions. Although Argentina may not agree with the rationale provided by the Panel, and we do not ourselves agree with all of its reasoning, we have no doubt that the Panel set out, in its Report, a 'basic rationale' consistent with the requirements of Article 12.7 of the DSU." 275

(b) Order of analysis

202. In *Brazil – Aircraft*, the Appellate Body examined the order of the legal reasoning of the Panel. The Appellate Body criticized the fact that the Panel had examined whether Brazil, the defending party, had met the requirements of a particular provision (in *casu* Article 3.1(a) of the *SCM Agreement*) and only subsequently considered whether this particular provision applied to Brazil in its capacity as a developing country, in light of another provision (in *casu* Article 27.4 of the *SCM Agreement*). The Appellate Body found that the reverse order of analysis would have been appropriate:

"The Panel commenced its legal reasoning by considering whether the interest rate equalization payments for regional aircraft under PROEX constitute 'subsidies' within the meaning of Article 1 of the *SCM Agreement* which are 'contingent … upon export performance' within the meaning of Article 3.1(a) of that Agreement. As Brazil had not disputed these two issues, the Panel concluded that the payments under PROEX relating to exports of Brazilian regional aircraft are subsidies contingent upon export performance. The Panel then went on to examine an 'affirmative defence' put forward by Brazil, that is, whether PROEX support for the regional aircraft industry, even if it did constitute an 'export subsidy', was nevertheless 'permitted' by item (k) of the Illustrative List. Given the Panel's correct analysis of the relationship between Articles 27 and 3.1(a) in its reasoning on the burden of proof, we find it odd that the Panel then went on to examine, in the following order: first, whether the conditions of Article 3.1(a) of the *SCM Agreement* had been met; next, a contention by Brazil of

\[\text{274 Appellate Body Report on *Chile – Alcoholic Beverages*, para. 78.}\]

\[\text{275 Appellate Body Report on *Argentina – Footwear (EC)*, para. 149.}\]
an 'affirmative defence' to a claim of violation of Article 3.1(a), based on item (k) of the Illustrative List; and, only then, whether Brazil had complied with the conditions of Article 27.4 so as to determine whether the prohibition of export subsidies in Article 3.1(a) even applied to Brazil in this case. The Panel should not have considered Brazil's 'affirmative defence' based on item (k) of the Illustrative List before determining whether Article 3.1(a) even applied to Brazil.

Our interpretation of the relationship between Article 27 and Article 3.1(a) of the SCM Agreement leads us, in this appeal, to examine, first, the issues appealed relating to whether Brazil has increased the level of its export subsidies contrary to the provisions of Article 27.4. Only if we determine that Brazil has not complied with the conditions of Article 27.4, and thereby find that the provisions of Article 3.1(a) do in fact apply to Brazil, will we need to examine Brazil's appeal of the Panel's findings relating to its alleged 'affirmative defence' under item (k) of the Illustrative List."

203. In US – FSC, the Appellate Body examined the United States' argument that the Panel had erred by failing to begin its examination of the European Communities claim under Articles 1.1 and 3.1(a) of the SCM Agreement, rather than with footnote 59 of that Agreement. The Appellate Body stated:

"Instead, the Panel began its examination with the general definition of a 'subsidy' that is set forth in Article 1.1 of the SCM Agreement. This definition applies throughout the SCM Agreement, to all the different types of 'subsidy' covered by that Agreement. In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export subsidies by examining the general definition of a 'subsidy' that is applicable to export subsidies in Article 3.1(a). In any event, whether the examination begins with the general definition of a 'subsidy' in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59."  

4. Access to the dispute settlement process by non-governmental organizations

204. In connection with the WTO access to the dispute settlement process, the Appellate Body in US – Shrimp emphasized that access and the legal right to have one's submission considered by a panel existed only for WTO Members:

"It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel. Correlatively, a

276 Appellate Body Report on Brazil – Aircraft, paras. 143-144. See also Appellate Body Report, Canada – Patent Term, para. 49.
278 (footnote original) See Articles 4, 6, 9 and 10 of the DSU.
panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is authorized to do under the DSU.\textsuperscript{279}

205. In \textit{Turkey – Textiles}, Turkey argued that India directed its complaint against Turkey concerning a measure taken by another entity, namely the customs union existing between Turkey and the European Communities. Turkey argued that it was not responsible for actions collectively taken by the members of the customs union through the institutions created by the agreement. The Panel did not accept this argument and ultimately held that the measures at issue had been taken by Turkey. See also paragraphs 97 and 139-141 above. The Panel also emphasized that the customs union between Turkey and the European Communities did not have standing under WTO law:

"[T]he WTO dispute settlement system is based on Member's rights; is accessible to Members only; and is enforced and monitored by Members only. The Turkey-EC customs union is not a WTO Member, and in that respect does not have any autonomous legal standing for the purpose of WTO law and therefore its dispute settlement procedures. Moreover, the European Communities' import restrictions appear \textit{a priori} to be WTO compatible and could not be the object of any panel recommendation that the European Communities brings its measure into conformity with the WTO Agreement, as required by Article 19 of the DSU.\textsuperscript{280}

XIII. \textbf{ARTICLE 13}

A. \textbf{TEXT OF ARTICLE 13}

\textit{Article 13}

\textbf{Right to Seek Information}

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

\textsuperscript{280} Panel Report on \textit{Turkey – Textiles}, para. 9.41.
B. INTERPRETATION AND APPLICATION OF ARTICLE 13

1. Article 13.1

(a) "right to seek information and technical advice from any individual or body"

206. In *EC – Hormones*, the Appellate Body examined the European Communities challenge of the Panel's selection and use of experts and stated that a Panel has the discretion to decide whether to seek advice from individual scientific experts or from a group of such experts, and may, in the former case, establish *ad hoc* rules for such consultations:

"Both Article 11.2 of the *SPS Agreement* and Article 13 of the DSU enable panels to seek information and advice as they deem appropriate in a particular case…. We find that in 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. 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."

207. In *US – Shrimp*, the Panel received a brief from three non-governmental organizations. The complaining parties in the dispute requested the Panel not to consider the contents of the briefs submitted by the organizations while the United States urged the Panel to take into account any relevant information in the two briefs that the Panel acknowledged receiving. The Panel found that "[a]ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration." The Appellate Body found that the Panel had erred in its legal interpretation of Article 13 of the *DSU* and held that accepting non-requested information from non-governmental sources was not incompatible with the provisions of the DSU. The Appellate Body began by emphasizing the "comprehensive nature" of a panel's authority to seek information in the context of a dispute:

"The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine the *need for information and advice* in a specific case, to ascertain the *acceptability and relevancy* of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.

The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and

extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...' (emphasis added)"\(^{283}\)

208. The Appellate Body in US – Shrimp subsequently held that the word "seek" in the phrase "seek information" should not be given an excessively "formal and technical" reading. The Appellate Body opined that given the breadth of a panel's mandate to seek information without "unduly delaying the panel process", "for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes":

"That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes inter alia that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes.

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may motu proprio have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.

Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. The Panel suggested instead, that, if any of the parties wanted 'to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so.' In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellants two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word 'seek' in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.

209. While in *US – Shrimp* the Appellate Body held that panels have the authority to accept so-called *amicus curiae* briefs (see paragraph 208 above), in *US – Lead and Bismuth II*, the Appellate Body recognized that it also had the authority to accept *amicus curiae* briefs, albeit on a different legal basis. See paragraph 241 below.

210. The Appellate Body in *Japan – Agricultural Products II* agreed with the Panel's finding that "[I]n deciding whether a fact or claim can...be accepted, we consider that we are called upon to examine and weigh all the evidence validly submitted to us, including the opinions we received from the experts advising the Panel in accordance with Article 13 of the DSU." The Appellate Body recalled its statement about the "comprehensive nature" of a panel's authority to engage in fact finding; however, it emphasized that a panel could not use this authority so as to relieve a complaining party of its burden of proof and the concomitant duty to make a prima facie case. With respect to this aspect of the burden of proof issue, see paragraph 173 above:

211. In *Canada – Aircraft*, Canada argued before the Panel that Brazil was obliged to demonstrate the existence of a subsidy and that the subsidy was contingent upon export performance. Canada submitted that it had the option of choosing to defend on either ground or both, and that if it chose to defend on only one element, the Panel was then precluded from seeking information on the other element to which Canada had not raised a defence. The Panel, in a finding not reviewed by the Appellate Body, disagreed with Canada and determined:

"With regard to certain measures before the Panel, Canada chose to defend itself on the issue of export contingency. Thus, Canada does not advance detailed arguments on the question of subsidization. Despite the absence of any defence on the issue of subsidization, Canada states expressly that it does not admit that the relevant measures constituted subsidies. Canada defends itself on the issue of export contingency, because it believes that the Panel will reject Brazil's claim on export contingency. However, Canada has ignored the possibility that the Panel could find in favour of Brazil on the question of export contingency. If the Panel were to find against Canada on the question of export contingency, the Panel would then be required to make findings on the subsidy issue, particularly given Canada's express statement that it does not admit that the relevant measures constitute subsidies.\(^{285}\) If the Panel were prevented from seeking information on the subsidy issue because of Canada's decision not to defend itself on that issue, the basis for the Panel's findings on subsidization would be weak at best. It is for these reasons that we reject Canada's argument that a party's decision not to put in a defence on a particular issue, when that party denies or refuses to admit elements of the claim, should prevent the Panel from seeking information on that issue.\(^{286}\)"

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\(^{285}\) (footnote original) Canada states that it is not necessary for this Panel to determine whether impugned programmes, activities or transactions are "subsidies", if it finds that they are not "contingent…on export performance", and vice versa. *A contrario*, we understand Canada to argue that it is necessary for the Panel to determine whether impugned programmes etc. are subsidies if it finds that they are contingent on export.

\(^{286}\) Panel Report on *Canada – Aircraft*, para. 9.83.
212. In India – Quantitative Restrictions, the Panel consulted with the IMF on India's balance-of-payments situation. In this context, the question arose whether in the light of Article XV:2, which speaks of consultations between the CONTRACTING PARTIES and the IMF, a panel could engage in such consultations with the IMF. The United States, the complaining party, opined that the terms of Article XV:2 of GATT 1994, read as per paragraph 2(b) of the Incorporation Clause of GATT 1994 in Annex 1A of the WTO Agreement, require the WTO to consult with the IMF in specific matters, and the WTO, by definition, includes panels. India, in contrast, argued that to interpret the terms of Article XV to refer to panels meant to ignore the division of functions between the different bodies of the WTO, and that only the General Council and the BOP Committee were covered by this provision. The Panel stated:

"Article 13.1 of the DSU entitles the Panel to consult with the IMF in order to obtain any relevant information relating to India's monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us.

... We do not find it necessary for the purposes of this case to decide the extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF. As will be seen in Section V.G infra, we accept in the circumstances of this case certain assessments of the IMF. In this regard, however, we note that whether or not the provisions of Article XV:2 extend to panels, the Panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU."

(b) "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate"

213. The Appellate Body in Canada – Aircraft addressed the issue of the authority of a panel to request a party to a dispute to submit information concerning that dispute. The Appellate Body stated:

"It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just 'from any individual or body' within the jurisdiction of a Member of the WTO, but also from any Member, including a fortiori a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: 'A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.'"

214. In Canada – Aircraft, Canada argued in its appeal that it was not legally bound to comply with the Panel's request to provide information relating to the disputed financing of the subject transaction. The Appellate Body held:

"[W]e are of the view that the word 'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather a merely exhortative, sense. Members are, in other words, under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."

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288 Appellate Body Report on Canada – Aircraft, para. 185.
2. Article 13.2

(a) "seek information from any relevant source"

215. In *Argentina – Textiles and Apparel*, Argentina argued on appeal, that the Panel had failed to make "an objective assessment of the matter" because it had not acceded to the request of the parties in seeking information from, and consulting with, the IMF concerning certain aspects of the statistical tax. The Appellate Body held that "[j]ust as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all":

"The DSU gives panels different means or instruments for complying with Article 11; among these is the right to 'seek information and technical advice' provided in Article 13 of the DSU.

Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves 'to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.' Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.

In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF."

216. In *Australia – Automotive Leather I*, Australia argued that the United States was limited to relying on the facts and arguments set forth in its request for consultations. Australia argued that the requirement that the request for consultations "include a statement of available evidence" pursuant to Article 4.2 of the *SCM Agreement*, in conjunction with the expedited nature of proceedings, require a panel to limit the complaining party to using the evidence and arguments set forth in the request for consultations. The Panel held that the expedited nature of the proceedings under Article 4 of the *SCM Agreement* did not limit the Panel's general right to seek information:

"[W]e note that panels have, under Article 13.2 of the DSU, a general right to seek information 'from any relevant source'. Indeed, it is a common feature of panel proceedings for panelists to question parties about the facts and arguments underlying their positions. There is nothing in Article 4 of the SCM Agreement to suggest that this right is somehow limited by the expedited nature of dispute settlement proceedings conducted under that provision. If Australia's position were correct, a panel might be constrained from seeking out relevant information from the party, in this case the United States, that was limited to reliance on the facts set forth in its request for consultations. Similarly, under Australia's view, the defending party

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290 Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 82, 84 and 86.
might introduce information during the panel proceedings, which the complaining party, in this case the United States, would not be able to rebut, as it would be limited to reliance on the facts set forth in its request for consultations. We do not believe Article 4.2 requires this result.\(^n\)\textsuperscript{291}

3. **Adverse inference from a refusal to provide information**

217. In Canada – Aircraft, the Appellate Body addressed the issue as to whether panels have the authority to draw adverse inferences from a party’s refusal to provide information. In this dispute, Canada refused to provide Brazil with information on the financing activities of a particular agency that Brazil had requested during consultations and which was subsequently also requested by the Panel. On appeal, Brazil submitted that the Panel erred by not drawing the inference that the information withheld by Canada was adverse to Canada and supportive of Brazil’s claim that the agency’s debt financing was a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. The Appellate Body held that it is within the discretion of panels to draw adverse inferences, and that in this particular case the Panel, in deciding not to draw adverse inferences, had not abused this discretion inconsistently with the provisions of the DSU. See paragraphs 193-194 above.

XIV. **ARTICLE 14**

A. **TEXT OF ARTICLE 14**

*Article 14*

*Confidentiality*

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

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*

*Interim Review Stage*

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel’s findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on

\(^{291}\) Panel Report on *Australia – Automotive Leather II*, para. 9.28.
the issues identified in the written comments. If no comments are received from any party within the
comment period, the interim report shall be considered the final panel report and circulated promptly to
the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the
interim review stage. The interim review stage shall be conducted within the time-period set out in
paragraph 8 of Article 12.

B. INTERPRETATION AND APPLICATION OF ARTICLE 15

No jurisprudence or decision of a competent WTO body.

XVI. ARTICLE 16

A. TEXT OF ARTICLE 16

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall
not be considered for adoption by the DSB until 20 days after the date they have been circulated to the
Members.

2. Members having objections to a panel report shall give written reasons to explain their
objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be
considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel
report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be
adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal
or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the
report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.
This adoption procedure is without prejudice to the right of Members to express their views on a panel
report.

(footnote original) If a meeting of the DSB is not scheduled within this period at a time that enables the
requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

B. INTERPRETATION AND APPLICATION OF ARTICLE 16

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE 17

A. TEXT OF ARTICLE 17

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear
appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one
case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.
Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

(footnote original) If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

B. INTERPRETATION AND APPLICATION OF ARTICLE 17

1. General

218. In US – Gasoline, the United States in its appeal argued that the issues of whether clean air is an exhaustible natural resources within the meaning of Article XX(g) and whether the baseline establishment rules are consistent with the TBT Agreement were not properly brought before the Appellate Body in accordance with the Working Procedures. Venezuela and Brazil appealed the relevant findings of the Panel, but brought up these issues in their appellee's submission, contrary to the Appellate Body's Working Procedures which stipulated that such "cross-appeal" be brought in an appellant's submission. The Appellate Body refused to "casually … disregard" its own Working Procedures and stated:

"[T]o deal with those two issues, under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own Working Procedures and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or force majeure. Venezuela and Brazil could have appealed the Panel's finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the Working Procedures and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.

… the route … Brazil and Venezuela chose for addressing the two issues in question is not contemplated by the Working Procedures, and therefore, these issues are not properly the subject of this appeal." 292

2. Article 17.1

(a) Establishment of the Appellate Body

219. At its meeting of 10 February 1995, the DSB established the Appellate Body in accordance with Article 17.1 of the DSU. 293

3. Article 17.2

(a) Appointment of Members of the Appellate Body

220. On 6 December 1994, the Preparatory Committee to the WTO approved its recommendations for the procedures for the appointment of Appellate Body members. 294

293 WT/DSB/M/1.
294 PC/IPL/13.
4. Article 17.6

(a) "issues of law…and legal interpretations"

(i) Factual findings versus legal findings

221. In EC – Bananas III, the Appellate Body examined whether the activity function rules on the European Communities import licensing procedures were consistent with Article I:1 of the GATT 1994, in the absence of the application of such rules to imports of traditional ACP bananas. 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, those required for importing traditional ACP bananas. This is a factual finding."

295

222. The Appellate Body in EC – Bananas III also considered the European Communities' argument that the Panel erred in giving retroactive effect to Articles II and XVII of the GATS, contrary to the principle stated in Article 28 of the Vienna Convention. The Appellate Body stated:

"It is, however, evident from the terms of its finding that the Panel concluded, as a matter of fact, that the de facto discrimination did continue to exist after the entry into force of the GATS. This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports."

296

223. The Appellate Body also considered the European Communities' argument that the Panel did not follow the ruling on the burden of proof set forth in US – Wool Shirts and Blouses and stated:

"In our view, the conclusions by the Panel on whether Del Monte is a Mexican company, the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas, the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin, and the nationality of the majority of operators that 'include or directly represent' EC (or ACP) producers, are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities."

297

224. In EC – Hormones, the Appellate Body considered the European Communities' argument that the Panel had failed to make an objective assessment of the facts as required by Article 11 of the DSU by disregarding or distorting the evidence submitted by the European Communities to the Panel as well as the opinions and statements made by the scientific experts advising the Panel. The Appellate Body made the following distinction between factual and legal questions:

"Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has

298 Appellate Body Report on EC – Bananas III, para. 239.
adopted an international standard, guideline or recommendation on [one of the growth hormones at issue] is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.\footnote{Appellate Body Report on \textit{EC – Hormones}, para. 132.}

225. In \textit{Australia – Salmon}, Australia argued in its appeal that the Panel erred in its allocation and application of the burden of proof under Articles 2 and 5 of the \textit{SPS Agreement}. The Appellate Body stated:

"Australia concedes that the Panel correctly articulated the burden of proof as established by us in \textit{United States – Shirts and Blouses} and, in its specific application to the \textit{SPS Agreement}, \textit{European Communities – Hormones}. However, Australia contends that the Panel 'applied the burden incorrectly' and failed to properly assess, in its consideration of the evidence before it, whether Canada had met the burden of proof in relation to its claims under Articles 5.1, 5.5 and 5.6.

It appears to us that the core of Australia's appeal on this question is not related to the allocation of the burden of proof, but rather how the Panel considered and weighed the evidence in concluding that Canada had established a \textit{prima facie} case of inconsistency with Articles 5.1, 5.5 and 5.6.

The Panel's consideration and weighing of the evidence in support of Canada's claims relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU.\footnote{Appellate Body Report on \textit{Australia – Salmon}, paras. 259-261. See also Appellate Body Report on \textit{Japan – Agricultural Products II}, para. 98.}

226. In \textit{Korea – Alcoholic Beverages}, the Appellate Body held that it could not "second-guess the Panel in appreciating either the evidentiary value of [scientific] studies or the consequences, if any, of alleged defects in those studies":

"The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies, methods of production, taste, colour, places of consumption, consumption with 'meals' or with 'snacks', and prices.

A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it. In \textit{European Communities - Hormones}, we dealt with allegations that the panel had 'disregarded', 'distorted' and 'misrepresented' the evidence before it.\footnote{Appellate Body Report on \textit{Korea – Alcoholic Beverages}, paras. 161-162.}
227. In *Canada – Aircraft*, the Appellate Body noted that the Panel found that "there is no *prima facie* case that EDC debt financing confers a 'benefit', and therefore constitutes a 'subsidy', within the meaning of Article 1 of the SCM Agreement." The Appellate Body then considered Brazil's argument that the Panel erred in its "legal characterization" of the facts. The Appellate Body stated:

"In our view, this new argument raised by Brazil is beyond the scope of appellate review. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." In principle, new arguments are not *per se* excluded from the scope of appellate review, simply because they are new. However, for us to rule on Brazil's new argument, we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise." \(^{302}\)

228. In *India – Quantitative Restrictions*, the Appellate Body considered India's argument that the evidence introduced by the United States could not have constituted a *prima facie* case that India's balance-of-payments restrictions were not justified under the Ad Note. The Appellate Body stated:

"[W]e recall that in *European Communities – Hormones*, the Appellate Body stated:

'… Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts …' \(^{303}\)

Similarly, in *Korea – Taxes on Alcoholic Beverages*, the Appellate Body stated:

'The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. …' \(^{304}\)

We believe that this second mistake alleged by India relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review." \(^{305}\)

(ii) Statements of panels not amounting to "legal findings"

229. In *US – Wool Shirts and Blouses*, the Appellate Body declined to address a particular statement by the Panel appealed by India. The Appellate Body held that the statement was not a legal finding, but rather a "descriptive and gratuitous comment":

"India appealed the following statement relating to Article 6.10 of the *ATC* at paragraph 7.20 of the Panel Report:

'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, 

\(^{302}\) Appellate Body Report on *Canada – Aircraft*, para. 211.
\(^{303}\) (footnote original) Appellate Body Report on *EC – Hormones*, para. 123.
\(^{304}\) (footnote original) Appellate Body Report on *Korea – Alcoholic Beverages*, para. 143.
\(^{305}\) Appellate Body Report on *India – Quantitative Restrictions*, paras. 143-144.
which, we understand, may relate to subsequent events.' (emphasis added)

In our view, this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'.

230. In EC – Poultry, the Appellate Body addressed the issue of the allocation of a tariff-rate quota share to a non-Member and the participation of non-Members in the "others" category of a tariff-rate quota. In this context the Appellate Body stated that it was mindful of the mandate under Article 17.6 of the DSU and held that, contrary to Brazil's claim, the Panel had not made any legal findings on this issue:

"It is true that in footnote 140 of the Panel Report, the Panel states that paragraph 7.75 of the EC - Bananas panel reports and 'particularly the use of the phrase 'all suppliers other than Members with a substantial interest in supplying the product' … 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'. We do not consider this comment made in a footnote by the Panel to be either a 'legal interpretation developed by the panel' within the meaning of Article 17.6 of the DSU or a 'legal finding' or 'conclusion' that the Appellate Body may 'uphold, modify or reverse' under Article 17.13 of the DSU. It is undisputed in this case that there is no allocation of a country-specific share in the tariff-rate quota to a non-Member. There is, therefore, no finding nor any 'legal interpretation developed by the panel' that may be the subject of an appeal of which the Appellate Body may take cognizance.'

(b) "Completing the analysis"

231. In Canada – Periodicals, the Appellate Body reversed the Panel's findings on the issue of "like products" under Article III:2 of GATT 1994. The Appellate Body then addressed the question whether it could "complete the Panel's analysis", specifically whether it could proceed to make a determination whether the goods at issue were "directly competitive or substitutable" within the meaning of Article III:2, second sentence, of GATT 1994. The Appellate Body held that it could do so, noting that Article III:2, first sentence and Article III:2, second sentence were part of a "logical continuum":

"We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the DSU. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis. We note that, due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products.

…

306 (footnote original) Within the meaning of Article 17.13 of the DSU.
We believe the Appellate Body can, and should, complete the analysis of Article III:2 of the GATT 1994 in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, provided that there is a sufficient basis in the Panel Report to allow us to do so. The first and second sentences of Article III:2 are closely related. The link between the two sentences is apparent from the wording of the second sentence, which begins with the word 'moreover'. It is also emphasized in Ad Article III, paragraph 2, which provides: '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 ...'. An examination of the consistency of Part V.1 of the Excise Tax Act with Article III:2, second sentence, is therefore part of a logical continuum.

The Appellate Body found itself in a similar situation in United States - Gasoline. Having reversed the Panel's conclusions on the first part of Article XX(g) and having completed the Article XX(g) analysis in that case, the Appellate Body then examined the measure's consistency with the provisions of the chapeau of Article XX, based on the legal findings contained in the Panel Report.

As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence, of the GATT 1994.

232. In EC – Asbestos, the Appellate Body specified the conditions under which it would hold itself competent to "complete the analysis" of a panel. It held that it would do so when there were sufficient factual findings made by the Panel and the additional analysis required was "closely related" to the findings actually made by the Panel. Finally, the Appellate Body noted that the rules it would have had to apply, had it decided to "complete the analysis" in the present case, would have meant applying provisions which had "not previously been the subject of any interpretation or application by either panels or the Appellate Body". The Appellate Body ultimately decided not to complete the panel's analysis in this respect:

"As we have reached a different conclusion from the Panel's regarding the applicability of the TBT Agreement to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the TBT Agreement. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. However, we have insisted that we can do so only if the
The factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.  

The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In Canada – Periodicals, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are closely related" and that those two sentences are "part of a logical continuum." (emphasis added)

In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement. We observe that, although the TBT Agreement is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.

As the Panel decided not to examine Canada's four claims under the TBT Agreement, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the TBT Agreement has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round Agreement on Technical Barriers to Trade, which preceded the TBT Agreement and which contained obligations similar to those in the TBT Agreement, were also never the subject of even a single ruling by a panel."

(c) "issues of law covered in the panel report and legal interpretations developed by the panel."


(footnote original) Supra, footnote 48, at 469.

footnote 59; and second, that, in consequence, the FSC measure is excluded from the prohibition in Article 3.1(a) of the SCM Agreement against export subsidies." The Appellate Body continued:

"In our view, examination of the substantive issues raised by this particular argument would be outside the scope of our mandate under Article 17.6 of the DSU, as this argument does not involve either an 'issue of law covered in the panel report' or 'legal interpretations developed by the panel'. The Panel was simply not asked to address the issues raised by the United States' new argument. Further, the new argument now made before us would require us to address legal issues quite different from those which confronted the Panel and which may well require proof of new facts."

234. In Australia – Salmon, the Appellate Body noted that "[b]ecause the Panel finds that the difference in the level of protection in respect of the three natural hormones, when used for growth promotion purposes, and the level of protection in respect of natural hormones present endogenously in meat and other foods is unjustifiable, the Panel regards it as unnecessary to decide whether the difference in the levels of protection set by the European Communities in respect of natural hormones used as growth promoters and in respect of the same hormones when used for therapeutic or zootechnical purposes, is justified." The Appellate Body then decided to complete the Panel's analysis:

"In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties. This occurred, for example, in the appeals in United States – Gasoline, Canada – Certain Measures Concerning Periodicals, European Communities – Measures Affecting the Importation of Certain Poultry Products ('European Communities – Poultry'), and United States – Import Prohibition of Certain Shrimp and Shrimp Products.

As we have reversed the Panel's finding that the SPS measure at issue, erroneously identified as the heat-treatment requirement, is not based on a risk assessment, we believe that -- to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record -- we should complete the legal analysis and determine whether the actual SPS measure at issue, i.e., Australia's import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon, is based on a risk assessment."

235. In Argentina – Footwear (EC), the Appellate Body upheld the conclusions of the Panel that Argentina's investigation in that case was inconsistent with the requirements of Articles 2 and 4 of the Agreement on Safeguards. The Appellate Body then stated:

"As a consequence, there is no legal basis for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred 'as a result of unforeseen developments'."

236. In Korea – Dairy, the Appellate Body considered the European Communities' request that the Appellate Body complete the Panel's reasoning and find that by imposing a safeguard measure in circumstances where the alleged increase in imports was not "as a result of unforeseen developments"

within the meaning of Article XIX:1(a) of GATT 1994, Korea also violated its obligations under Article XIX of the GATT 1994. The Appellate Body declined to do so, noting there were insufficient factual findings:

"In the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, 'a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …', we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994."\(^{318}\)

237. The Appellate Body in *Korea – Dairy* also noted that in determining whether Korea violated the second sentence of Article 5.1 of the Agreement on Safeguards, it would have to determine whether the quantitative restrictions imposed by Korea were below the average level of imports in the last three representative years for which statistics were available, and if so, whether Korea had given a reasoned explanation as required by the second sentence of Article 5.1. Similarly, with regard to its conclusions referenced in paragraph 236 above, the Appellate Body held that it did not have a sufficient factual basis on which to complete the analysis:

"The Panel did not make any factual findings on the average level of imports of skimmed milk powder preparations in the last three representative years. The average level of imports in that period was also contested by the parties. Accordingly, we are not in a position, within the scope of our mandate under Article 17 of the DSU, to complete the analysis in this case and make a determination as to the consistency of Korea's safeguard measure with the second sentence of Article 5.1."\(^{319}\)

5. **Rule 17.9**

(a) Working procedures of the Appellate Body

238. On 15 February 1996, the Appellate Body circulated the Working Procedures of the Appellate Body as an unrestricted document.\(^{320}\)

(b) Amendment of working procedures

239. In a communication, dated 24 February 1997, the Chairman of the Appellate Body informed the Chairman of the Dispute Settlement Body and the Members that the Appellate Body, after consultations with the DSB Chairman and the Director-General, pursuant to paragraph 9 of Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Rule 32(2) of the Working Procedures for Appellate Review (WT/AB/WP/1) (the "Working Procedures"), had amended Rule 5(2) of its Working Procedures as follows:

"5. Paragraph 2 is hereby repealed and replaced with the following:

(2) The first Chairman of the Appellate Body shall have a term of office of two years. Thereafter, the term of office of the Chairman shall be one year. In order to ensure rotation of the Chairmanship, no

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\(^{318}\) Appellate Body Report on *Korea – Dairy*, para. 92.  
\(^{320}\) WT/AB/WP/1.
Member shall serve as Chairman for more than one term consecutively.  


(c) "Working procedures shall be drawn up by the Appellate Body"

241. In US – Lead and Bismuth II, the Appellate Body examined whether it could admit amicus curiae briefs submitted by the American Iron and Steel Institute and the Specialty Steel Industry of North America. With respect to the issue of amicus curiae briefs submitted to panels, see paragraphs 207-208 above. The Appellate Body stated that it was also entitled to accept such briefs:

"[Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."

XVIII. ARTICLE 18

A. TEXT OF ARTICLE 18

Article 18

Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

B. INTERPRETATION AND APPLICATION OF ARTICLE 18

1. Article 18.2

(a) Business confidential information

242. In Canada – Aircraft, the Panel adopted special Procedures Governing Business Confidential Information that went beyond the protection afforded by Article 18.2 of the DSU. The Procedures state that the Business Confidential Information ("BCI") is to be stored in a safe in a locked room at the premises of the relevant Geneva missions, with restrictions imposed on access to the locked room.

321 WT/AB/WP/2.
322 (footnote original) In addition, Rule 16(1) of the Working Procedures allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the Working Procedures.
and safe. The Procedures also provide for either party to visit the other party's Geneva mission and review the proposed location of the safe and propose any changes. In a subsequent submission, Canada stated that it could not submit BCI under the revised Procedures because they did not provide the requisite level of protection. The Panel stated:

"[T]he important distinction between the 4 November 1998 Procedures, and the final Procedures, is that the latter would facilitate the work of the parties in preparing themselves for these 'fast-track' proceedings, without impairing the protection afforded to the substance of the BCI. The timetable of the proceedings is such that party representatives would be likely to spend large periods of time in Geneva. As noted above, Canada itself has recognised the need for a party to have 'reasonable access' to BCI submitted by the other party. In the context of a fast-track case in particular, we do not consider that there is 'reasonable access' to the BCI if a party is required to adjust its work in respect of that BCI to the official working hours of the WTO Secretariat, excluding evenings and weekends. Under the final Procedures, authorised representatives of the parties would have had the convenience of access to the BCI of the other party at any time of day or night, rather than during the working hours of the WTO Secretariat. In our view, the final Procedures therefore strike a reasonable balance between (1) the need for 'reasonable access' to BCI by the Panel and the other disputing parties, and (2) the need to provide private business interests with adequate protection for their proprietary business information."

243. In Canada – Aircraft, the Appellate Body made a preliminary ruling on 11 June 1999 that it was not necessary to adopt additional procedures to protect business confidential information in the appellate proceeding. The Appellate Body held that the existing provisions concerning confidentiality of dispute settlement proceedings were sufficient for the purposes at issue:

"Pursuant to Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'DSU'), the Appellate Body has the authority to draw up its own Working Procedures. Under Rule 16.1 of our Working Procedures for Appellate Review, a Division of the Appellate Body may adopt additional procedures for the orderly conduct of a particular appeal, provided that any such additional procedures are not inconsistent with the DSU, the other covered agreements and the Working Procedures for Appellate Review. We have concluded, however, that it is not necessary, under all the circumstances of this case, to adopt additional procedures to protect 'business confidential information' during these appellate proceedings.

We note that, with respect to 'business confidential information' submitted to the Panel that remains currently in the possession of the participants, Article XII of the Panel Procedures Governing Business Confidential Information required the parties, '[a]t the conclusion of the Panel', to 'return any printed or binary-encoded Business Confidential information in their possession to the party that submitted such Business Confidential (sic)' and to 'destroy all tapes and transcripts of the panel hearings that contain Business Confidential information, unless the parties mutually agree otherwise.' It thus appears that each participant has an obligation, under the Panel Procedures, to return any Business Confidential information submitted by the other participant. The WTO Secretariat, assisting the Panel, was required, by the Panel Procedures, to 'transmit any printed or binary-encoded Business Confidential information, plus all tapes and transcripts of the panel hearings that contain Business Confidential Information, to the Appellate Body as part of the record of the Panel proceedings.' That information will be kept in a secure, locked cabinet in the Appellate Body Secretariat.

Panel Report on Canada – Aircraft, para. 9.68.
We also note that all Members are obliged, by the provisions of the DSU, to treat these proceedings of the Appellate Body, including written submissions and other documents filed by the participants and the third participants, as confidential. We are confident that the participants and the third participants in this appeal will fully respect their obligations under the DSU, recognizing that a Member's obligation to maintain the confidentiality of these proceedings extends also to the individuals whom that Member selects to act as its representatives, counsel and consultants.

Accordingly, we decline the request of Brazil and Canada. The reasons for this ruling will be set out more fully in the Appellate Body Report in this appeal.\(^\text{325}\)

244. In its final ruling in *Canada – Aircraft*, the Appellate Body determined that it had no further reasons to add to the first two paragraphs of its preliminary ruling, referenced in paragraph 243 above. Noting that its ruling applies only to the request for additional procedures to protect business confidential information, the Appellate Body stated:

"[T]he provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.

..."

For these reasons, we do not consider that it is necessary, under all the circumstances of this case, to adopt additional procedures for the protection of business confidential information in these appellate proceedings.\(^\text{326}\)

XIX. ARTICLE 19

A. TEXT OF ARTICLE 19

*Article 19*

*Panel and Appellate Body Recommendations*

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned\(^9\) bring the measure into conformity with that agreement.\(^10\) In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

(footnote original) \(^9\) The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

(footnote original) \(^10\) With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

\(^{325}\) Appellate Body Report on *Canada – Aircraft*, para. 141.

\(^{326}\) Appellate Body Report on *Canada – Aircraft*, paras. 145 and 147.
B. **INTERPRETATION AND APPLICATION OF ARTICLE 19**

1. **Article 19.1**

   (a) "the panel...may suggest ways in which the Member concerned could implement the recommendation"

   245. In *Brazil – Aircraft (Article 21.5 – Canada)*, Canada requested that the Panel suggest that the parties develop mechanisms that would allow Canada to verify compliance with the original recommendation of the DSB. The Panel stated:

   "In our view, Article 19.1 appears to envision suggestions regarding what could be done to a measure to bring it into conformity or, in case of a recommendation under Article 4.7 of the *SCM Agreement*, what could be done to 'withdraw' the prohibited subsidy. It is not clear if Article 19.1 also addresses issues of surveillance of those steps. That said, any agreement that WTO Members might reach among themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged." 327

2. **Article 19.2**

   246. In *Chile – Alcoholic Beverages*, Chile claimed that through its findings, the Panel had added to the rights and obligations of WTO Members under the *WTO Agreement*, contrary to Article 19.2 of the *DSU*. The Appellate Body rejected this argument. See paragraph 12 above

XX. **ARTICLE 20**

A. **TEXT OF ARTICLE 20**

   **Article 20**

   *Time-frame for DSB Decisions*

   Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 20**

   *No jurisprudence or decision of a competent WTO body.*

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327 Panel Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 7.3. See also Panel Report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 6.4. With respect to a request concerning repayment of anti-dumping duties, see Panel Report on *Guatemala – Cement II*, paras. 9.4-9.7.
XXI. ARTICLE 21

A. TEXT OF ARTICLE 21

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

   (footnote original) If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose

   (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

   (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

   (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

   (footnote original) If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

   (footnote original) The expression “arbitrator” shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any
Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

B. INTERPRETATION AND APPLICATION OF ARTICLE 21

1. Article 21.2

(a) "interests of developing country Members"

247. In Indonesia – Autos (Article 21.3), the Arbitrator, in determining the "reasonable period of time" pursuant to Article 21.3(c) of the DSU, took into account not only Indonesia's status as a developing country in determining the "reasonable period of time", but also the fact that "it is a developing country that is currently in a dire economic and financial situation":

"Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here. Indonesia has indicated that in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance. However, this is not a 'normal situation'. Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is 'near collapse'. In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case."

248. In Chile – Alcoholic Beverages (Article 21.3), the Arbitrator held that taking into account interests of developing countries in determining the "reasonable period of time" pursuant to Article 21.3(c), should not result in different "kinds of considerations that may be taken into account":

"It is not necessary to assume that the operation of Article 21.2 will essentially result in the application of ‘criteria’ for the determination of the ‘reasonable period of time’ – understood as the kinds of considerations that may be taken into account – that would be ‘qualitatively’ different for developed and for developing country Members. I do not believe Chile is making such an assumption. Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, inter alia, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great..."

328 Award of the Arbitrator on Indonesia – Autos (Article 21.3), para. 24.
difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB.\footnote{329}

2. **Article 21.3(c)**

(a) "reasonable period of time"

249. In *Canada – Pharmaceutical Patents (Article 21.3)*, the Arbitrator noted:

"[T]he 15-month period is a 'guideline', and not an average, or usual, period. It is expressed also as a *maximum* period, subject only to any 'particular circumstances' mentioned in the second sentence."\footnote{330}

250. In *EC – Bananas III (Article 21.3)*, the European Communities requested a period of 15 months and one week based on the alleged complexity and difficulty of amending the then existing import regime for bananas. The Arbitrator implicitly found that it was up to the complaining parties to persuade him "that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU [15 months]." In the case at issue, the Arbitrator found that he had not been persuaded accordingly by the complaining parties:

"When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'.

The Complaining Parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the 'reasonable period' of time for implementation would expire by 1 January 1999.

Therefore, I conclude that, pursuant to Article 21.3(c), the 'reasonable period of time' for the European Communities to implement the recommendations and rulings of the DSB adopted on 25 September 1997 in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, shall be the period from 25 September 1997 to 1 January 1999.\footnote{331}

251. In determining the reasonable period of time, the Arbitrator in *EC – Hormones (Article 21.3)* defined such a period as the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB". The Arbitrator held, *inter alia*, that "when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months":

"The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule. This guideline is stated expressly to be
that 'the reasonable period of time ... should not exceed 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: 'Prompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members' (emphasis added). Article 3.3 states: 'The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (emphasis added). The Concise Oxford Dictionary defines the word, 'prompt', as meaning 'a. acting with alacrity; ready. b. made, done, etc. readily or at once'. Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less.\footnote{332}{Award of the Arbitrator on EC – Hormones (Article 21.3), paras. 25-26. See also the Awards of the Arbitrator on Chile – Alcoholic Beverages (Article 21.3), para. 38; and Canada – Pharmaceutical Patents (Article 21.3), para. 47.}

252. The Arbitrator in EC – Hormones (Article 21.3) went on to state that while scientific studies or consultations with experts may form part of the domestic implementation process, the time required to conduct such studies or consultations could not be included in the reasonable period of time:

"An implementing Member … has a measure of discretion in choosing the means of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.

It would not be in keeping with the requirement of prompt compliance to include in the reasonable period of time, time to conduct studies or to consult experts to demonstrate the consistency of a measure already judged to be inconsistent. That cannot be considered as 'particular circumstances' justifying a longer period than the guideline suggested in Article 21.3(c). This is not to say that the commissioning of scientific studies or consultations with experts cannot form part of a domestic implementation process in a particular case. However, such considerations are not pertinent to the determination of the reasonable period of time."\footnote{333}{Award of the Arbitrator on EC – Hormones (Article 21.3), paras. 38-39. See also the Award of the Arbitrator on Australia – Salmon, para. 36.}

253. In Australia – Salmon (Article 21.3), the Arbitrator held that in the case at issue, he saw several aspects "which persuade [him] that the reasonable period of time should be significantly less than 15 months". The Arbitrator noted that Australia had requested a significant part of that period for scientific risk assessments and recalled previous findings on the issue of administrative implementation of the DSU rulings and recommendations:
"In the present case, there are certain considerations which persuade me that the reasonable period of time should be significantly less than 15 months. In the first place, Australia's request for 15 months was based on the assumption that a good part, if not most, of that period would be used to conduct a number of risk assessments. … Since I have concluded that conducting risk assessments is not pertinent to the determination of the reasonable period of time, it follows that the reasonable period in this case should be considerably less than 15 months. In the second place, both parties agree with the arbitrator in European Communities – Hormones that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. Both parties also agree that the process involved in bringing the measure in dispute into conformity with Australia's obligations under the SPS Agreement is an administrative, not a legislative, process. As pointed out by the arbitrator in European Communities – Hormones, when implementation can be effected by administrative means, the reasonable period of time should be 'considerably shorter than 15 months.'

… I determine that the reasonable period of time for Australia to implement the recommendations and rulings of the DSB in this case is eight months from the date of adoption of the Appellate Body and Panel Reports by the DSB, i.e. eight months from 6 November 1998."334

254. In Korea – Alcoholic Beverages (Article 21.3), the Arbitrator stated that while the reasonable period of time should be the shortest period possible within the legal system of the Member concerned, the Member in question should not be required to utilize extraordinary legislative procedures to comply with the recommendations and rulings of the DSB:

"Although the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize an extraordinary legislative procedure, rather than the normal legislative procedure, in every case. Taking into account all of the circumstances of the present case, I believe that it is reasonable to allow Korea to follow its normal legislative procedure for the consideration and adoption of a tax bill with budgetary implications, that is, to submit the proposed amendments to the next regular session of the National Assembly. For the same reasons, I consider it reasonable that the new tax legislation should be enacted by the National Assembly in the course of the next regular session, and promulgated by the President before the end of this year.

According to Korea, an additional period of five months is necessary to complete certain 'follow-up measures', including related changes to Presidential and Ministerial Decrees, enforcement regulations and administrative procedures. m335

(b) "particular circumstances"

(i) General

255. In Japan – Alcoholic Beverages II (Article 21.3), Japan argued that a period of 23 months was a "reasonable period of time" on the basis that there were "particular circumstances" justifying such an extension of the 15-month period set forth as a maximum period. Japan claimed that the limited powers of the executive branch over tax matters and the need for a formal adoption of legislation by

334 Award of the Arbitrator on Australia – Salmon (Article 21.3), paras. 38-39.
335 Award of the Arbitrator on Korea – Alcoholic Beverages (Article 21.3), paras. 42-43.
the parliament, the adverse effects of the tax increases on Japanese consumers of shochu, and the administrative constraints on the execution of taxation were "particular circumstances" justifying a 23-month period needed to implement the recommendations and rulings of the DSB. The Arbitrator was not persuaded that these circumstances were "particular circumstances" within the meaning of Article 21.3(c) and determined 15 months as the reasonable period of time.  

256. In Canada – Pharmaceutical Patents (Article 21.3), the Arbitrator defined the term "particular circumstances" as "those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member" and in this regard mentioned implementation by administrative or legislative means, the complexity of the proposed implementation and the legally binding force of the component steps leading to implementation as relevant criteria for determining the existence of "particular circumstances":

"The 'particular circumstances' mentioned in Article 21.3 are, therefore, those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member.

… if implementation is by administrative means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through legislative means.

Likewise, the complexity of the proposed implementation can be a relevant factor. If implementation is accomplished through extensive new regulations affecting many sectors of activity, then adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed. On the other hand, if the proposed implementation is the simple repeal of a single provision of perhaps a sentence or two, then, obviously, less time will be needed for drafting, consulting, and finalizing the procedure. To be sure, complexity is not merely a matter of the number of pages in a proposed regulation; yet it seems reasonable to assume that, in most cases, the shorter a proposed regulation, the less its likely complexity.

In addition, the legally binding, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account. If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other hand, if there is no such mandate, then a Member asserting the need for a certain period of time must bear a much more imposing burden of proof. Something required by law must be done; something not required by law need not necessarily be done, depending on the facts and the circumstances in a particular case.

These are but examples … . [T]he 'particular circumstances' mentioned in Article 21.3 do not include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation….The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements."  

336 Award of the Arbitrator on Japan – Alcoholic Beverages II (Article 21.3), para. 27. See also the Award of the Arbitrator on EC – Bananas III (Article 21.3), paras. 6-10.  
337 Award of the Arbitrator on Canada – Pharmaceutical Patents (Article 21.3), paras. 48-52.
257. With respect to the US – FSC dispute, at its meeting of 12 October 2000, the DSU accepted the request of the United States, respondent, to modify the time-period for compliance which had been decided by the DSB.\footnote{338} 

(ii) Burden of proof

258. In EC – Hormones (Article 21.3), the Arbitrator held that the burden of proof falls on any party arguing for a period longer or shorter than 15 months:

"In my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable."\footnote{339}

259. The Arbitrator in Canada – Pharmaceutical Patents (Article 21.3) applied the burden of proof differently. He held that it was for the implementing Member to bear the burden of proof in showing that the duration of any proposed period of implementation is a "reasonable period of time":

"Based on the wording of Articles 21.3, and on the context provided in Articles 3.3, 21.1 and 21.4 of the DSU, I agree with the arbitrator in European Communities – Hormones that "the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB." Moreover, as immediate compliance is clearly the preferred option under Article 21.3, it is, in my view, for the implementing Member to bear the burden of proof in showing – "[i]f it is impracticable to comply immediately" – that the duration of any proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time". And the longer the proposed period of implementation, the greater this burden will be."\footnote{340}

260. The Arbitrator in US – 1916 Act (Article 21.3) quoted with approval the statements of the Arbitrator in Canada – Pharmaceutical Patents (Article 21.3).\footnote{341}

261. With respect to the allocation of the burden of proof in an Article 21.3 arbitration, see also paragraph 258 above.

(iii) Participation by all the original parties

262. In Japan – Alcoholic Beverages II (Article 21.3), it was agreed that all the original parties to the dispute could participate in the arbitration process even though only the United States requested binding arbitration pursuant to Article 21.3.\footnote{342}

\footnote{338} WT/DSB/M/90, subsection 1(a).
\footnote{339} Award of the Arbitrator on EC – Hormones (Article 21.3), para. 27.
\footnote{340} (footnote original) Supra, footnote 11, para. 26. (Award of the Arbitrator on EC – Hormones (Article 21.3), para. 26).
\footnote{341} Award of the Arbitrator on Canada – Pharmaceutical Patents (Article 21.3), para. 47.
\footnote{342} Award of the Arbitrator on US – 1916 Act (Article 21.3), para. 32.
\footnote{343} Award of the Arbitrator on Japan – Alcoholic Beverages II (Article 21.3), para. 3.
Mandate of the Arbitrator

263. The Arbitrator defined his mandate in Korea – Alcoholic Beverages (Article 21.3) in the following terms:

"My mandate in this arbitration relates exclusively to determining the reasonable period of time for implementation under Article 21.3(c) of the DSU. It is not within my mandate to suggest ways and means to implement the recommendations and rulings of the DSB. Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements. I consider it, therefore, inappropriate to determine whether, and to what extent, amendments to various regulatory instruments are required before the new tax legislation comes into effect."  344

3. Article 21.5

(a) "measures taken to comply"

264. In Canada – Aircraft (Article 21.5 – Brazil), Brazil argued in its appeal that the Panel had erred by not reviewing its "specific targeting" argument. The Appellate Body noted that the Article 21.5 Panel had stated that the DSB "cannot have required Canada to take implementation action to ensure that TPC [Technology Partnership Canada] assistance is not 'specifically targeted' at the aerospace and regional aircraft industries, because such alleged 'specific targeting' did not form part of the basis for the finding of de facto export contingency that gave rise to that recommendation." 345 The Appellate Body held that proceedings under Article 21.5 concern only measures "taken to comply" with the recommendations and rulings of the DSB:

"Proceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures taken to comply' with the recommendations and rulings of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will not be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: 346 the original measure which gave rise to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to implement those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the revised TPC programme, which became effective on 18 November 1999 and which Canada presents as a 'measure taken to comply with the recommendations and rulings' of the DSB." 347

265. Further, the Appellate Body made clear that under Article 21.5, a panel was obliged to examine the consistency of the "measures taken to comply" with the entirety of WTO law, not only with the recommendations and rulings of the DSB:

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344 Award of the Arbitrator on Korea – Alcoholic Beverages (Article 21.3), para. 45. See also the Award of the Arbitrator on Canada – Pharmaceutical Patents (Article 21.3), para. 41.
345 Panel Report on Canada – Aircraft (Article 21.5 – Brazil), para. 5.17.
346 (footnote original) We recognize that, where it is alleged that there exist no "measures taken to comply", a panel may find that there is no new measure.
347 Appellate Body Report on Canada – Aircraft (Article 21.5 – Brazil), para. 36.
"Furthermore, in our view, the obligation of the Article 21.5 Panel, in reviewing 'consistency' under Article 21.5 of the DSU, was to examine whether the new measure – the revised TPC programme – was 'in conformity with', 'adhering to the same principles of' or 'compatible with' Article 3.1(a) of the SCM Agreement.\textsuperscript{348} In short, both the DSU and the Article 21.5 Panel's terms of reference required the Article 21.5 Panel to determine whether the revised TPC programme involved prohibited export subsidies within the meaning of Article 3.1(a) of the SCM Agreement.

We have already noted that these proceedings, under Article 21.5 of the DSU, concern the 'consistency' of the revised TPC programme with Article 3.1(a) of the SCM Agreement. Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada has implemented the DSB recommendation'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the SCM Agreement.

Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU.\textsuperscript{349}

With respect to the relationship between "measures taken to comply" and a panel's terms of reference, see paragraph 119 above. See also the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the SCM Agreement, paragraphs 84-87.


\textsuperscript{349} Appellate Body Report on Canada – Aircraft (Article 21.5 – Brazil), paras. 37, 40-42.
UNDERSTANDING ON RULES AND PROCEDURES
GOVERNING THE SETTLEMENT OF DISPUTES

(b) Burden of proof

267. In Brazil – Aircraft (Article 21.5 – Canada), Brazil argued that the Article 21.5 Panel erred in placing upon Brazil the burden of proving that its implementation measure complied with the recommendations and rulings of the DSB. Brazil claimed that Canada must bear the burden of proving that Brazil's measure does not implement the DSB recommendations and rulings. The Appellate Body stated:

"[T]he fact that the measure at issue was 'taken to comply' with the recommendations and rulings of the DSB does not alter the allocation of the burden of proving Brazil's 'defence' under item (k). In this respect, we note that Brazil concedes that the revised PROEX measure is, in principle, prohibited under Article 3.1(a) of the SCM Agreement; yet Brazil asserts nonetheless that the PROEX measure is justified, under the first paragraph of item (k). Thus, in our view, Brazil is, clearly, using item (k) to make an affirmative claim in its defence. In United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, we said: 'It is only reasonable that the burden of establishing [an affirmative] defence should rest on the party asserting it.' As it is Brazil that is asserting this 'defence' using item (k) in these proceedings, we agree with the Article 21.5 Panel that Brazil has the burden of proving that the revised PROEX is justified under the first paragraph of item (k), including the burden of proving that payments under the revised PROEX are not 'used to secure a material advantage in the field of export credit terms.'

(c) Bilateral agreements: Articles 21 and 22

268. In US – Shrimp, following consultation between the Governments of Malaysia and the United States on the implementation of the Dispute Settlement Body (DSB) recommendations and rulings in United States – Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), two communications, dated 22 December 1999, from the Permanent Missions of Malaysia and the United States to the Chairman of the Dispute Settlement Body, were circulated at the request of these delegations, confirming the understanding reached between the two Governments regarding possible proceedings pursuant to Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning that implementation. The relevant part of the Understanding reads as follows:

"1. Malaysia will not at this stage initiate proceedings under Article 21.5 or Article 22 of the DSU.

2. If Malaysia at some future date decides that it may wish to initiate proceedings under Articles 21.5 and Article 22 of the DSU, Malaysia will initiate proceedings under Article 21.5 prior to any proceedings under Article 22. Malaysia will provide the United States advance notice of any proposal to initiate proceedings under Article 21.5 and will consult with the United States before requesting the establishment of a panel under Article 21.5. Malaysia will not request authorization to suspend concessions or other obligations under Article 22 until the adoption of the Article 21.5 panel report. If on the basis of the proceedings under Article 21.5 Malaysia decides to initiate proceedings under Article 22, the United States will not assert that Malaysia is precluded from obtaining DSB authorization because Malaysia's request was made outside the 30-day time period specified in the first sentence of Article 22.6. This is without prejudice to the rights of the United States to have the matter referred to arbitration in accordance with Article 22.6.

350 Appellate Body Report on Brazil – Aircraft (Article 21.5 – Canada), para. 66.
3. In light of the fact that the DSB recommendations and rulings in this dispute were based on a report of the Appellate Body, if Malaysia at some future date initiates proceedings under Article 21.5 of the DSU, either Malaysia or the United States may appeal the report of the panel established under Article 21.5; and Article 16.4 of the DSU, which provides in part that the DSB shall not consider the report of that panel for adoption until after the completion of the appeal, shall apply.\textsuperscript{351}

269. In Australia – Automotive Leather II, Australia and the United States agreed to refrain from appealing the forthcoming panel report under Article 21.5 in that matter. In the proceedings, the European Communities commented that "it is not possible to exclude a right of appeal in panel proceedings under Article 21.5 DSU", "that the fact that the parties have agreed not to appeal, and have apparently taken the view that other rules of the DSU (such as those relating to third parties) may be dispensed with or varied, means that this proceeding is in fact an arbitration under Article 25 DSU" and that "these circumstances, and the absence of the discipline of a potential appeal in these proceedings, should be taken into account by any future panel which is considering whether the reasoning of the report arising out of these proceedings is of any guidance in resolving similar questions with which it may be confronted."\textsuperscript{352}

270. In Brazil – Aircraft and Canada – Aircraft, with regard to the two proceedings under Article 21.5 brought by Canada and Brazil against each other in relation to their respective aircraft export subsidies, Canada and Brazil reached two identical agreements (though the names of the parties were swapped) on the conduct of proceedings.\textsuperscript{353} The agreements obliged the parties not to object to certain actions taken by the other party, and also specified certain deadlines. The agreements read as follows:

"The Panel and Appellate Body reports in this dispute were adopted by the Dispute Settlement Body on 20 August 1999.

The DSB recommendations and rulings included the recommendation that Brazil bring its measures found to be inconsistent with the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) into conformity with the provisions of that Agreement and that Brazil withdraw the export subsidies for regional aircraft under PROEX within 90 days, or by 18 November 1999.

There is disagreement between Canada and Brazil as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, within the meaning of Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

Canada and Brazil have reached an agreement concerning the procedures to be applicable for proceedings in this case pursuant to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, as follows:

1. On 23 November 1999, Canada will request that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. Canada will also request the convening of a DSB meeting on 3 December 1999 and Brazil will not object to the holding of such a meeting.

\textsuperscript{351} WT/DS58/16.
\textsuperscript{353} Contained in Annex to WT/DS46/13 and WT/DS70/9.
2. At the DSB meeting convened in response to the request by Canada, Brazil will accept the establishment of a review panel under Article 21.5 of the DSU and will not pose any procedural objection to the establishment of such a panel.

3. Brazil and Canada shall cooperate to ensure that the review panel convened under Article 21.5 of the DSU will be able to circulate its report within 60 days of its establishment. Canada will not request authorization to suspend concessions until after circulation of the Article 21.5 report.

4. Neither Brazil nor Canada will object to a request that the DSB be convened to consider the report that may be submitted to it under Article 21.5 for adoption. In the event that such report finds that Brazil has not complied with the recommendations or rulings of the DSB, neither party will object to DSB consideration of a request by Canada for authorization to suspend concessions pursuant to Article 22.2 of the DSU and/or Article 4.10 of the SCM Agreement; provided, however, that Brazil may request that the matter be referred to arbitration pursuant to Article 22.6 of the DSU.

5. Pursuant to footnote 6 to Article 4 of the SCM Agreement, Brazil and Canada agree that the deadline for DSB action under the first sentence of Article 22.6 of the DSU shall be 15 days after the circulation of the report under Article 21.5 of the DSU, and that the deadline specified in the third sentence of Article 22.6 of the DSU for completion of arbitration shall be 30 days after the matter is referred to arbitration.\textsuperscript{354}

271. In \textit{US – FSC}, the following information was provided by the European Communities with regard to the agreed procedures in the follow-up to the Foreign Sales Corporations dispute:

"The representative of the European Communities, speaking under 'Other Business', said that by a joint letter of 2 October 2000, the EC and the US had informed the DSB of the procedures agreed by the parties in the follow-up to the Foreign Sales Corporations (FSC) dispute (WT/DS108/12). The objective of the agreed procedures was to deal with the so-called 'sequencing issue' in a way that would allow for a multilateral determination regarding WTO-compatibility of the US legislation while fully protecting the EC's rights to suspend concessions and adopt countermeasures if the US legislation was found to be WTO-incompatible. The US reading of the DSU provisions as applied in the banana dispute had left the EC with two options on the procedures to follow in this case: (i) either to go directly to Article 22.6 of the DSU and request authorization to suspend concessions, as the United States had done in the banana dispute; (ii) or to agree on procedures like those contained in the agreement that combined legal security for the EC with the fundamental WTO principle that prohibited unilateral determinations. In this respect, the parties had agreed to simultaneously start Articles 21.5 and 22.6 of DSU procedures, but to suspend the work of the Arbitrators until the reports of the compliance panel and Appellate Body, in case of appeal, had been adopted. The agreed procedures were also designed to apply in case the United States failed to adopt any FSC replacement legislation, in which case the EC could have direct recourse to Article 22.6 of the DSU. Finally, he

\textsuperscript{354} See Annex to WT/DS46/13. For the (identical) agreement in the Canada – Aircraft dispute see WT/DS70/9.
wished to reiterate the point made under item 1 with respect to the issue of sequencing and the hope that he had expressed thereunder.\textsuperscript{355}

272. The relevant part of the Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the \textit{DSU} and Article 4 of the \textit{SCM Agreement} in \textit{US – FSC} reads as follow:

"The European Communities and the United States would like to inform the Dispute Settlement Body that they have agreed on the following 'Agreed procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 4 of the SCM Agreement applicable in the follow-up to the United States – Tax Treatment of 'Foreign Sales Corporations' WTO dispute' (WT/DS108).

Agreed procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 4 of the SCM Agreement applicable in the follow-up to the United States – Tax Treatment of 'Foreign Sales Corporations' WTO Dispute

The Panel and Appellate Body reports in the WTO dispute United States – Tax Treatment for 'Foreign Sales Corporations' (WT/DS108/R and WT/DS108/AB/R) between the European Communities (EC) and the United States of America (US) were adopted by the Dispute Settlement Body (DSB) on 20 March 2000.

The parties, in reaching this agreement, contemplate that the US Congress will pass legislation this Congressional session to replace the foreign sales corporation provisions of the Internal Revenue Code.

This agreement does not prejudice the parties' rights to take any action or procedural step to protect their rights or interests, including the activation of any aspect of dispute settlement proceedings.

The EC and the US have agreed on the following procedures:

1. Should the European Communities consider that the situation described in Article 21.5 of the DSU exists, the EC will request consultations which the parties agree to hold within 12 days from the date of circulation of the request so as to allow third parties to request to join the consultations. The EC and the US agree that at the end of this round of consultations, should either party so state, the parties will jointly consider that the consultations have failed to settle the dispute.

2. Consequently, the EC will be entitled to request immediately the establishment of a panel pursuant to Article 21.5 of the DSU (the Article 21.5 compliance panel).

3. At the first DSB meeting in which the EC request appears as an item on the agenda, the US will accept the establishment of the Article 21.5 compliance panel.

4. The EC and the US will cooperate to enable the Article 21.5 compliance panel to circulate its report within 90 days of its establishment, excluding any time during which the panel's work may be suspended pursuant to Article 12.12 of the DSU.

\textsuperscript{355} WT/DSB/M/90, para. 13.
5. Either party may request the DSB to adopt the report of the Article 21.5 compliance panel in a meeting at least 20 days after the circulation of the report unless either party appeals the report.

6. In case of an appeal of the Article 21.5 compliance panel report, the EC and the US will cooperate to enable the Appellate Body to circulate its report within 60 days from the date of notification of the appeal.

7. In the event of an appeal, either party may request the DSB to adopt the reports of the Appellate Body and the Article 21.5 compliance panel (as modified by the Appellate Body report) in a meeting within 15 days after the circulation of the Appellate Body report.

8. Where the EC has requested consultations under paragraph 1, and after the end of the period (the implementation period) available to the US to implement the DSB recommendations and rulings in the WTO dispute United States – Tax Treatment of 'Foreign Sales Corporations', the European Communities may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU and to adopt countermeasures pursuant to Article 4.10 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

9. Where there exist no measures taken to comply with the DSB recommendations and rulings by the end of the implementation period, the EC may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU and to adopt countermeasures pursuant to Article 4.10 of the SCM Agreement, without having recourse to Article 21.5 of the DSU.

10. Under Article 22.6 of the DSU including Article 4.11 of the SCM Agreement, the US will object to the appropriateness of the countermeasures and/or the level of the suspension of concessions or other obligations and/or make an Article 22.3 claim, before the date of the DSB meeting considering the EC request, and the matter will be referred to arbitration pursuant to Article 22.6 of the DSU. The European Communities will not pose any objection to referral of the matter to such arbitration.

11. Where the EC has requested the establishment of a panel under paragraph 2, both the EC and the US agree to request the arbitrator, at the earliest possible moment, to suspend its work until either (a) adoption of the Article 21.5 compliance panel report or (b) if there is an appeal, adoption of the Appellate Body report.

12. In the event that the DSB finds that measures taken by the US to comply with the recommendations and rulings of the DSB are inconsistent with the covered agreements referred to in the Article 21.5 compliance panel request, the arbitrator will automatically resume its work. In the event that the DSB finds that the measures taken by the US to comply with the recommendations and rulings of the DSB are not inconsistent with the covered agreements referred to in the Article 21.5 compliance panel request, the EC will withdraw its request under Article 22.2 of the DSU, thereby terminating the arbitration procedure.

13. The EC and the US will cooperate to enable the arbitrator to circulate its report within 60 days of the resumption of its work.

14. If any of the original panelists are not available for either the Article 21.5 compliance panel or the Article 22.6 arbitration (or both), the EC and the US agree to
request the Director-General of the WTO to appoint as soon as possible a replacement for the proceeding or proceedings in which this is required. If an original panelist is unavailable to serve in both proceedings, the parties will further request that in making this appointment the Director-General seek a person who will be available to act in both proceedings.

15. As this dispute has been conducted under the SCM Agreement and the Agreement on Agriculture, the parties agree that the timeframes under the DSU will continue to apply to the proceedings covered by this agreement, except as otherwise agreed herein.

16. The parties agree to continue to cooperate in all matters related to this agreement and not to raise any procedural objections to any of the steps set out in this agreement. If during the application of this agreement the parties consider that a procedural aspect has not been properly covered by this agreement, they will endeavour to find a solution within the shortest time possible that will not affect the other aspects and steps therein agreed.

273. In Australia – Salmon, Canada simultaneously requested the establishment of a panel pursuant to Article 21.5 and an authorization to suspend concessions and obligations. The DSB established the panel and, upon request by Australia, an arbitration panel to determine the level of suspension of concessions pursuant to Article 22.6. Canada and Australia subsequently agreed that the arbitration panel would be suspended until the report of the panel pursuant to Article 21.5 had been circulated.

XXII. ARTICLE 22

A. TEXT OF ARTICLE 22

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

356 WT/DS108/12.
357 WT/DS18/13 and WT/DS18/16.
358 WT/DS18/RW, para. 1.3.
(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

   (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

   (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

   (i) with respect to goods, all goods;

   (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;

   (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(footnote original) The list in document MTN.GNS/W/120 identifies eleven sectors.

(g) for purposes of this paragraph, "agreement" means:

   (i) with respect to goods, the agreements listed in Annex IA of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

   (ii) with respect to services, the GATS;

   (iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. 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.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.
6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

(footnote original) 15 The expression “arbitrator” shall be interpreted as referring either to an individual or a group.

7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

(footnote original) 16 The expression “arbitrator” shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance. 17

(footnote original) 17 Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

B. INTERPRETATION AND APPLICATION OF ARTICLE 22

1. Article 22.2

(a) Specificity in the request for suspension

274. In EC – Hormones (US) (Article 22.6 – EC), the Arbitrators stated that the minimum requirements attached to a request to suspend concessions or other obligations are:
"… (1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.359,360

275. In EC – Bananas III (Ecuador) (Article 22.6 – EC), in connection with the first minimum requirement for making a request for the suspension of concessions or other obligations, Ecuador requested suspension under Article 22.2 of the DSU in the amount of US$ 450 million. Ecuador's methodology paper and submissions indicated that the direct and indirect harm and macro-economic repercussions of its entire economy amount to US$ 1 billion. Ecuador argued that, pursuant to Article 21.8 of the DSU, the total economic impact of the European Communities banana regime should be considered by the Arbitrators by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. The Arbitrators stated:

"[T]he level of suspension specified in Ecuador's request under Article 22.2 is the relevant one and defines the amount of requested suspension for purposes of this arbitration proceeding. Additional estimates advanced by Ecuador in its methodology document and submissions were not addressed to the DSB and thus cannot form part of the DSB's referral of the matter to arbitration. Belated supplementary requests and arguments concerning additional amounts of alleged nullification or impairment are, in our view, not compatible with the minimum specificity requirements for such a request because they were not included in Ecuador's request for suspension under Article 22.2 of the DSB."361

276. With respect to the second minimum requirement for making a request for the suspension of concessions or other obligations, the Arbitrators noted that Ecuador listed the service subsector of "wholesale trade services (CPC 622)" under the GATS; "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations" in Section 1 (Copyright and related rights), Section 3 (Geographical indications) and Section 4 (Industrial designs) under the TRIPS Agreement. The Arbitrators determined that these requests by Ecuador under the GATS and TRIPS Agreement fulfilled the minimum requirement to specify the agreements and sectors with respect to which it requests authorization to suspend concessions or other obligations. However, the Arbitrators held with respect to Ecuador's statement that it "reserve[d] the right" to suspend concessions under the GATT:

"[T]he terms of reference of arbitrators, acting pursuant to Article 22.6, are limited to those sector(s) and/or agreement(s) with respect to which suspension is specifically being requested from the DSB. We thus consider Ecuador's statement that it 'reserves the right' to suspend concessions under the GATT as not compatible with the minimum requirements for requests under Article 22.2. Therefore, we conclude that our terms of reference in this arbitration proceeding include only Ecuador's requests for authorization of suspension of concessions or other obligations with respect to those specific sectors under the GATS and the TRIPS Agreement that were unconditionally listed in its request under Article 22.2."362

359 (footnote original) The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc…, the better. Such precision can only be encouraged in pursuit of the DSU objectives of "providing security and predictability to the multilateral trading system" (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that "all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute".

360 Decision by the Arbitrators on EC – Hormones (US) (Article 22.6 – EC), para. 16.
361 Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 24.
362 Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 29.
2. Article 22.3

(a) General

277. In EC – Bananas III (Ecuador) (Article 22.6 – EC), the Arbitrators examined Ecuador's request for suspension of concessions or other obligations in the area of GATS and the TRIPS Agreement. The Arbitrators stated:

"[W]e further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner." 363

(b) "the complaining party shall apply the following principles and procedures"

278. With respect to the principles and procedures to be applied under Article 22.3, see paragraphs 279-280 below.

3. Article 22.3(b) and (c)

(a) "if that party considers that it is not practical or effective"

279. In EC – Bananas III (Ecuador) (Article 22.6 – EC), the European Communities argued that Ecuador had not demonstrated why it was not practicable or effective for it to suspend concessions under the GATT or commitments under the GATS in service sectors other than distribution services. Ecuador claimed that "it did not request suspension entirely under the GATT and/or in service sectors under the GATS other than distribution services because it considered that it would not be practicable or effective in the meaning of Article 22.3(b) and (c) of the DSU, that circumstances in Ecuador's bananas trade sector and the economy on the whole are serious enough to justify suspension under another agreement, and that the parameters in Article 22.3(d)(i)-(ii) corroborate this conclusion." 364

The Arbitrators held that the term "practicable" connoted "availability" and "suitability"; with respect to the term "effective", the Arbitrators held that "the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time."

"[A]n examination of the 'practicability' of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case.

To give an obvious example, suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable. But also other case-specific and country-specific situations may exist where suspension of concessions or other obligations in a particular trade sector or area of WTO law may not be 'practicable'.

363 Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 33.
364 Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 68.
In contrast, the term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.

One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.

Our interpretation of the 'practicability' and 'effectiveness' criteria is consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly.  

280. In EC – Bananas III (Ecuador) (Article 22.6 – EC), Ecuador argued that it was the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for the purposes of suspending concessions or other obligations. The Arbitrators held that the term "consider" in subparagraphs (b) and (c) granted a certain margin of appreciation, but that a decision by a Member was nevertheless subject to review by the Arbitrators regarding whether the Member had considered "the necessary facts objectively":

"It follows from the choice of the words 'if that party considers' in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words 'in considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures' in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it

365 Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), paras. 70-73 and 76.
could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.\textsuperscript{366}

(b) Relationship between paragraphs (a) and (c) of Article 22.3

281. In \textit{EC – Bananas III (Ecuador) (Article 22.6 – EC)}, the Arbitrators noted that Ecuador argued that, in addition to suspending concessions or other obligations under the \textit{GATS} and \textit{TRIPS Agreement}, it "reserves the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner."\textsuperscript{367} With respect to the criterion of specificity relating to this request, see paragraph 276 above. The Arbitrators noted an "inconsistency" between making simultaneously a request under Articles 22.3(a) and Article 22.3(c):

"Even if Ecuador's 'reservation' of a request for suspension under the GATT were permissible, there would be a certain degree of inconsistency between making a request under Article 22.3(c) – implying that suspension is not practicable or effective within the same sector under the same agreement or under another agreement – and simultaneously making a request under Article 22.3(a) – which implies that suspension is practicable and effective under the same sector. In this respect, we note that, although Ecuador did not in fact make both requests at the very same point in time, if it were likely that the suspension of concessions under the GATT could be applied in a practicable and effective manner, doubt would be cast on Ecuador's assertion that at present only suspension of obligations under other sectors and/or other agreements within the meaning of Article 22.3(b-c) is practicable or effective in the case before us.

… we fail to see how it could be possible to suspend concessions or other obligations for a particular amount of nullification or impairment under the same sector as that where a violation was found (which implies that this \textit{is} practicable and effective) and simultaneously for the same amount in another sector or under a different agreement (which implies that suspension under the same sector \textsuperscript{368} – or under a different sector under the same agreement – is \textit{not} practicable or effective). But we do not exclude the possibility that, once a certain amount of nullification or impairment has been determined by the Arbitrators, suspension may be practicable and effective under the same sector(s) where a violation has been found only for part of that amount and that for the rest of this amount of suspension is practicable or effective only in (an)other sector(s) under the same agreement or even only under another agreement.\textsuperscript{369}

4. Article 22.6

(a) Burden of proof

282. In \textit{Brazil – Aircraft (Article 22.6 – Brazil)}, the Arbitrators addressed the issue of burden of proof in light of the fact that they needed to rely on data available only to one party. The Arbitrators stated:

\textsuperscript{366} Decision by the Arbitrators on \textit{EC – Bananas III (Ecuador) (Article 22.6 – EC)}, para. 52.
\textsuperscript{367} Decision by the Arbitrators on \textit{EC – Bananas III (Ecuador) (Article 22.6 – EC)}, para. 27.
\textsuperscript{368} \textit{(footnote original)} We note that within a sector, suspension may be possible with respect to certain types of products, while it is not practicable or effective with respect to other categories of products.
\textsuperscript{369} Decision by the Arbitrators on \textit{EC – Bananas III (Ecuador) (Article 22.6 – EC)}, paras. 30-31.
"In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency. In the present case, the action at issue is the Canadian proposal to suspend concessions and other obligations in the amount of C$700 million as 'appropriate countermeasures' within the meaning of Article 4.10 of the SCM Agreement. Brazil challenges the conformity of this proposal with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a prima facie case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case.

An issue to be distinguished from the question of who bears the burden of proof is that of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. This is why, even though Brazil bears the original burden of proof, we expected Canada to come forward with evidence explaining why its proposal constitutes appropriate countermeasures and we requested it to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes."

(b) Specificity in the request for suspension of concessions or other obligations

283. In EC – Bananas III (Ecuador) (Article 22.6 – EC), the European Communities argued that Ecuador's request under Article 22.2 of the DSU and its methodology for calculating the amount of retaliation requested were not detailed enough. The Arbitrators held that "requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2" and set out their two main functions:

"The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply mutatis mutandis to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment."
(c) Third party rights

284. In Brazil – Aircraft (Article 22.6 – Brazil), Australia requested that it be granted the authorization to participate as a third party in the Article 22.6 arbitration in light of its participation in that capacity in the Article 21.5 Panel. The Arbitrator declined this request and noted the absence of a specific provision, in Article 22, on third party rights:

"[W]e informed Australia that we declined its request. Our decision took into account the views expressed by the parties, the fact that there is no provision in the DSU as regards third party status under Article 22, and the fact that we do not believe that Australia's rights would be affected by this proceeding.

We note in this respect that third party rights were granted in the Article 22.6 arbitrations concerning European Communities – Measures Concerning Meat and Meat Products (Hormones) and rejected in the EC – Bananas (1999) Article 22.6 arbitration. We do not consider that Australia in this case is in the same situation as Canada and the United States in the EC – Hormones arbitrations, nor even in the same situation as Ecuador in the EC – Bananas (1999) arbitration. Indeed, Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue. Moreover, Australia did not draw the attention of the Arbitrators to any benefits accruing to it or any rights under the WTO Agreement which might be affected by their decision.\footnote{Decision by the Arbitrators on Brazil – Aircraft (Article 22.6 – Brazil), paras. 2.5-2.6.}  

5. Article 22.7

(a) General

285. The Arbitrators in EC – Bananas III (Ecuador) (Article 22.6 – EC) held with respect to their authority under Article 22.7:

"[T]he jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is equivalent to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed."\footnote{Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 11.}

(b) Scope of review of arbitrators

286. In EC – Bananas III (US) (Article 22.6 – EC), the Arbitrators examined the scope of the authority of arbitrators to review the choice made by a complaining Member pursuant to Article 22.3. The Arbitrators found that there was no contradiction between the competence of Arbitrators under paragraphs 6 and 7 of Article 22 of the DSU:

"Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators to such examination to cases where a request for authorization to suspend concessions is made under subparagraphs (b) or (c) of Article 22.3 of the DSU. However, we
believe that there is no contradiction between paragraphs 6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.

If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement, outside of the scope of the sectors or agreements to which a Panel's findings relate, paragraphs (b)-(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective.

We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of sub-paragraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made – in full or in part – under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether.

(c) "The arbitrator...shall determine whether the level of such suspension is equivalent to the level of nullification or impairment."

287. In EC – Bananas III (Ecuador) (Article 22.6 – EC), the European Communities requested that the Arbitrators disregard certain information contained in Ecuador's methodology document on the basis such information was included in Ecuador's first submission only and not in the methodology document. The Arbitrators held that while a procedural step of submitting a methodology document had been stipulated in another arbitration proceeding for reasons of practicality, such a "methodology document" was not expressly mentioned in the DSU. Furthermore, the Arbitrators rejected "the idea that the specificity requirements of Article 6.2 apply mutatis mutandis to the methodology document":

"[W]e introduced the procedural step of submitting a methodology document in the US/EC Bananas III arbitration proceeding because we reckoned that certain information about the methodology used by the party for calculating the level of nullification or impairment would logically only be in the possession of that Member and that it would not be possible for the Member requesting arbitration pursuant to Article 22 of the DSU to challenge this information unless it was disclosed. Obviously, if such information were to be disclosed by the Member suffering impairment only in its first submission, the Member requesting arbitration could only..."

375 Decision by the Arbitrators on EC – Bananas III (US) (Article 22.6 – EC), paras. 3.5-3.7.
rebut that information in its rebuttal submission, while its first submission would become necessarily less meaningful and due process concerns could arise. It was out of these concerns that the United States was requested to submit a document explaining the methodology used for calculating impairment before the filing of the first submission by both parties. Unlike in panel proceedings, where parties do not file their first submissions simultaneously, it has been the practice in past arbitration proceedings under Article 22 that both rounds of submissions take place before a single oral hearing of the parties by the Arbitrators and that in both these rounds parties file their submissions simultaneously.

However, we agree with Ecuador that such a methodology document is nowhere mentioned in the DSU. Nor do we believe, as explained in detail above, that the specificity requirements of Article 6.2 relate to that methodology document rather than to requests for suspension pursuant to Article 22.2, and to requests for the referral of such matters to arbitration pursuant to Article 22.6. For these reasons, we reject the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document. In our view, questions concerning the amount, usefulness and relevance of information contained in a methodology document are more closely related to the questions of who is required at what point in time to present evidence and in which form, or in other words, the issue of the burden of proof in an arbitration proceeding under Article 22.6.\(^{376}\)

288. See also the excerpts from the reports of the panels and Appellate Body referenced in the Chapter on the *SCM Agreement*, paragraphs 94-95.

**XXIII. ARTICLE 23**

**A. TEXT OF ARTICLE 23**

*Article 23*

*Strengthening of the Multilateral System*

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements.

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\(^{376}\) Decision by the Arbitrators on *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 35-36.
agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

B. **INTERPRETATION AND APPLICATION OF ARTICLE 23**

1. **General**

289. In *US – Section 301 Trade Act*, the Panel stated that Article 23 has to be construed in light of the object and purpose of the WTO. The Panel opined that State responsibility was not only triggered when an actual violation takes place:

"In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals."

290. In *US – Certain EC Products*, the Panel considered the European Communities argument that the United States unilaterally imposed trade sanctions and thereby violated Article 23 of the DSU. The Panel, in a finding not directly reviewed by the Appellate Body, held that both paragraphs of Article 23 provide a prohibition on "unilateral redress", but that this prohibition is more directly provided for under the second paragraph of Article 23:

"The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation, they shall do so only through the DSU. This is a general obligation. Any attempt to seek 'redress' can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU.

The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the terms used in the chapeau of Article 23.2 ("in such cases, Members shall"), it is also clear that the second paragraph of Article 23 is 'explicitly linked to, and has to be read together with and subject to, Article 23.1'. That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, i.e. when such action is performed by a WTO Member with a view to redressing a WTO violation."

291. The Panel also agreed with the European Communities that Article 23.2 contains specific examples of conduct inconsistent with the rules of the DSU, but held that the first analytical step necessarily was to determine – before turning to Article 23.2 – whether the measure at issue falls under the scope of Article 23.1:

"We also agree with the *US – Section 301 Trade Act* Panel Report that Article 23.2 contains 'egregious examples of conduct that contradict the rules of the DSU' and which constitute more specific forms of unilateral actions, otherwise generally prohibited by Article 23.1 of the DSU."

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377 Panel Report on *US – Section 301 Trade Act*, para. 7.81.
378 Article 23.1 of the DSU refers more accurately to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", i.e. the three causes of actions under WTO. In this Panel Report, the expression "WTO violation(s)" refers to all three causes of actions mentioned in Article 23.1 of the DSU.
379 (footnote original) Panel Report on *US – Section 301 Trade Act*, para 7.44.
380 (footnote original) Panel Report on *US – Section 301 Trade Act*, para. 7.45.
'[t]hese rules and procedures [Article 23.1] clearly cover much more than the ones specifically mentioned in Article 23.2. There is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.' (Footnotes omitted)  \(^{381}\)

The same Panel identified a few examples of such instances where the DSU could be violated  \(^{382}\) contrary to the provisions of Article 23. Each time a Member seeking the redress of a WTO violation is not abiding by a rule of the DSU, it thus violates Article 23.1 of the DSU.

In order to verify whether individual provisions of Article 23.2 have been infringed (keeping in mind that the obligation to also observe other DSU provisions can be brought under the umbrella of Article 23.1), we must first determine whether the measure at issue comes under the coverage of Article 23.1. In other words, we need to determine whether Article 23 is applicable to the dispute before addressing the specific violations envisaged in the second paragraph of Article 23 of the DSU or elsewhere in the DSU.  \(^{383}\)

2. Article 23.1

(a) "seeking the redress of a WTO violation"

292. In  US – Certain EC Products, the Panel, in a finding not reviewed by the Appellate Body, considered whether the United States was "seeking to redress" what it perceived to be a WTO violation when it decided to withhold liquidation on imports from the European Communities of a list of products and impose a contingent liability for 100 per cent duties on each individual importation of affected products ("3 March Measure").

"The term 'seeking' or 'to seek' is defined in the Webster New Encyclopedic Dictionary as: 'to resort to, ... to make an attempt, try'. ... The term 'to redress' is defined in the New Shorter Oxford English Dictionary as 'repair (an action); atone for (a misdeed); remedy or remove; to set right or rectify (injury, a wrong, a grievance etc.); obtaining reparation or compensation'. ... The term 'redress' implies, therefore, a reaction by a Member against another Member, because of a perceived (or WTO determined) WTO violation, with a view to remedying the situation.

..."

On its face, this description of the 3 March Measure shows that, because of the US perceived WTO inconsistency of the 1998 Bananas regime put in place by the European Communities as a measure taken to implement the Panel and Appellate Body recommendations (the 'EC implementing measure'), the United States imposed an increased contingent liability on EC listed imports only. This 3 March Measure was, therefore, discriminatory and aimed at the European Communities exclusively. The unilateral imposition of a liability for 100 per cent duty as of 3 March (well above the bound rates of tariffs) constitutes imposition of a debt on such imports, and adds further obligations on such imports, even if the full effect of such liability is...

\(^{381}\) (footnote original) Panel Report on  US – Section 301 Trade Act, para. 7.45.

\(^{382}\) (footnote original) See Panel Report on  US – Section 301 Trade Act, fns. 655 and 656.

\(^{383}\) Panel Report on  US – Certain EC Products, paras. 6.17-6.20, as upheld by the Appellate Body Report, para. 111.
suspended until a future liquidation date. This debt, this liability, this additional obligation imposed on listed EC imports, is evidence that the United States wanted to remedy, was 'seeking to redress', what it perceived to be a WTO violation.\(^{384}\)

(b) "recourse to, and abide by"

293. In US – Section 301 Trade Act, the Panel held that Article 23.1 of the DSU prescribes "a general duty of a dual nature":

"Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU."\(^{385}\)

294. The Panel on US – Section 301 Trade Act held that a statute "which … reserves the right for the Member concerned to do something which it has promised not to do under Article 23.2(a)" is a violation of Article 23.2(a) read together with Article 23.1:

"The text of Article 23.1 is simple enough: Members are obligated generally to (a) have recourse to and (b) abide by DSU rules and procedures. These rules and procedures include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings.

…

[The] very discretion granted under Section 304, which under the US argument absolves the legislation, is what, in our eyes, creates the presumptive violation. The statutory language which gives the USTR this discretion on its face precludes the US from abiding by its obligations under the WTO. In each and every case when a determination is made whilst DSU proceedings are not yet exhausted, Members locked in a dispute with the US will be subject to a mandatory determination by the USTR under a statute which explicitly puts them in that very danger which Article 23 was intended to remove.

…

Trade legislation, important or positive as it may be, which statutorily reserves the right for the Member concerned to do something which it has promised not to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1.\(^{386}\)

3. Article 23.2(c)

295. After determining that the so-called 3 March Measure, which imposed an increased bonding requirement upon goods from the European Communities, constituted a measure taken to redress a WTO violation (see the excerpt referenced in paragraph 292 above), the Panel in US – Certain
Measures examined whether the 3 March Measure violated Article 23.2(c) of the DSU. The Panel, in a finding not reviewed by the Appellate Body, held that "any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited":

"Article 23.2(c) prohibits any suspensions of concessions or other obligations (taken as measures seeking to redress a WTO violation), prior to a relevant DSB authorization. Article 3.7 provides that suspension of concessions or other obligations should be used as a last resort, and subject to a DSB authorization. In Article 22.6, the suspension of concessions or other obligations is prohibited during the arbitration process which can only take place before the DSB authorization.

... In the context of these provisions, any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited. On 3 March there was no relevant DSB authorization of any sort."\(^{387}\)

XXIV. ARTICLE 24

A. TEXT OF ARTICLE 24

*Article 24*

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

B. INTERPRETATION AND APPLICATION OF ARTICLE 24

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE 25

A. TEXT OF ARTICLE 25

*Article 25*

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

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2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

B. INTERPRETATION AND APPLICATION OF ARTICLE 25

No jurisprudence or decision of a competent WTO body.

XXVI. ARTICLE 26

A. TEXT OF ARTICLE 26

Article 26

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that
any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

B. INTERPRETATION AND APPLICATION OF ARTICLE 26

1. Article 26.1

(a) "detailed justification in support of any complaint"

296. In Japan – Film, the Panel examined the issue of which party bears the burden of proof in a claim involving non-violation under Article 26.1 of the DSU. The Panel stated:

"In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a detailed justification to back up its allegations."

... 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.\(^{388}\)

2. Jurisprudence under Article XXIII:1(b)

297. With respect to Panel Reports and Appellate Body Reports on claims brought under Article XXIII:1(b), see Chapter on GATT 1994, paragraphs 539-540.

C. RELATIONSHIP WITH OTHER WTO AGREEMENTS

1. Article XXIII:1(a) of the GATT 1994

298. With respect to the relationship between Article XXIII:1(a) and Article XXIII:1(b) of the GATT, see Chapter on GATT 1994, paragraph 537.

\(^{388}\) Panel Report on Japan – Film, paras. 10.30 and 10.32.
2. Article XXIII:1(b) of the GATT 1994

299. With respect to the issue of non-violation, see Chapter on GATT 1994, paragraphs 539-540.

XXVII. ARTICLE 27

A. TEXT OF ARTICLE 27

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

B. INTERPRETATION AND APPLICATION OF ARTICLE 27

No jurisprudence or decision of a competent WTO body.

XXVIII. WORKING PROCEDURES FOR APPELLATE REVIEW

A. RULE 20 COMMENCEMENT OF APPEAL

1. Rule 20(2)

(a) Notice of appeal

300. In US – Shrimp, the Appellate Body discussed the requirement in the Working Procedures for Appellate Review, according to which the appellant is to be brief in its notice of appeal in, setting out "the nature of the appeal, including the allegations of errors":

"The Working Procedures for Appellate Review enjoin the appellant to be brief in its notice of appeal in setting out 'the nature of the appeal, including the allegations of errors'. We believe that, in principle, the 'nature of the appeal' and 'the allegations of errors' are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission." 389

The appellees in *US – Shrimp* argued that the notice of appeal of the United States was both vague and cursory and therefore not in compliance with the procedural requirements of Rule 20(2) of the *Working Procedures for Appellate Review*. The Appellate Body disagreed:

"It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions."

In *EC – Bananas III*, the Appellate Body had to decide whether the European Communities had properly indicated, in its notice of appeal, that it was appealing one particular Panel finding relating to Ecuador's right to invoke Article XIII:2 or XIII:4 of *GATT 1994*:

"The Panel's finding on this issue reads as follows:

'... we find that the failure of Ecuador's Protocol of Accession to address banana-related issues does not mean that Ecuador must accept the validity of the BFA as contained in the EC's Schedule or that it is precluded from invoking Article XIII:2 or XIII:4.'

Paragraphs (c) and (d) of the Notice of Appeal [by the European Communities] read as follows:

(c) The Panel erred in law in its interpretation of the Agreement on Agriculture and, in particular, of Articles 4.1 and 21.1 of that Agreement and their relation to the GATT, in particular its Article XIII.

(d) In the alternative: the Panel erred in its interpretation of Article XIII of GATT, in particular paragraph 2(d) (both in relation to the allocation of country shares in the Tariff Rate Quota (TRQ)) for bananas and to the tariff quota reallocation rules of the Banana Framework Agreement (BFA).'

In our view, the claims of error by the European Communities set out in paragraphs (c) and (d) of the Notice of Appeal do not cover the Panel's finding in paragraph 7.93 of the Panel Reports. The finding in that paragraph explicitly deals with Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994, given that Ecuador acceded to the WTO after the WTO Agreement entered into force and after the tariff quota for the BFA countries had been negotiated and inscribed in the EC Schedule to the GATT 1994. There is no specific mention of this Panel finding in either the Notice of Appeal or in the main arguments of the appellant's submission by the European Communities. Therefore, Ecuador had no notice that the European Communities was appealing this finding. For these reasons, we conclude that the Panel's finding in paragraph 7.93 of the Panel Reports should be excluded from the scope of this appeal."

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391 Panel Reports, para. 7.93.
392 Appellate Body Report on *EC – Bananas III*, paras. 149-152.
XXIX. GENERAL ISSUES IN WTO DISPUTE PROCEEDINGS

A. DUE PROCESS IN WTO DISPUTE SETTLEMENT PROCEEDINGS

303. The Appellate Body in *India – Patents (US)* stated:

"It is worth noting that, with respect to fact-finding, the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings."

304. Similarly, the Appellate Body in *Argentina – Textiles and Apparel* observed:

"As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 144; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 95."

305. The European Communities argued in *EC – Computer Equipment* that its right to due process was violated because the term LAN equipment lacked precision. The Appellate Body stated:

"We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities in the course of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."

306. In *Australia – Salmon*, the Appellate Body stated:

"We note that Article 12.2 of the DSU provides that ‘[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.’ However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted."

307. In the same case, the Appellate Body continued:

"A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it. In this case, we believe that the Panel *did* accord Australia a proper opportunity to respond by allowing Australia to submit a third written submission. We cannot see how the Panel failed to accord due process to Australia by granting the extra time it had requested."

308. See also the excerpt from the report of the Appellate Body referenced in paragraph 54 above.

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393 Appellate Body Report on *India – Patents (US)*, para. 95.
394 Appellate Body Report on *Argentina – Textiles and Apparel*, fn. 68.
395 Appellate Body Report on *EC – Computer Equipment*, para. 70.
397 Appellate Body Report on *Australia – Salmon*, para. 278.
B. PRIVATE COUNSEL

309. In EC – Bananas III, the Appellate Body held that nothing in the WTO Agreement, the DSU or its Working Procedures prevented a Member from admitting whomever it deems fit to become part of its delegation to Appellate Body proceedings. Accordingly, the Appellate Body permitted that a Member could include private counsel in its delegation to an Appellate Body hearing:

"[W]e can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia, and the responses dated 14 July 1997 received from Canada; Jamaica; Ecuador, Guatemala, Honduras, Mexico and the United States, we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

... We note that there are no provisions in the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'), in the DSU or in the Working Procedures that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance -- especially for developing-country Members -- to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings."

1. Judicial economy

310. With respect to judicial economy, see paragraphs 183-192 above

C. DOMESTIC LAW

311. In response to India's assertion that municipal law is a fact that must be established before an international tribunal by the party relying on it and that the Panel should have sought guidance from India on matters relating to the interpretation of Indian law, the Appellate Body in India – Patents (US) stated:

"In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. For example, in Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice observed:

'It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.' 

'It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act as they relate to the 'administrative instructions', is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law as such; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the WTO Agreement. This, clearly, cannot be so.

Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in United States - Section 337 of the Tariff Act of 1930, the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the differences between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947. This seems to us to be a comparable case.'
We note, finally, that terms used both in Sections 301-310 and in WTO provisions, do not necessarily have the same meaning. For example, the word 'determination' need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a 'determination' under Sections 304 and 306, is not by this fact alone precluded from meeting the threshold of a 'determination' under Article 23.2(a) of the DSU. By contrast, the fact that a certain act is characterized as a 'determination' under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements.  

313. In *US – 1916 Act*, in connection with the examination of the 1916 Act, the European Communities argued that the Panel should not be influenced by the terms used by the United States courts whereas the United States argued that "the proper interpretation of the 1916 Act is a question of act to be established, as it is an accepted principle of international law that municipal law is a fact to be proven before international tribunals." Referring to paragraph 66 of the Appellate Body Report in *India – Patents (US)*, the Panel stated:

"[O]ur understanding of the term 'examination' as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement."

314. The Panel on *US – 1916 Act (EC)* then noted that both complaining parties and the defending party rely on United States court cases in their claims. In connection with the consideration of the case law relating to the 1916 Act, the Panel stated:

"We recall that the International Court of Justice, in the *Elettronica Sicula S.p.A (ELSI)* case, referred to the judgement of the Permanent Court of International Justice in the *Brazilian Loans* case – to which the United States also refers in its submissions - and noted that:

'Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)" (Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989, p. 47, para. 62).

Panel Report on *US – Section 301 Trade Act*, paras. 7.18 and 7.20.


(footnote original) This is evidenced by the examples used by the Appellate Body (Ibid., para. 67):

"Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930* [footnote omitted], the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the difference between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947."

We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the Brazilian Loans case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from 'weighing the jurisprudence of municipal [US] courts' if it is 'uncertain or divided'. This would not require us to develop our own independent interpretation of US law, but simply to select among the relevant judgements the interpretation most in conformity with the US law, as necessary in order to resolve the matter before us.

The Panel also examined the legislative history to determine the intent of Congress to understand the actual scope and operation of the 1916 Act. In so doing, the Panel considered public declarations of various United States officials and stated:

"[W]e should determine whether they could actually generate legal obligations for the United States under international law. For instance, since they are subsequent to the notification by the United States of its 'grandfathered' legislation under the GATT 1947, it might be argued that they implicitly modified that notification by stating that the 1916 Act was 'grandfathered'. We recall that the International Court of Justice has developed, inter alia in its judgement in the Nuclear tests case, criteria on when a statement by a representative of a State could generate international obligations for that State. In the present case, we are reluctant to consider the statements made by senior US officials in testimonies or letters to the US Congress or to members thereof as generating international obligations for the United States. First, we recall that the constitution of the United States provides for a strict separation of the judicial and executive branches. With the exception of criminal prosecutions, the application of the 1916 Act falls within the exclusive responsibility of the federal courts. Under those circumstances, a statement by the executive branch of government in a domestic forum can only be of limited value. Second, with the possible exception of the statement of US Trade Representative Clayton Yeutter, they were not made at a sufficiently high level compared with the statements considered by the International Court of Justice in the Nuclear Tests case, where essentially declarations by a head of State and of members of the French government were at

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407 (footnote original) We do not consider that this would be engaging into interpreting US law, with the risks highlighted by the United States in its submissions. Our approach is in line with the reasoning of the PCIJ in the Brazilian Loans case, which, even though it had to apply domestic law, was prudent in its approach of the domestic case-law:

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case" (PCIJ, Series A, Nos. 20/21, p. 124).


issue. Moreover, the statements referred to in the present case were not directly addressed to the general public. Finally, they were not made on behalf of the United States, but – at best – on behalf of the executive branch of government. This aspect would not be essential if the statements had been made in an international forum, where the executive branch represents the State. However, in the present case, the statements were addressed to the US legislative branch. Therefore, we cannot consider them as creating obligations for the United States under international law.

XXX. DSB ACTIONS: GENERAL

A. COMMUNICATIONS TO THE SECRETARIAT

316. At its meeting on 31 May 1995, the DSB agreed that, for reasons of efficiency, communications under the DSU or any other covered agreements should always be sent to the Secretariat with a copy to the Chairman.

B. TIME-PERIODS

317. At its meeting of 27 September 1995, the DSB agreed to the practice concerning the expiration of time-periods contained in WT/DSB/W/10 and Add.1.

C. RULES OF PROCEDURES FOR THE DSB

318. At the meeting of 10 February 1995, the DSB in accordance with Article IV:3 of the WTO Agreement, adopted the Rules of Procedure contained in PC/IPL/9.

D. RULES OF CONDUCT

1. Adopted by the DSB


320. At its meeting on 25, 28 and 29 January and 1 February 1999, in accordance with Section IX of the Rules of Conduct, which provide for periodic review of the rules, DSB agreed to continue to apply the current Rules of Conduct as contained in WT/DSB/RC/1.

2. Adopted by the Appellate Body

321. With a communication, dated 20 January 1997, from the Chairman of the Appellate Body addressed to the Chairman of the Dispute Settlement Body, and circulated to Members for information, "the Appellate Body confirms that the Rules of Conduct have been directly incorporated into the Working Procedures for Appellate Review. Accordingly, the Rules of Conduct, as adopted

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410 (footnote original) See also Article 7 of the Vienna Convention.
412 WT/DSB/M/5, section 7.
413 WT/DSB/M/7, section 10. With respect to the elections of officials, see WT/DSB/M/4.
414 WT/DSB/M/27, section 1.
415 WT/DSB/M/54, section 9.
by the Dispute Settlement Body, are made a part of, and supersede Annex II of, the Working
Procedures for Appellate Review.\textsuperscript{416}

XXXI. APPENDIX 1

A. TEXT OF APPENDIX 1

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

   Annex 1A: Multilateral Agreements on Trade in Goods
   Annex 1B: General Agreement on Trade in Services
   Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

   Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

   Annex 4: Agreement on Trade in Civil Aircraft
   Agreement on Government Procurement
   International Dairy Agreement
   International Bovine Meat Agreement

   The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to
   the adoption of a decision by the parties to each agreement setting out the terms for the application of the
   Understanding to the individual agreement, including any special or additional rules or procedures for
   inclusion in Appendix 2, as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF APPENDIX 1

\textit{No jurisprudence or decision of a competent WTO body.}

\textsuperscript{416}WT/DSB/RC/2.
XXXII. APPENDIX 2

A. TEXT OF APPENDIX 2

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES
CONTAINED IN THE COVERED AGREEMENTS

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Rules and Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement on the Application of Sanitary and</td>
<td>11.2</td>
</tr>
<tr>
<td>Phytosanitary Measures</td>
<td></td>
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<tr>
<td>Agreement on Textiles and Clothing</td>
<td>2.14, 2.21, 4.4, 5.2,</td>
</tr>
<tr>
<td></td>
<td>5.4, 5.6, 6.9, 6.10,</td>
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<tr>
<td></td>
<td>6.11, 8.1 through 8.12</td>
</tr>
<tr>
<td>Agreement on Technical Barriers to Trade</td>
<td>14.2 through 14.4,</td>
</tr>
<tr>
<td></td>
<td>Annex 2</td>
</tr>
<tr>
<td>Agreement on Implementation of Article VI of</td>
<td>17.4 through 17.7</td>
</tr>
<tr>
<td>GATT 1994</td>
<td></td>
</tr>
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<td>Agreement on Implementation of Article VII of GATT</td>
<td>19.3 through 19.5,</td>
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<td>Agreement on Subsidies and Countervailing Measures</td>
<td>4.2 through 4.12, 6.6,</td>
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<td></td>
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<td></td>
<td>footnote 35, 24.4, 27.7, Annex V</td>
</tr>
<tr>
<td>General Agreement on Trade in Services</td>
<td>XXII:3, XXIII:3</td>
</tr>
<tr>
<td>Annex on Financial Services</td>
<td>4</td>
</tr>
<tr>
<td>Annex on Air Transport Services</td>
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<td>Decision on Certain Dispute Settlement Procedures for</td>
<td>1 through 5</td>
</tr>
<tr>
<td>the GATS</td>
<td></td>
</tr>
</tbody>
</table>

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

B. INTERPRETATION AND APPLICATION OF APPENDIX 2

322. With respect to the interpretation and application of Article 1.2 DSU, setting forth the rules applying to the "special or additional rules and procedures", see paragraphs 6-9 above.
XXXIII. APPENDIX 3

A. TEXT OF APPENDIX 3

APPENDIX 3

WORKING PROCEDURES

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.
12. Proposed timetable for panel work:

(a) Receipt of first written submissions of the parties:

<table>
<thead>
<tr>
<th>Description</th>
<th>Timeframe</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) complaining Party</td>
<td>_____ 3-6 weeks</td>
</tr>
<tr>
<td>(2) Party complained against</td>
<td>_____ 2-3 weeks</td>
</tr>
</tbody>
</table>

(b) Date, time and place of first substantive meeting with the parties; third party session:

| Date, time and place of first substantive meeting with the parties; third party session | 1-2 weeks |

(c) Receipt of written rebuttals of the parties:

| Receipt of written rebuttals of the parties | 2-3 weeks |

(d) Date, time and place of second substantive meeting with the parties:

| Date, time and place of second substantive meeting with the parties | 1-2 weeks |

(e) Issuance of descriptive part of the report to the parties:

| Issuance of descriptive part of the report to the parties | 2-4 weeks |

(f) Receipt of comments by the parties on the descriptive part of the report:

| Receipt of comments by the parties on the descriptive part of the report | 2 weeks |

(g) Issuance of the interim report, including the findings and conclusions, to the parties:

| Issuance of the interim report, including the findings and conclusions, to the parties | 2-4 weeks |

(h) Deadline for party to request review of part(s) of report:

| Deadline for party to request review of part(s) of report | 1 week |

(i) Period of review by panel, including possible additional meeting with parties:

| Period of review by panel, including possible additional meeting with parties | 2 weeks |

(j) Issuance of final report to parties to dispute:

| Issuance of final report to parties to dispute | 2 weeks |

(k) Circulation of the final report to the Members:

| Circulation of the final report to the Members | 3 weeks |

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

B. INTERPRETATION AND APPLICATION OF APPENDIX 3

1. Margin of discretion

323. The Appellate Body in *EC – Hormones* held that Panels, under the *DSU*, enjoy a margin of discretion to deal with situations that "are not explicitly regulated":

"[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."

324. The Appellate Body in *EC – Hormones* stated that it agreed with the Panel's exercise of its margin of discretion when it allowed the United States to participate in the second substantive meeting.
meeting of the proceedings initiated by Canada in the same dispute. With respect to "enhanced" third party rights, see paragraphs 131-136 above.

2. Submission of new evidence or allegation

325. In Argentina – Textiles and Apparel, Argentina argued in its appeal that the Panel had acted inconsistently with Article 11 of the DSU by permitting certain evidence in the form of approximately 90 invoices and customs documents which purported to show specific cases in which Argentina had applied duties in excess of its 35 per cent ad valorem tariff binding. Argentina requested that this evidence be rejected because it had been submitted too late in the Panel proceeding and because it was impossible for Argentina to respond to the evidence presented due to blacking-out of certain information from these documents. The Appellate Body noted that the Panel had admitted the evidence and had given Argentina two weeks to respond to the evidence. The Appellate Body then held that while "the Working Procedures in Appendix 3 do contemplate two distinguishable stages" where "a full presentation of the facts on the basis of submission of supporting evidence" should be made during the first stage, it ultimately found that "the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence" and that the Panel had acted within its discretion when it admitted the additional evidence:

"Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute.419 It is true that the Working Procedures 'do not prohibit' submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel….Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties.

[The Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the

419 (footnote original) As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See Appellate Body Reports on EC – Bananas III, para. 144; and India – Patents I, para. 95.
United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.\(^{420}\)

326. In *Canada – Aircraft*, Canada requested the Panel to make a preliminary ruling on the issue of whether the complaining party may adduce new evidence or allegations after the end of the first substantive meeting. Canada argued that it would suffer prejudice under the accelerated procedure under Article 4 of the *SCM Agreement* as a result of the late submission of allegations or evidence. The Panel, in a finding not addressed by the Appellate Body, ruled that it was not bound to exclude the submission of new allegations after the first substantive meeting and that it could not see any legal basis for such a duty:

"[A]n absolute rule excluding the submission of evidence by a complaining party after the first substantive meeting would be inappropriate, since there may be circumstances in which a complaining party is required to adduce new evidence in order to address rebuttal arguments made by the respondent. Furthermore, there may be instances, as in the present case,\(^{421}\) where a party is required to submit new evidence at the request of the panel. For these reasons, we rejected Canada's request for a preliminary ruling that the Panel should not accept new evidence submitted by Brazil after the first substantive meeting.

[W]e are not bound to exclude the submission of new allegations after the first substantive meeting. We can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence. Indeed, one could envisage situations in which the respondent might present information to a panel during the first substantive meeting that could reasonably be used as a basis for a new allegation by the complaining party. Provided the new allegation falls within the panel's terms of reference, and provided the respondent party's due process rights of defence are respected, we can see no reason why any such new allegation should necessarily be rejected by the panel as a matter of course, simply because it is submitted after the first substantive meeting with the parties. We consider that this approach is consistent with the Appellate Body's ruling in *European Communities – Bananas* that '[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.'\(^{422}\)\(^{423}\)

3. **Deadline for affirmative defence**

327. In *Canada – Aircraft*, Brazil argued that a good faith interpretation of the *DSU* requires a party making an affirmative defence to set forth the grounds for that affirmative defence in its first written submission to the panel. The Panel disagreed:

"As noted above, there is nothing in the DSU, or in the Appendix 3 Working Procedures, to prevent a party submitting new evidence or allegations after the first

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\(^{420}\) Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 79-80.  
\(^{421}\) (footnote original) At the time of the second substantive meeting, we asked the parties a series of questions that could have led to the submission of new evidence or arguments. In order to ensure due process, we allowed each party 18 days (i.e., equivalent to the time between the deadline for the respondent's first submission and the deadline for rebuttal submissions) in which to comment on any new evidence or arguments adduced by the other party in response to our questions.  
\(^{422}\) (footnote original) Appellate Body Report on *EC – Bananas III*, para. 145.  
\(^{423}\) Panel Report on *Canada – Aircraft*, paras. 9.73-9.74.
substantive meeting. We can see no basis in the DSU to treat the submission of affirmative defences after the first substantive meeting any differently. Thus, although it is desirable that affirmative defences, as with any claim, should be submitted as early as possible, there is no requirement that affirmative defences should be submitted before the end of the first substantive meeting with the parties. Provided that due process is respected, we see nothing to prohibit the submission of affirmative defences after the first substantive meeting with the parties." 424

4. Objections to panels' jurisdiction

328. In US – 1916 Act, the European Communities argued in its appeal that any jurisdictional objections should have been raised before the interim review stage and invoked the principle that procedural objections must be made in a timely manner and in good faith. The Appellate Body held that "vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings" and that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time":

"We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.' 425 We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner." 426


XXXIV. APPENDIX 4

A. TEXT OF APPENDIX 4

APPENDIX 4

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review 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 expert review 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 an expert review 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 an expert review group. Members of expert review 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 an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review 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 an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review 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 expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

B. INTERPRETATION AND APPLICATION OF APPENDIX 4

No jurisprudence or decision of a competent WTO body.
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I. PARAGRAPH A

A. TEXT OF PARAGRAPH A

Members hereby agree as follows:

   A. Objectives

      (i) The purpose of the Trade Policy Review Mechanism ("TPRM") is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral
Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.

(ii) The assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment. However, the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH A

1. Mission of TPRM

1. With respect to the mission of the TPRM, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB reaffirmed the relevance of TPRM's mission as defined in Annex 3. The TPRM had been conceived as a policy exercise and it was therefore not intended to serve as a basis for the enforcement of specific WTO obligations or for dispute settlement procedures, or to impose new policy commitments on Members. The Mechanism should continue to focus on improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence contribute to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the Mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. Reviews under the Mechanism should continue to take place, to the extent relevant, against the background of the wider economic and development needs, policies and objectives of the Members concerned, as well as of their external environment. Greater attention should be given to transparency in government decision-making on trade policy matters, in line with Paragraph B of Annex 3."¹

2. Reference to GATT practice

2. With respect to GATT practice on this subject-matter see GATT Analytical Index, pages 305-308.

II. PARAGRAPH B

A. TEXT OF PARAGRAPH B

B. Domestic transparency

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the

¹ WT/MIN(99)/2, para. 3. See para. 28 of this Chapter.
implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.

B. **INTERPRETATION AND APPLICATION OF PARAGRAPH B**

3. The TPRB, in its Report to the Third Ministerial Conference, found:

"The Mechanism had demonstrated that it had a valuable public-good aspect, particularly in its contribution to transparency. The Mechanism had also been a catalyst for Members to reconsider their policies, had served as an input into policy formulation and had helped identify technical assistance needs."\(^2\)

4. The TPRB then concluded in the Report that "[g]reater attention should be given to transparency in government decision-making on trade policy matters, in line with Paragraph B of Annex 3."\(^3\)

III. **PARAGRAPH C**

A. **TEXT OF PARAGRAPH C**

C. **Procedures for review**

   (i) The Trade Policy Review Body (referred to herein as the "TPRB") is hereby established to carry out trade policy reviews.

   (ii) The trade policies and practices of all Members shall be subject to periodic review. The impact of individual Members on the functioning of the multilateral trading system, defined in terms of their share of world trade in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) shall be subject to review every two years. The next 16 shall be reviewed every four years. Other Members shall be reviewed every six years, except that a longer period may be fixed for least-developed country Members. It is understood that the review of entities having a common external policy covering more than one Member shall cover all components of policy affecting trade including relevant policies and practices of the individual Members. Exceptionally, in the event of changes in a Member's trade policies or practices that may have a significant impact on its trading partners, the Member concerned may be requested by the TPRB, after consultation, to bring forward its next review.

   (iii) Discussions in the meetings of the TPRB shall be governed by the objectives set forth in paragraph A. The focus of these discussions shall be on the Member's trade policies and practices, which are the subject of the assessment under the review mechanism.

   (iv) The TPRB shall establish a basic plan for the conduct of the reviews. It may also discuss and take note of update reports from Members. The TPRB shall establish a programme of reviews for each year in consultation with the Members directly concerned. In consultation with the Member or Members under review, the Chairman may choose discussants who, acting in their personal capacity, shall introduce the discussions in the TPRB.

   (v) The TPRB shall base its work on the following documentation:

   (a) a full report, referred to in paragraph D, supplied by the Member or Members under review;

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\(^2\) WT/MIN(99)/2, para. 4. See para. 28 of this Chapter.

\(^3\) WT/MIN(99)/2, section VIII, fourth bullet point. See para. 28 of this Chapter.
(b) a report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned. The Secretariat should seek clarification from the Member or Members concerned of their trade policies and practices.

(vi) The reports by the Member under review and by the Secretariat, together with the minutes of the respective meeting of the TPRB, shall be published promptly after the review.

(vii) These documents will be forwarded to the Ministerial Conference, which shall take note of them.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH C

1. Subparagraph (i)

(a) Establishment of Trade Policy Review Body

5. With respect to the composition of the TPRB, see the Chapter on the WTO Agreement, paragraph 56.

(b) Rules of procedure

6. At its meeting of 6 June 1995, pursuant to Article IV:4 of the WTO Agreement, the TPRB adopted the rules of procedure for its meetings, where the TPRB follows, mutatis mutandis, the rules of procedure for the General Council, with certain exceptions.

7. The procedural improvements proposed by the TPRB to the TPRM and the discussion of these proposals can be found in two Notes by the Chairperson.

(c) Overview of activities

(i) Reviews

8. As of 30 June 2001, the TPRB has conducted 143 reviews since its establishment in 1989. In its annual report for 2000, the TPRB stated:

"The reviews have covered 74 out of a total of 124 Members, counting the European Union as one, and represent around 83% of the share of world trade (in 1998) and around 60% of the total WTO Membership (64% if the EU were counted as 15 members). Increased importance given to the reviews of least developed countries has led to 12 such reviews since 1989 (Bangladesh has been reviewed twice)."

(ii) Reporting

9. The TPRB issues annual reports covering its annual assessment of the TPRM and the extent to which it fulfils its objectives as set out in the WTO Agreement.

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4 The text of the adopted rules of procedure can be found in WT/TPR/6.
5 WT/L/28.
6 The text of the notes can be found in WT/TPR/13 and WT/TPR/20. The latter note was submitted to the TPRB meeting of 11 and 12 July 1996. WT/TPR/21, para. 2.
7 WT/TPR/86, para. 4 and Annex I.
8 WT/TPR/86, para. 4.
2. **Subparagraph (ii)**

(a) **Timing and frequency of review**

10. Paragraph 2 of the rules of procedure for TPRB meetings provides as follows:

"The cycle of reviews provided for in Paragraph C (ii) of the Agreement on the Trade Policy Review Mechanism (TPRM) shall be applied with a general flexibility of up to six months, if and as may be necessary. Schedules of subsequent reviews shall be established counting from the date of the previous review meeting. Members should adhere strictly to the timetables for the preparation of reviews, once agreed."

11. The TPRB, in its Report to the Third Ministerial Conference, observed:

"The TPRB considered that the current frequency of reviews provided a balance amongst numerous competing considerations, including TPRM objectives, particularly the smoother functioning of the multilateral trading system, the need to maintain a realistic workload, and the benefits of reviewing all Members soon."

12. Also in the Report, the TPRB concluded that "[a]ll Members, including LDCs, should be reviewed at least once as soon as possible."

(b) "the review of entities having a common external policy"

13. With respect to the reviews of regional entities and "grouped" reviews, the Note by the Chairperson dated 13 December 1995 states:

"I believe it should be stressed that individual reviews must remain the basis of the TPRM. There is room for consideration of grouping of reviews, where possible; however, at this stage there is no support for reviews of regional entities other than the EU."

14. Also, the Note by the Chairperson submitted to the TPRB meeting of 11-12 June 1996 states:

"There is caution about the idea of 'grouping' countries for review, since criteria for such groupings would be difficult to develop and the benefits are not self-evident. However, where smaller member States might themselves volunteer to be reviewed as a group, such requests would be sympathetically considered."

15. Further, the TPRB, in its Report to the Third Ministerial Conference, stated:

"Efforts to maximize efficiency might include: (i) a more considered use of grouped reviews ...."

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10 WT/TPR/6, para. 3.
11 WT/MIN(96)/2, para. 9. See para. 28 of this Chapter. On this matter, see also WT/TPR/13, section (i) and WT/TPR/20, para. 10. In this regard, see para. 7 of this Chapter.
12 WT/MIN(96)/2, section VIII, second bullet point. See para. 28 of this Chapter.
13 WT/TPR/13, para. 11. See para. 7 of this Chapter. The Note, however, states that "[t]he general feeling was that national trade policy reviews should not be confused with analyses of regional agreements under Article XXIV of GATT 1994 and Article V of GATS." WT/TPR/13, para. 9.
14 WT/TPR/20, para. 11. See para. 7 of this Chapter.
15 WT/MIN(99)/2, para. 15. See para. 28 of this Chapter.
16. The TPRB has conducted reviews of the European Communities and its members. Also, the TPRB has conducted to date the group review of the WTO Members of (i) the South African Customs Union ("SACU")\textsuperscript{16} and (ii) the Organisation of Eastern Caribbean States ("OECS").\textsuperscript{17}

3. **Subparagraph (iii)**

17. On TPRB meetings, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB judged two half-days as an appropriate time-span for a TPRB review, and a day-in-between as desirable. More interactive discussion was encouraged, as was greater participation in reviews of smaller Members, if possible at a rank reflecting the high-level representation often sent by Members under review. Reviews could highlight changes since the previous review."

4. **Subparagraph (v)**

(a) **Documentation**

18. On the issue of documentation, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB felt it essential to meet the agreed four weeks lead time for document distribution in all WTO official languages, as active participation in reviews depended on the timely availability of documents. The TPRB favoured flexibility on the lead time to submit written questions, as well as on the role and number of discussants. Current practice concerning minutes of meetings was seen as appropriate, as was the inclusion of written questions and answers in minutes. Members were encouraged to provide written answers whenever possible during the TPRB meetings. Questions left unanswered during the review should be answered in writing, with responses made available to the Membership; on this there should be a regular follow-up by the WTO Secretariat."

(b) **Government reports**

19. With respect to reports by Member(s), see paragraphs 22-27 below.

(c) **Secretariat reports**

20. On the Secretariat reports, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The Secretariat should retain its capacity to prepare autonomous, in-depth reports that allowed the TPRB to arrive at an independent, fully informed evaluation of a Member's trade policies and practices. The present structure and coverage of Secretariat reports was generally satisfactory; care should continue to be taken that the reports achieve an appropriate balance between the traditional and relatively new areas of the WTO. Reports should be WTO-relevant, comprehensive and self-contained. The TPRB saw scope for making the Summary Observations of the

\textsuperscript{16} WT/TPR/M/34-38. The WTO Members of the SACU are: South Africa, Botswana, Lesotho, Namibia and Swaziland.

\textsuperscript{17} WT/TPR/M/85. The WTO Members of the OECS are: Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.

\textsuperscript{18} WT/MIN(99)/2, para. 11. See para. 28 of this Chapter.

\textsuperscript{19} WT/MIN(99)/2, para. 12. See para. 28 of this Chapter.
Secretariat report more readable and for presenting in relevant parts of the report subsequent developments on issues raised at the previous review.\textsuperscript{20}

5. Subparagraph (vi)

21. On the dissemination of reviews, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB considered present dissemination practices as satisfactory. Members noted the value of building awareness within the wider public of the work of the TPRB. Taking existing publication arrangements and budgetary implications into account, the fullest possible dissemination of reviews was encouraged, particularly through the Internet."\textsuperscript{21}

IV. PARAGRAPH D

A. TEXT OF PARAGRAPH D

D. Reporting

In order to achieve the fullest possible degree of transparency, each Member shall report regularly to the TPRB. Full reports shall describe the trade policies and practices pursued by the Member or Members concerned, based on an agreed format to be decided upon by the TPRB. This format shall initially be based on the Outline Format for Country Reports established by the Decision of 19 July 1989 (BISD 36S/406-409), amended as necessary to extend the coverage of reports to all aspects of trade policies covered by the Multilateral Trade Agreements in Annex 1 and, where applicable, the Plurilateral Trade Agreements. This format may be revised by the TPRB in the light of experience. Between reviews, Members shall provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format. Particular account shall be taken of difficulties presented to least-developed country Members in compiling their reports. The Secretariat shall make available technical assistance on request to developing country Members, and in particular to the least-developed country Members. Information contained in reports should to the greatest extent possible be coordinated with notifications made under provisions of the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH D

1. Government reports

(a) Format


23. On this topic, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB saw the Secretariat and Government reports as complementary. Governments were free to define the structure and coverage of their own reports, but were encouraged to keep them short, WTO-relevant and forward-looking,

\textsuperscript{20} WT/MIN(99)/2, para. 8. See para. 28 of this Chapter. See also WT/TPR/13, section (iii). In this regard, see para. 7 of this Chapter.

\textsuperscript{21} WT/TPR/13, section (iii). In this regard, see para. 7 of this Chapter.

\textsuperscript{22} WT/TPR/13, section (iii). In this regard, see para. 7 of this Chapter.

L/6552.
highlighting recent trade policy development and future policy directions and their impact on trade."\textsuperscript{23}

24. Further, a decision of the CONTRACTING PARTIES to \textit{GATT 1947} adopted at the Council meeting of 10 May 1994, states:

"[I]n order to avoid duplication of the material contained in the Secretariat report, and to lighten the burden of delegations, Government reports shall be in the form of policy statements."\textsuperscript{24}

(b) Timing

25. The rules of procedure for the TPRB meetings state:

"Documentation relating to each review meeting shall be circulated in all working languages not less than four weeks in advance of the relevant meetings."\textsuperscript{25}

26. Also, the TPRB, in its Report to the Third Ministerial Conference, stated:

"The TPRB felt it essential to meet the agreed four weeks lead time for document distribution in all WTO official languages, as active participation in reviews depended on the timely availability of documents. The TPRB favoured flexibility on the lead time to submit written questions, as well as on the role and number of discussants."\textsuperscript{26}

27. In practice, Members are accordingly requested to submit their government reports to the WTO at least eight weeks before the TPRB meeting for their review.\textsuperscript{27}

V. PARAGRAPH E

A. TEXT OF PARAGRAPH E

E. \textit{Relationship with the balance-of-payments provisions of GATT 1994 and GATS}

Members recognize the need to minimize the burden for governments also subject to full consultations under the balance-of-payments provisions of GATT 1994 or GATS. To this end, the Chairman of the TPRB shall, in consultation with the Member or Members concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements that harmonize the normal rhythm of the trade policy reviews with the timetable for balance-of-payments consultations but do not postpone the trade policy review by more than 12 months.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH E

\textit{No jurisprudence or decision of a competent WTO body.}

\textsuperscript{23} WT/MIN(99)/2, para. 7. See para. 28 of this Chapter.
\textsuperscript{24} L/7458.
\textsuperscript{25} WT/TPR/6, para. 10. See para. 6 of this Chapter.
\textsuperscript{26} WT/MIN(99)/2, para. 12. See para. 28 of this Chapter.
\textsuperscript{27} See also the Decision adopted by the GATT Council at its meeting 12 April 1989 to establish the Trade Policy Review Mechanism, L/6490, para. B(i).
VI. PARAGRAPH F

A. TEXT OF PARAGRAPH F

F. Appraisal of the Mechanism

The TPRB shall undertake an appraisal of the operation of the TPRM not more than five years after the entry into force of the Agreement Establishing the WTO. The results of the appraisal will be presented to the Ministerial Conference. It may subsequently undertake appraisals of the TPRM at intervals to be determined by it or as requested by the Ministerial Conference.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH F

28. At its meeting of 27 January 1999, the TPRB agreed on a procedure to appraise the operation of the TPRM. On 5 October 1999, the TPRB adopted a report to the Third Ministerial Conference concerning the results of its first appraisal. With respect to the contents of this report, see paragraphs 1, 3, 4, 11, 12, 15, 17, 18, 20, 21, 26 and 29 in this Chapter.

29. With respect to a further appraisal of the operation of the TPRM, the TPRB's report to the Third Ministerial Conference states:

"The TPRB should undertake a further appraisal of the operation of the TPRM not more than five years after the conclusion of the Third WTO Ministerial or as requested by a Ministerial Conference." 30

VII. PARAGRAPH G

A. TEXT OF PARAGRAPH G

G. Overview of Developments in the International Trading Environment

An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the TPRB. The overview is to be assisted by an annual report by the Director-General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system.

B. INTERPRETATION AND APPLICATION OF PARAGRAPH G

30. Annual reports by the Director-General are submitted to the TPRB in accordance with Paragraph G. 31

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28 WT/TPR/69, para. 7.
29 WT/TPR/69, para. 7. The text of the adopted report can be found in WT/MIN(99)/2.
30 WT/MIN(99)/2, section VIII, last bullet point. See para. 28 of this Chapter.
31 The reports are numbered WT/TPR/OV/-. 
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I. PREAMBLE

A. TEXT OF THE PREAMBLE

Signatories 1 to the Agreement on Trade in Civil Aircraft, hereinafter referred to as "this Agreement";

(footnote original) 1 The term "Signatories" is hereinafter used to mean Parties to this Agreement.

Noting that Ministers on 12-14 September 1973 agreed the Tokyo Round of Multilateral Trade Negotiations should achieve the expansion and ever-greater liberalization of world trade through,
inter alia, the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade;

Desiring to achieve maximum freedom of world trade in civil aircraft, parts and related equipment, including elimination of duties, and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects;

Desiring to encourage the continued technological development of the aeronautical industry on a worldwide basis;

Desiring to provide fair and equal competitive opportunities for their civil aircraft activities and for their producers to participate in the expansion of the world civil aircraft market;

Being mindful of the importance in the civil aircraft sector of their overall mutual economic and trade interests;

Recognizing that many Signatories view the aircraft sector as a particularly important component of economic and industrial policy;

Seeking to eliminate adverse effects on trade in civil aircraft resulting from governmental support in civil aircraft development, production, and marketing while recognizing that such governmental support, of itself, would not be deemed a distortion of trade;

Desiring that their civil aircraft activities operate on a commercially competitive basis, and recognizing that government-industry relationships differ widely among them;

Recognizing their obligations and rights under the General Agreement on Tariffs and Trade, hereinafter referred to as "the GATT", and under other multilateral agreements negotiated under the auspices of the GATT;

Recognizing the need to provide for international notification, consultation, surveillance and dispute settlement procedures with a view to ensuring a fair, prompt and effective enforcement of the provisions of this Agreement and to maintain the balance of rights and obligations among them;

Desiring to establish an international framework governing conduct of trade in civil aircraft;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

1. General

(a) Origins

1. The Aircraft Agreement was concluded on 12 April 1979 at the end of the Tokyo Round. It entered into force on 1 January 1980.¹ Signatories adopted on 8 March 1983 an "Agreed interpretation of Article 2.1.2 of the Agreement on Trade in Civil Aircraft" and "Common guidelines for binding of duties on repairs, to be inserted as a headnote in Signatories' respective GATT schedules."² During the Uruguay Round, the negotiators tried unsuccessfully to elaborate a new Aircraft Agreement. At the end of the negotiations, the 1979 Aircraft Agreement was annexed, unchanged, to the WTO Agreement.

¹ BISD 26S/162-170.
² AIR/M/10, paras. 9-25 (see footnote 10 of this Chapter). For the Agreed interpretation of Article 2.1.2, see para. 6 of this Chapter.
AGREEMENT ON TRADE IN CIVIL AIRCRAFT

(b) Status under the WTO

2. As of 30 June 2001, 28 Members were signatories to the Aircraft Agreement.3

I. ARTICLE 1

C. TEXT OF ARTICLE 1

Article 1

Product Coverage

1.1 This Agreement applies to the following products:

(a) all civil aircraft,
(b) all civil aircraft engines and their parts and components,
(c) all other parts, components, and sub-assemblies of civil aircraft,
(d) all ground flight simulators and their parts and components,

whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft.4

1.2 For the purposes of this Agreement "civil aircraft" means (a) all aircraft other than military aircraft and (b) all other products set out in Article 1.1 above.

D. INTERPRETATION AND APPLICATION OF ARTICLE 1

1. Paragraph 1

3. The Annex to the Aircraft Agreement on Product Coverage, to which there were three certifications of modifications and rectifications5, has been further amended by means of a Protocol in 1986.6 At its last meeting on 6 June 2001, the Committee adopted ad referendum the Protocol (2001) Amending the Annex to the Agreement on Trade in Civil Aircraft, subject to certain conditions.7

4. At the meeting of 30 November 1998, the Aircraft Committee decided that the factual information regarding civil/military identification for domestic customs purposes contained in AIR/TSC/W/49 should be updated.8

3 Although the Aircraft Agreement is also open to accession by non-WTO Members (Article 9.1.3), all 28 signatories are WTO Members. They are: Bulgaria, Canada, Estonia, the European Communities, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Egypt, Georgia, Japan, Latvia, Macau, Norway, Romania, Switzerland and the United States. Some WTO Members have observer status in the Committee. They are: Argentina, Australia, Bangladesh, Brazil, Cameroon, Colombia, the Czech Republic, Finland, Gabon, Ghana, India, Indonesia, Israel, Korea, Malta, Mauritius, Nigeria, Poland, Singapore, the Slovak Republic, Sri Lanka, Trinidad and Tobago, Tunisia and Turkey. In addition, China, Chinese Taipei, the Russian Federation and Saudi Arabia have observer status in the Committee. The IMF and UNCTAD are also observers.

4 With respect to the coverage of this Agreement, see the Annex in Section X.


7 TCA/M/12. The objective of the amendment is the update of HS headings to the HS 1996 and the extension of product coverage of the Product Coverage Annex to include "aircraft ground maintenance simulators". The latest version of the Draft Revised Protocol and Product Coverage Annex can be found in TCA/W/5/Rev.3.

8 WT/L/291, para. 4. As of 15 November 2000, Bulgaria, Canada, the European Communities, Japan and the United States had provided the requisite information, TCA/M/11, para. 58.
At its meeting of 15 November 2000, the Aircraft Committee adopted the following decision:

"The Committee decides to urge that Signatories apply immediately, on an interim basis, duty-free treatment to the goods of the proposed product coverage Annex outlined in WTO document TCA/W/5/Rev. 3, including aircraft ground maintenance simulators. Signatories shall inform the Committee on steps they have taken relating to such interim application."

II. ARTICLE 2

A. TEXT OF ARTICLE 2

Article 2

Customs Duties and Other Charges

2.1 Signatories agree:

2.1.1 to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges\(^1\) of any kind levied on, or in connection with, the importation of products, classified for customs purposes under their respective tariff headings listed in the Annex, if such products are for use in a civil aircraft and incorporation therein, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion;

(footnote original)\(^1\) "Other charges" shall have the same meaning as in Article II of the GATT.

2.1.2 to eliminate by 1 January 1980, or by the date of entry into force of this Agreement, all customs duties and other charges\(^1\) of any kind levied on repairs on civil aircraft;

(footnote original)\(^1\) "Other charges" shall have the same meaning as in Article II of the GATT.

2.1.3 to incorporate in their respective GATT Schedules by 1 January 1980, or by the date of entry into force of this Agreement, duty-free or duty-exempt treatment for all products covered by Article 2.1.1 above and for all repairs covered by Article 2.1.2 above.

2.2 Each Signatory shall: (a) adopt or adapt an end-use system of customs administration to give effect to its obligations under Article 2.1 above; (b) ensure that its end-use system provides duty-free or duty-exempt treatment that is comparable to the treatment provided by other Signatories and is not an impediment to trade; and (c) inform other Signatories of its procedures for administering the end-use system.

B. INTERPRETATION AND APPLICATION OF ARTICLE 2

6. As mentioned in paragraph 1 above, on 8 March 1983, the signatories adopted an "Agreed Interpretation of Article 2.1.2 of the Agreement on Trade in Civil Aircraft\(^10\), which states that the elimination of "all customs duties and other charges of any kind levied on repairs on civil aircraft" applies only to repairs of complete civil aircrafts and those civil aircraft products covered by the respective tariff headings listed in the Annex to the Aircraft Agreement.

\(^9\) TCA/M/11, para. 48. See also TCA/M/12, paras. 47-51, and TCA/W/7 concerning a communication from Japan on the non-legally binding nature of the Aircraft Committee decision on 15 November 2000.

\(^10\) AIR/M/10, BISD 30S/24.
III. ARTICLE 3
A. TEXT OF ARTICLE 3

Article 3

Technical Barriers to Trade

3.1 Signatories note that the provisions of the Agreement on Technical Barriers to Trade apply to trade in civil aircraft. In addition, Signatories agree that civil aircraft certification requirements and specifications on operating and maintenance procedures shall be governed, as between Signatories, by the Provisions of the Agreement on Technical Barriers to Trade.

B. INTERPRETATION AND APPLICATION OF ARTICLE 3

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE 4
A. TEXT OF ARTICLE 4

Article 4

Government-Directed Procurement, Mandatory Sub-Contracts and Inducements

4.1 Purchasers of civil aircraft should be free to select suppliers on the basis of commercial and technological factors.

4.2 Signatories shall not require airlines, aircraft manufacturers, or other entities engaged in the purchase of civil aircraft, nor exert unreasonable pressure on them, to procure civil aircraft from any particular source, which would create discrimination against suppliers from any Signatory.

4.3 Signatories agree that the purchase of products covered by this Agreement should be made only on a competitive price, quality and delivery basis. In conjunction with the approval or awarding of procurement contracts for products covered by this Agreement a Signatory may, however, require that its qualified firms be provided with access to business opportunities on a competitive basis and on terms no less favourable than those available to the qualified firms of other Signatories.¹

¹ Use of the phrase “access to business opportunities ... on terms no less favourable ...” does not mean that the amount of contracts awarded to the qualified firms of one Signatory entitles the qualified firms of other Signatories to contracts of a similar amount.

4.4 Signatories agree to avoid attaching inducements of any kind to the sale or purchase of civil aircraft from any particular source which would create discrimination against suppliers from any Signatory.

B. INTERPRETATION AND APPLICATION OF ARTICLE 4

No jurisprudence or decision of a competent WTO body.
V. ARTICLE 5

A. TEXT OF ARTICLE 5

Article 5

Trade Restrictions

5.1 Signatories shall not apply quantitative restrictions (import quotas) or import licensing requirements to restrict imports of civil aircraft in a manner inconsistent with applicable provisions of the GATT. This does not preclude import monitoring or licensing systems consistent with the GATT.

5.2 Signatories shall not apply quantitative restrictions or export licensing or other similar requirements to restrict, for commercial or competitive reasons, exports of civil aircraft to other Signatories in a manner inconsistent with applicable provisions of the GATT.

B. INTERPRETATION AND APPLICATION OF ARTICLE 5

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE 6

A. TEXT OF ARTICLE 6

Article 6

Government Support, Export Credits, and Aircraft Marketing

6.1 Signatories note that the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Agreement on Subsidies and Countervailing Measures) apply to trade in civil aircraft. They affirm that in their participation in, or support of, civil aircraft programmes they shall seek to avoid adverse effects on trade in civil aircraft in the sense of Articles 8.3 and 8.4 of the Agreement on Subsidies and Countervailing Measures. They also shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all Signatories to participate in the expansion of the world civil aircraft market.

6.2 Signatories agree that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs, including non-recurring programme costs, identifiable and pro-rated costs of military research and development on aircraft, components, and systems that are subsequently applied to the production of such civil aircraft, average production costs, and financial costs.

B. INTERPRETATION AND APPLICATION OF ARTICLE 6

No jurisprudence or decision of a competent WTO body.
VII. ARTICLE 7

A. TEXT OF ARTICLE 7

Article 7

Regional and Local Governments

7.1 In addition to their other obligations under this Agreement, Signatories agree not to require or encourage, directly or indirectly, regional and local governments and authorities, non-governmental bodies, and other bodies to take action inconsistent with provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE 7

No jurisprudence or decision of a competent WTO body.

VIII. ARTICLE 8

A. TEXT OF ARTICLE 8

Article 8

Surveillance, Review, Consultation, and Dispute Settlement

8.1 There shall be established a Committee on Trade in Civil Aircraft (hereinafter referred to as "the Committee") composed of representatives of all Signatories. The Committee shall elect its own Chairman. It shall meet as necessary, but not less than once a year, for the purpose of affording Signatories the opportunity to consult on any matters relating to the operation of this Agreement, including developments in the civil aircraft industry, to determine whether amendments are required to ensure continuance of free and undistorted trade, to examine any matter for which it has not been possible to find a satisfactory solution through bilateral consultations, and to carry out such responsibilities as are assigned to it under this Agreement, or by the Signatories.

8.2 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the CONTRACTING PARTIES to the GATT of developments during the period covered by such review.

8.3 Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, Signatories shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity.

8.4 The Committee may establish such subsidiary bodies as may be appropriate to keep under regular review the application of this Agreement to ensure a continuing balance of mutual advantages. In particular, it shall establish an appropriate subsidiary body in order to ensure a continuing balance of mutual advantages, reciprocity and equivalent results with regard to the implementation of the provisions of Article 2 above related to product coverage, the end-use systems, customs duties and other charges.

8.5 Each Signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by another Signatory with respect to any matter affecting the operation of this Agreement.

8.6 Signatories recognize the desirability of consultations with other Signatories in the Committee in order to seek a mutually acceptable solution prior to the initiation of an investigation to determine the existence, degree and effect of any alleged subsidy. In those exceptional circumstances in which no consultations occur before such domestic procedures are initiated,
Signatories shall notify the Committee immediately of initiation of such procedures and enter into simultaneous consultations to seek a mutually agreed solution that would obviate the need for countervailing measures.

8.7 Should a Signatory consider that its trade interests in civil aircraft manufacture, repair, maintenance, rebuilding, modification or conversion have been or are likely to be adversely affected by any action by another Signatory, it may request review of the matter by the Committee. Upon such a request, the Committee shall convene within thirty days and shall review the matter as quickly as possible with a view to resolving the issues involved as promptly as possible and in particular prior to final resolution of these issues elsewhere. In this connection the Committee may issue such rulings or recommendations as may be appropriate. Such review shall be without prejudice to the rights of Signatories under the GATT or under instruments multilaterally negotiated under the auspices of the GATT, as they affect trade in civil aircraft. For the purposes of aiding consideration of the issues involved, under the GATT and such instruments, the Committee may provide such technical assistance as may be appropriate.

8.8 Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the Understanding related to Notification, Consultation, Dispute Settlement and Surveillance shall be applied, mutatis mutandis, by the Signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.

B. INTERPRETATION AND APPLICATION OF ARTICLE 8

7. The Aircraft Committee, reviews annually the implementation of the Aircraft Agreement and, pursuant to Article IV.8 of the WTO Agreement, submits annual report to the General Council.11

8. At its meeting of 20 February 1980, the Aircraft Committee established a Technical Sub-Committee12, with the following terms of reference:

"1. Pursuant to Article 8.4, to examine the implementation of the provisions of Article 2 related to product coverage, the end-use system, customs duties and other charges, including matters relating to aircraft tariff nomenclature, and to report to the Committee.

2. In the light of the Preamble of the Agreement, to examine proposals for modifying the product coverage and to report thereon to the Committee"13.

9. At its meeting of 16 July 1992, the Aircraft Committee also established the Sub-Committee of the Committee on Trade in Civil Aircraft in which negotiations under Article 8.3 of the Agreement would be conducted.14 The Sub-Committee has not met since its fourteenth meeting in November 1995.15

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11 WT/L/107; WT/L/193; WT/L/247; WT/L/291; WT/L/340 (+Corr.1); WT/L/374. (See TCA/M/1, para. 20).
12 AIR/M/1, paras. 36-40.
13 AIR/M/1, para. 38.
14 AIR/M/32, para. 35. See also AIR/M/34, paras. 6-11.
15 TCA/1. See also TCA/M/4, paras. 18-25.
IX. ARTICLE 9

A. TEXT OF ARTICLE 9

Article 9

Final Provisions

9.1 Acceptance and Accession

9.1.1 This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community.

9.1.2 This Agreement shall be open for acceptance by signature or otherwise by governments having provisionally acceded to the GATT, on terms related to the effective application of rights and obligations under this Agreement, which take into account rights and obligations in the instruments providing for their provisional accession.

9.1.3 This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Signatories, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

9.1.4 In regard to acceptance, the provisions of Article XXVI:5 (a) and (b) of the General Agreement would be applicable.

9.2 Reservations

9.2.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Signatories.

9.3 Entry into Force

9.3.1 This Agreement shall enter into force on 1 January 1980 for the governments1 which have accepted or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

(footnote original) 1 For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Economic Community.

9.4 National Legislation

9.4.1 Each government accepting or acceding to this Agreement shall 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.

9.4.2 Each Signatory 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.

9.5 Amendments

9.5.1 The Signatories may amend this Agreement, having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the Signatories have concurred in accordance with the procedures established by the Committee, shall not come into force for any Signatory until it has been accepted by such Signatory.
9.6 Withdrawal

9.6.1 Any Signatory may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of twelve months from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any Signatory may upon such notification request an immediate meeting of the Committee.

9.7 Non-Application of this Agreement Between Particular Signatories

9.7.1 This Agreement shall not apply as between any two Signatories if either of the Signatories, at the time either accepts or accedes to this Agreement, does not consent to such application.

9.8 Annex

9.8.1 The Annex to this Agreement forms an integral part thereof.

9.9 Secretariat

9.9.1 This Agreement shall be serviced by the GATT secretariat.

9.10 Deposit

9.10.1 This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT who shall promptly furnish to each Signatory and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to Article 9.5 and a notification of each acceptance thereof or accession thereto pursuant to Article 9.1, or each withdrawal therefrom pursuant to Article 9.6.

9.11 Registration

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

Done at Geneva this twelfth day of April nineteen hundred and seventy-nine in a single copy, in the English and French languages, each text being authentic, except as otherwise specified with respect to the various lists in the Annex.¹

¹On 25 March 1987, the Committee agreed that the Spanish text of the Agreement shall also be considered authentic.

B. INTERPRETATION AND APPLICATION OF ARTICLE 9

No jurisprudence or decision of a competent WTO body.
X. ANNEX

A. TEXT OF THE ANNEX

ANNEX

(as amended by the Protocol (1986) amending the access to the Agreement on Trade in Civil Aircraft)

PRODUCT COVERAGE

1. The product coverage is defined in Article 1 of the Agreement on Trade in Civil Aircraft.

2. Signatories agree that products covered by the descriptions listed below and properly classified for customs purposes under the Customs Co-operation Council Nomenclature (Revised) headings of the Harmonized System codes shown alongside shall be accorded duty-free or duty-exempt treatment, if such products are for use in civil aircraft or ground flying trainers* and for incorporation therein, in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion.

   These products shall not include:

   an incomplete or unfinished product, unless it has the essential character of a complete or finished part, component, sub-assembly or item of equipment of a civil aircraft or ground flying trainer*, (e.g. an article which has a civil aircraft manufacturer's number),

   materials in any form (e.g. sheets, plates, profile shapes, strips, bars, pipes, tubes or other shapes) unless they have been cut to size or shape and/or shaped for incorporation in civil aircraft or a ground flying trainer* (e.g. an article which has a civil aircraft manufacturer's part number),

   raw materials and consumable goods.

4. For the purpose of this Annex, «Ex» has been included to indicate that the product description referred to does not exhaust the entire range of products within the Customs Co-operation Council Nomenclature (Revised) headings or the Harmonized System codes listed below.¹

   (footnote original)¹ The list is not reproduced.
   (footnote original)² For the purposes of Article 1.1 of this Agreement «ground flight simulators» are to be regarded as ground flying trainers as provided for under 8805.20 of the Harmonized System.

B. INTERPRETATION AND APPLICATION OF THE ANNEX

No jurisprudence or decision of a competent WTO body.
Agreement on Government Procurement

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PARTIES TO THIS AGREEMENT (hereinafter referred to as "Parties").

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I

Scope and Coverage

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.1

1 For each Party, Appendix I is divided into five Annexes:
- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexes.

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply mutatis mutandis to such requirements.

4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. Paragraph 1

(a) Loose-leaf system for updating appendices

1. At its meeting of 4 June 1996, the Committee on Government Procurement decided to establish a loose-leaf system with legal effect to periodically update the Appendices to the Agreement on Government Procurement. At its meeting on 24 February 1997, the Committee on Government Procurement agreed on the procedures for subsequent modifications to the loose-leaf system. In addition to being made available in hard-copy form, the loose-leaf system and future new or replacement pages are circulated to parties and other WTO Members in electronic form through the WTO Document Dissemination Facility. An up-to-date copy of the loose-leaf system is also available to the general public through the government procurement site on the WTO Home Page on the Internet.

2. Appendix 1

2. With respect to the interpretation of the Korean Annex 1 in the Panel on Korea – Procurement, see paragraphs 24-28 below.

3. Paragraph 4

3. At its meeting of 27 February 1996, the Committee on Government Procurement decided on the "Modalities for Notifying Threshold Figures in National Currencies".

III. ARTICLE II

A. TEXT OF ARTICLE II

Article II

Valuation of Contracts

1. The following provisions shall apply in determining the value of contracts for purposes of implementing this Agreement.

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1 GPA/M/2, Section E.
2 GPA/M/5, Section D.
3 GPA/19, para. 7.
4 GPA/M/1, Section B.
AGREEMENT ON GOVERNMENT PROCUREMENT

This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.

3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.

4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:

   (a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

   (b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:

   (a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;

   (b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.

If there is any doubt, the second basis for valuation, namely (b), is to be used.

6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III

National Treatment and Non-discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

   (a) that accorded to domestic products, services and suppliers; and

   (b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:
(a) that its entities shall not treat a locally-established supplier less favourably than another
locally-established supplier on the basis of degree of foreign affiliation or ownership;
and
(b) that its entities shall not discriminate against locally-established suppliers on the basis
of the country of production of the good or service being supplied, provided that the
country of production is a Party to the Agreement in accordance with the provisions of
Article IV.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind
imposed on or in connection with importation, the method of levying such duties and charges, other
import regulations and formalities, and measures affecting trade in services other than laws, regulations,
procedures and practices regarding government procurement covered by this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

No jurisprudence or decision of a competent WTO body.

V. ARTICLE IV

A. TEXT OF ARTICLE IV

Article IV

Rules of Origin

1. A Party shall not apply rules of origin to products or services imported or supplied for purposes
of government procurement covered by this Agreement from other Parties, which are different from the
rules of origin applied in the normal course of trade and at the time of the transaction in question to
imports or supplies of the same products or services from the same Parties.

2. Following the conclusion of the work programme for the harmonization of rules of origin for
goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement
Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement") and
negotiations regarding trade in services, Parties shall take the results of that work programme and those
negotiations into account in amending paragraph 1 as appropriate.

B. INTERPRETATION AND APPLICATION OF ARTICLE IV

No jurisprudence or decision of a competent WTO body.

VI. ARTICLE V

A. TEXT OF ARTICLE V

Article V

Special and Differential Treatment for Developing Countries

Objectives

1. Parties shall, in the implementation and administration of this Agreement, through the provisions
set out in this Article, duly take into account the development, financial and trade needs of developing
countries, in particular least-developed countries, in their need to:
(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;

(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;

(c) support industrial units so long as they are wholly or substantially dependent on government procurement; and

(d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.

2. Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Agreed Exclusions

4. A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, inter alia, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as "the Committee") to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6. Paragraphs 4 and 5 shall apply mutatis mutandis to developing countries acceding to this Agreement after its entry into force.
7. Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.

Technical Assistance for Developing Country Parties

8. Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, inter alia, to:

   - the solution of particular technical problems relating to the award of a specific contract; and
   - any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

10. Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Information Centres

11. Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, inter alia, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Special Treatment for Least-Developed Countries

12. Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203-205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.

13. Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Review

4. The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.
5. In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

No jurisprudence or decision of a competent WTO body.

VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI

Technical Specifications

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:

   (a) be in terms of performance rather than design or descriptive characteristics; and

   (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.

(footnote original) For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service 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, service, process or production method.

(footnote original) For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services 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, service, process or production method.

3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

No jurisprudence or decision of a competent WTO body.
VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII

Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:
   (a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.
   (b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.
   (c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

B. INTERPRETATION AND APPLICATION OF ARTICLE VII

No jurisprudence or decision of a competent WTO body.

IX. ARTICLE VIII

A. TEXT OF ARTICLE VIII

Article VIII

Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;
(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers’ list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;

(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;

(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(g) each Party shall ensure that:

(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and

(ii) efforts be made to minimize differences in qualification procedures between entities.

(h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE VIII

No jurisprudence or decision of a competent WTO body.

X. ARTICLE IX

A. TEXT OF ARTICLE IX

Article IX

Invitation to Participate Regarding Intended Procurement

1. In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.

2. The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.

3. Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.
4. Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.

5. Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.

6. Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:

   (a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;

   (b) whether the procedure is open or selective or will involve negotiation;

   (c) any date for starting delivery or completion of delivery of goods or services;

   (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;

   (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;

   (f) any economic and technical requirements, financial guarantees and information required from suppliers;

   (g) the amount and terms of payment of any sum payable for the tender documentation; and

   (h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

7. Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph 6 as is available. It shall in any case include the information referred to in paragraph 8 and:

   (a) a statement that interested suppliers should express their interest in the procurement to the entity;

   (b) a contact point with the entity from which further information may be obtained.

8. For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:

   (a) the subject matter of the contract;

   (b) the time-limits set for the submission of tenders or an application to be invited to tender; and

   (c) the addresses from which documents relating to the contracts may be requested.
9. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;

(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and

(c) the period of validity of the lists, and the formalities for their renewal.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

(d) the nature of the products or services concerned;

(e) a statement that the notice constitutes an invitation to participate.

However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.

10. If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

11. Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE IX

No jurisprudence or decision of a competent WTO body.

XI. ARTICLE X

A. TEXT OF ARTICLE X

Article X

Selection Procedures

1. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

2. Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.
3. Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4. Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

B. INTERPRETATION AND APPLICATION OF ARTICLE X

No jurisprudence or decision of a competent WTO body.

XII. ARTICLE XI

A. TEXT OF ARTICLE XI

*Article XI*

*Time-limits for Tendering and Delivery*

**General**

1. (a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.

(b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.

**Deadlines**

2. Except in so far as provided in paragraph 3,

   (a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;

   (b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;

   (c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.

3. The periods referred to in paragraph 2 may be reduced in the circumstances set out below:

   (a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:

      (i) as much of the information referred to in paragraph 6 of Article IX as is available;
(ii) the information referred to in paragraph 8 of Article IX;

(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and

(iv) a contact point with the entity from which further information may be obtained,

the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;

(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;

(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or

(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.

4. Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.

B. INTERPRETATION AND APPLICATION OF ARTICLE XI

No jurisprudence or decision of a competent WTO body.

XIII. ARTICLE XII

A. TEXT OF ARTICLE XII

Article XII

Tender Documentation

1. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO.

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

(a) the address of the entity to which tenders should be sent;

(b) the address where requests for supplementary information should be sent;

(c) the language or languages in which tenders and tendering documents must be submitted;
(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;

(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;

(i) the terms of payment;

(j) any other terms or conditions;

(k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.

Forwarding of Tender Documentation by the Entities

3. (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.

(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.

(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

B. INTERPRETATION AND APPLICATION OF ARTICLE XII

No jurisprudence or decision of a competent WTO body.

XIV. ARTICLE XIII

A. TEXT OF ARTICLE XIII

Article XIII

Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:
(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or facsimile are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and

(b) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

Receipt of Tenders

2. A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.

Opening of Tenders

3. All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Award of Contracts

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

(b) Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

Option Clauses

5. Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIII

No jurisprudence or decision of a competent WTO body.
XV. ARTICLE XIV

A. TEXT OF ARTICLE XIV

*Article XIV*

*Negotiation*

1. A Party may provide for entities to conduct negotiations:

   (a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or

   (b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2. Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3. Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.

4. Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:

   (a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;

   (b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;

   (c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and

   (d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIV

*No jurisprudence or decision of a competent WTO body.*

XVI. ARTICLE XV

A. TEXT OF ARTICLE XV

*Article XV*

*Limited Tendering*

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:

   (a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation
provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services;

(e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV;

(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;

(g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;

(h) for products purchased on a commodity market;

(i) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;

(j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as regards the publication, in the sense of Article IX, of an
invitation to suitably qualified suppliers, to participate in such a contest which shall be
judged by an independent jury with a view to design contracts being awarded to the
winners.

2. Entities shall prepare a report in writing on each contract awarded under the provisions of
paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or
services procured, country of origin, and a statement of the conditions in this Article which prevailed.
This report shall remain with the entities concerned at the disposal of the government authorities
responsible for the entity in order that it may be used if required under the procedures of Articles XVIII,
XIX, XX and XXII.

B. INTERPRETATION AND APPLICATION OF ARTICLE XV

No jurisprudence or decision of a competent WTO body.

XVII. ARTICLE XVI

A. TEXT OF ARTICLE XVI

Article XVI

Offsets

1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the
evaluation of tenders and award of contracts, impose, seek or consider offsets.\footnote{Offsets in government}
procurement are measures used to encourage local development or
improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment
requirements, counter-trade or similar requirements.

2. Nevertheless, having regard to general policy considerations, including those relating to
development, a developing country may at the time of accession negotiate conditions for the use of
offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used
only for qualification to participate in the procurement process and not as criteria for awarding contracts.
Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the
country's Appendix I and may include precise limitations on the imposition of offsets in any contract
subject to this Agreement. The existence of such conditions shall be notified to the Committee and
included in the notice of intended procurement and other documentation.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVI

No jurisprudence or decision of a competent WTO body.

XVIII. ARTICLE XVII

A. TEXT OF ARTICLE XVII

Article XVII

Transparency

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations
from competitive tendering procedures or access to challenge procedures, under which tenders will be
entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to
creating transparency in their own contract awards, nevertheless:

(a) specify their contracts in accordance with Article VI (technical specifications);
(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;

(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVII

1. Working Group on Transparency in Government Procurement

4. The 1996 Singapore Ministerial Conference decided to establish a working group "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."  

5. The Working Group on Transparency in Government Procurement reports to the General Council on an annual basis.  

XIX. ARTICLE XVIII

A. TEXT OF ARTICLE XVIII

Article XVIII

Information and Review as Regards Obligations of Entities

1. Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:

(a) the nature and quantity of products or services in the contract award;

(b) the name and address of the entity awarding the contract;

(c) the date of award;

(d) the name and address of winning tenderer;

(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;

(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and

(g) the type of procedure used.

2. Each entity shall, on request from a supplier of a Party, promptly provide:

(a) an explanation of its procurement practices and procedures;

6 WT/WGTGP/1-4.
pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and 

to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3. Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.

4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

B. INTERPRETATION AND APPLICATION OF ARTICLE XVIII

No jurisprudence or decision of a competent WTO body.

XX. ARTICLE XIX

A. TEXT OF ARTICLE XIX

Article XIX

Information and Review as Regards Obligations of Parties

1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.

2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.

4. Confidential information provided to any Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.

5. Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:
AGREEMENT ON GOVERNMENT PROCUREMENT

(a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;

(b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;

(c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and

(d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.

To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

B. INTERPRETATION AND APPLICATION OF ARTICLE XIX

1. Paragraph 5

6. At its meeting of 27 February 1996, the Committee on Government Procurement adopted the recommendation of the Statistical Working Group that the rules of origin used for the purposes of statistical reporting in Article XIX:5 of the Agreement should be the same as those applied under Article IV, which are those used in the normal course of trade.7

7. At its meeting of 4 June 1996, the Committee on Government Procurement adopted the product classification system of 26 product categories as proposed by the Chairman.8 The Committee on Government Procurement also adopted the services classification system as proposed by the Chairman9, as amended by merging category 71 and 73 into one category named "transport services".10

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7 GPA/M/1, paras. 56-57.
8 GPA/W/17, Annex 1.
9 GPA/W/17, Annex 2.
10 GPA/M/2, paras. 49-51.
XXI.  ARTICLE XX

A.  TEXT OF ARTICLE XX

Article XX

Consultations

1.  In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2.  Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3.  Each Party shall provide its challenge procedures in writing and make them generally available.

4.  Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5.  The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6.  Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

   (a)  participants can be heard before an opinion is given or a decision is reached;

   (b)  participants can be represented and accompanied;

   (c)  participants shall have access to all proceedings;

   (d)  proceedings can take place in public;

   (e)  opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;

   (f)  witnesses can be presented;

   (g)  documents are disclosed to the review body.

7.  Challenge procedures shall provide for:

   (a)  rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

   (b)  an assessment and a possibility for a decision on the justification of the challenge;
(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

B. INTERPRETATION AND APPLICATION OF ARTICLE XX

No jurisprudence or decision of a competent WTO body.

XXII. ARTICLE XXI

A. TEXT OF ARTICLE XXI

Article XXI

Institutions

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXI

1. Paragraph 1

8. At its meeting of 27 February 1996, the Committee on Government Procurement approved recommendations for decisions adopted by the Interim Committee on Procedures on the Participation of Observers.\(^{11}\)

9. At its meeting of 27 February 1996, the Committee on Government Procurement adopted interim procedures on the circulation of documents and on the derestriction of documents, pending definitive measures.\(^{13}\) Subsequently, at its meeting of 24 February 1997, the Committee on Government Procurement adopted revised procedures with respect to circulation and derestriction of documents.\(^{14}\)

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\(^{12}\) GPA/M/1, Section B.

\(^{13}\) GPA/M/1, Section B.

\(^{14}\) GPA/M/5, Section G. The text of the decision can be found in GPA/1/Add.2.
XXIII. ARTICLE XXII

A. TEXT OF ARTICLE XXII

Article XXII

Consultations and Dispute Settlement

1. The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable except as otherwise specifically provided below.

2. If any Party considers 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 this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as "DSB"), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.

3. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.

4. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:

"To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement."

In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.

5. Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.

6. Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.

7. Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this
Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXII

1. Paragraph 2

(a) Non-violation claim

10. In Korea – Procurement, the Panel was requested to determine alternatively – if no violation of the Agreement on Government Procurement were found – whether the measures nevertheless nullified or impaired benefits accruing to the United States under the Agreement on Government Procurement, pursuant to Article XXII:2 providing for non-violation claims. The Panel began by noting the general requirements for a "non-violation claim":

"[N]ormal non-violation cases involve an examination as to whether there is: (1) an application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member." 15

11. The Panel on Korea – Procurement then held that the question in the case before it 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":

"In this case, the United States has asserted that measures it claimed violated the GPA (that is, the imposition of inadequate bid-deadlines; the imposition of certain qualification requirements; the imposition of certain domestic partnering requirements; and the failure to establish effective domestic challenge procedures engaged in by KAA [Korea Airports Authority] and its successors in relation to the IIA [Inchon International Airport] project) nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA. A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of 'reasonable expectation' is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, the question is 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."16

12. Noting that non-violation is an exceptional concept within the WTO dispute settlement system, stemming from the public international law principle of pacta sunt servanda, the Panel however specified that it was not implying that "a complainant [must] affirmatively prove actual bad faith on the part of another Member":

"[U]pon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect

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15 Panel Report on Korea – Procurement, para. 7.86.
16 Panel Report on Korea – Procurement, para. 7.87.
of such commitments. However, we must also note that, while the overall burden of proof is on the complainant, we do not mean to introduce here a new requirement that a complainant affirmatively prove actual bad faith on the part of another Member. It is fairly clear from the history of disputes prior to the conclusion of the Uruguay Round that such a requirement was never established and there is no evidence in the current treaty text that such a requirement was newly imposed. Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.”  

13. With reference to the case at hand, the Panel subsequently held that an error in treaty negotiation can also be addressed under Article 26 of the DSU and Article XXII:2 of the Agreement on Government Procurement:

"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. It is clear to us (as discussed in paragraphs 7.110 and 7.121 below) that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.

Thus, on the basis of the ample evidence provided by both parties to the dispute, we 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. 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 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.”

14. After examination of the facts of the case, the Panel on Korea – Procurement found that while Members had a "right to expect full and forthright answers to their questions submitted during negotiations", they had to protect their own interests "as well":

"Members have a right to expect full and forthright answers to their questions submitted during negotiations, particularly with respect to Schedules of affirmative commitments such as those appended to the GPA. However, Members must protect

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18 (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.
their own interests as well and in this case the United States did not do so. It had a significant amount of time to realize, particularly in light of the wide knowledge of KAA's role, that its understanding of the Korean answer was not accurate. Therefore, we find that, even if the principles of a traditional non-violation case were applicable in this situation the United States has failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued.\textsuperscript{20}

15. With regard to the possible error in treaty formation, the Panel held that it would consider "whether the United States was induced into error about a fact or situation which it assumed existed in the relation to the agreement being negotiated regarding Korea's accession to the GPA":

"[W]e […] first recall our finding that there is a particular duty of transparency and openness on the 'offering' party in negotiations on concessions under the GPA. The negotiations between the Parties under the GPA do not benefit from a generally accepted framework such as the Harmonized System with respect to goods or even the Central Product Classification in services. The Annexes to the GPA which contain the entities whose procurement is covered by the Agreement are basically self-styled Schedules whose interpretation may require extensive knowledge of another country's procurement systems and governmental organization. Therefore, we believe that transparency and forthright provision of all relevant information are of the essence in negotiations on GPA Schedules.

In our view, as discussed fully in the previous section, Korea's response to the US question was not as forthright as it should have been. Indeed, the response could be characterized as at best incomplete in light of existing Korean legislation and ongoing plans for further legislation. However, when addressing this problem, rather than asking whether there was a nullification or impairment of expectations arising from a concession, it might be better to inquire as to whether the United States was induced into error about a fact or situation which it assumed existed in the relation to the agreement being negotiated regarding Korea's accession to the GPA. In this case, it clearly appears that the United States was in error when it assumed that the IIA project was covered by the GPA as a result of the entity coverage offered by Korea." \textsuperscript{21}

16. The Panel noted that Article 48(1) of the Vienna Convention provides that "[a] State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty". The Panel then went on to recall that, in the course of the negotiations on the Annexes to the Agreement on Government Procurement:

"[T]he United States believed that the IIA project was covered. As we have found in section VII:B of these Findings, that was not correct. The IIA project procurement was the responsibility of a non-covered entity. Hence the US error related to a fact or situation which was assumed by the US to exist at the time when the treaty was concluded. In our view, it also appears from the behaviour of the United States that this purported concession arguably formed an essential basis of its consent to be bound by the treaty as finally agreed. Hence the initial conditions for error under Article 48(1) of the Vienna Convention seem to us to be satisfied." \textsuperscript{22}

\textsuperscript{20} Panel Report on Korea – Procurement, para. 7.119.
\textsuperscript{21} Panel Report on Korea – Procurement, paras. 7.121-7.122.
\textsuperscript{22} Panel Report on Korea – Procurement, para. 7.124.
17. After making the finding referenced in paragraph 16 above, the Panel then turned to the second paragraph of Article 48, which states that "Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error". The Panel ultimately found that the United States error was not excusable:

"This raises the question of whether the exclusionary clause of the second paragraph of Article 48 can be overcome. Although we have indicated above that the duty to demonstrate good faith and transparency in GPA negotiations is particularly strong for the 'offering' party, this does not relieve the other negotiating partners from their duty of diligence to verify these offers as best as they can. Here again the facts already recounted in the previous sub-section demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer, the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was 'concluded.' Therefore, the error was no longer 'excusable' and only an excusable error can qualify as an error which may vitiates the consent to be bound by the agreement."\(^{23}\)

18. With respect to non-violation claims under the GATT 1994 in general, see the Chapter on GATT 1994, paragraphs 539-540.

19. The following table lists the disputes in which panel and/or Appellate Body reports have been adopted where the provisions of the Agreement on Government Procurement were invoked:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Case Number</th>
<th>Invoked Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea – Procurement</td>
<td>WT/DS163</td>
<td>Article 1(1), XXII:2</td>
</tr>
</tbody>
</table>

XXIV. ARTICLÉ XXIII

A. TEXT OF ARTICLE XXIII

Article XXIII

Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. 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 any Party from imposing or enforcing measures: necessary to protect public morals,

\(^{23}\) Panel Report on Korea – Procurement, para. 7.125.
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order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

B. INTERPRETATION AND APPLICATION OF ARTICLE XXIII

No jurisprudence or decision of a competent WTO body.

XXV. ARTICLE XXIV

A. TEXT OF ARTICLE XXIV

Article XXIV

Final Provisions

1. Acceptance and Entry into Force

This Agreement shall enter into force on 1 January 1996 for those governments\(^8\) whose agreed coverage is contained in Annexes I through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.

(footnote original)\(^8\) For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

2. Accession

Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement.\(^24\)

3. Transitional Arrangements

(a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.

(b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the "1988 Agreement") shall be governed by the substantive provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference for that purpose and shall remain in force until 31 December 1996.

(footnote original)\(^9\) All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.

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\(^24\) With respect to accession to the Agreement on Government Procurement, in Marrakesh, see the Decision on Accession to the Agreement on Government Procurement, in Section XXVII.
Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.

Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These provisions shall be applied under the auspices of the Committee under this Agreement.

Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.

4. Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement.

5. National Legislation

(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.

(b) Each Party 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.

6. Rectifications or Modifications

(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.

(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.
7. **Reviews, Negotiations and Future Work**

(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.

(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.

(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

8. **Information Technology**

With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

9. **Amendments**

Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.

10. **Withdrawal**

(a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.

(b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.

11. **Non-application of this Agreement between Particular Parties**

This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

12. **Notes**, Appendices and Annexes

The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.

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25 For the Notes, see Section XXVIII.
13. **Secretariat**

This Agreement shall be serviced by the WTO Secretariat.

14. **Deposit**

This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.

15. **Registration**

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

Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

B. **INTERPRETATION AND APPLICATION OF ARTICLE XXIV**

1. **Paragraph 2**

20. At its meeting of 27 February 1996, the Committee on Government Procurement adopted the Procedures for Accession to the Agreement.\(^{26}\)

21. In June 2000, with respect to the process of accession to the *Agreement on Government Procurement*, the Committee on Government Procurement adopted a Checklist of issues for the provision of information by applicant governments.\(^{27}\)

2. **Paragraph 3**

22. At its meetings of 18 February and 25 June 1998, the Committee on Government Procurement discussed the legal and procedural aspects of the relationship of the *Tokyo Round Agreement on Government Procurement* to the 1994 Agreement on Government Procurement on the basis of a Note prepared by the Secretariat in response to the Committee's request.\(^{28}\)

3. **Paragraph 5**

23. At its meeting on 4 June 1996, the Committee on Government Procurement adopted the Procedures for the Notification of National Implementing Legislation.\(^{29}\)

**XXVI. APPENDIX I**

A. **CENTRAL GOVERNMENT ENTITIES**

24. The Panel on *Korea – Procurement* examined whether several entities concerned at successive stages with the procurement of airport construction in Korea, specifically the Korean

\(^{26}\) GPA/M/1, Section B.  
\(^{27}\) GPA/M/13, Section G, and GPA/M/14, Section C. The text of the adopted document can be found in GPA/35.  
\(^{28}\) GPA/M/8, Section C and GPA/M/9, Section B.  
\(^{29}\) GPA/M/2, para.7.
Airport Construction Authority (KOACA), Korea Airports Authority (KAA) and the Inchon International Airport Corporation (IIAC) were within the scope of Korea's list of "central government entities" as specified in Annex 1 of Korea's obligations in Appendix I of the Agreement on Government Procurement. The United States contended that the practices of these entities were inconsistent with Korea's obligations under the Agreement on Government Procurement. In this regard, the Panel noted:

"A critical question we must first address is determining what is explicitly contained in Korea's Schedule. A preliminary issue is the status of Note 1 to Annex 1, in particular the extent to which Parties can qualify the coverage of listed entities through such Notes. In our view, Members determine, pursuant to negotiation, the scope of the coverage of their commitments as expressed in the Schedules. In this regard, we take note of the panel finding in United States - Restrictions on Imports of Sugar ('United States – Sugar') wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves."

Accordingly, the Panel noted that:

"[T]he first step of the analysis, therefore, will be to examine Korea's Schedule and determine whether, within the ordinary meaning of the terms therein, the entity responsible for Inchon International Airport (IIA) procurement is covered. This will include a review of all relevant Annexes and Notes."

In light of the fact that the Ministry of Construction and Transportation ("MOCT") was included in the list of central government entities in Annex 1 to Korea's Schedule, the Panel went on to consider whether "there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity":

"[T]here is a remaining question as to whether there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity. These arguably are general issues which arise with respect to any Member's Schedule regardless of the structure and content of the Schedule and any qualifying Notes."

The Panel eventually rejected the United States' argument that KAA could be considered a part of MOCT because it was controlled, at least for the purposes of the IIA project, by MOCT. The Panel noted in this respect that:

"There is no use of the term 'direct control' or even 'control' in the sense that the United States wishes to use it. It has not been defined in this manner either in the context used in the Tokyo Round Agreement or elsewhere. We cannot agree with the overall US position that a 'control' test should be read into the GPA. However, we also do not think that it is an entirely irrelevant question. We think the issue of 'control' of one entity over another can be a relevant criterion among others for determining coverage of the GPA, as discussed below."

[W]e do believe that entities that are not listed in an Annex 1 to the GPA whether in the Annex list or through a Note to the Annex, can, nevertheless, be covered under

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30 Panel Report on Korea – Procurement, para. 7.30.
31 Panel Report on Korea – Procurement, para. 7.12.
32 Panel Report on Korea – Procurement, para. 7.49.
the GPA. We believe that this flows from the fact that an overly narrow interpretation of 'central government entity' may result in less coverage under Annex 1 than was intended by the signatories. On the other hand, an overly broad interpretation of the term may result in coverage of entities that were never intended to be covered by signatories."\(^{33}\)

28. The Panel on *Korea – Procurement* then put forward two criteria for answering the question referenced in paragraph 27 above:

"In the present case, our view is that the relevant questions are: (1) Whether an entity (KAA, in this case) is essentially a part of a listed central government entity (MOCT) – in other words, are the entities, legally unified? and (2) Whether KAA and its successors have been acting on behalf of MOCT. The first test is appropriate because if entities that are essentially a part of, or legally unified with, listed central government entities are not considered covered, it could lead to great uncertainty as to what was actually covered because coverage would be dependent on the internal structure of an entity which may be unknown to the other negotiating parties. The second test is appropriate because procurements that are genuinely undertaken on behalf of a listed entity (as, for example, in the case where a principal/agent relationship exists between the listed entity and another entity) should properly be covered under Annex 1 because they would be considered legally as procurements by MOCT. In our view, it would defeat the objectives of the GPA if an entity listed in a signatory's Schedule could escape the Agreement's disciplines by commissioning another agency of government, not itself listed in that signatory's Schedule, to procure on its behalf."\(^{34}\)

29. With respect to the first question, the Panel, persuaded on balance by the indicia of independence of KAA and its successors, found that KAA was not legally unified with or a part of MOCT, basing itself on the following criteria:

"KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had its own management and employees who were not government employees; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions of the IIA project with its own monies."\(^{35}\)

30. With regard to the question whether or not KAA and its successors were acting on behalf of MOCT, at least with respect to the IIA project (i.e., whether the IIA project was really the legal responsibility of MOCT), the Panel, after having reviewed the laws governing construction of the IIA as well as other factual evidence regarding involvement of MOCT in the IIA project, found that:

"[T]here certainly is a role under Korean law for MOCT in the IIA project. It appears to be a role of oversight. We do not think oversight by one governmental entity of a project which has been delegated by law to another entity (which we have already found to be independent and not covered by GPA commitments) results in a conclusion that there is an agency relationship between them."\(^{36}\)

\(^{33}\) Panel Report on *Korea – Procurement*, paras. 7.57-7.58.
\(^{34}\) Panel Report on *Korea – Procurement*, para. 7.59.
\(^{35}\) Panel Report on *Korea – Procurement*, para. 7.60.
\(^{36}\) Panel Report on *Korea – Procurement*, para. 7.70.
XXVII. Decision on Accession to the Agreement on Government Procurement

A. Text of the Decision

Decision on Accession to the Agreement on Government Procurement

1. Ministers invite the Committee on Government Procurement established under the Agreement on Government Procurement in Annex 4(b) of the Agreement Establishing the World Trade Organization to clarify that:

(a) a Member interested in accession according to paragraph 2 of Article XXIV of the Agreement on Government Procurement would communicate its interest to the Director-General of the WTO, submitting relevant information, including a coverage offer for incorporation in Appendix I having regard to the relevant provisions of the Agreement, in particular Article I and, where appropriate, Article V;

(b) the communication would be circulated to Parties to the Agreement;

(c) the Member interested in accession would hold consultations with the Parties on the terms for its accession to the Agreement;

(d) with a view to facilitating accession, the Committee would establish a working party if the Member in question, or any of the Parties to the Agreement, so requests. The working party should examine: (i) the coverage offer made by the applicant Member; and (ii) relevant information pertaining to export opportunities in the markets of the Parties, taking into account the existing and potential export capabilities of the applicant Member and export opportunities for the Parties in the market of the applicant Member;

(e) upon a decision by the Committee agreeing to the terms of accession including the coverage lists of the acceding Member, the acceding Member would deposit with the Director-General of the WTO an instrument of accession which states the terms so agreed. The acceding Member's coverage lists in English, French and Spanish would be appended to the Agreement;

(f) prior to the date of entry into force of the WTO Agreement, the above procedures would apply mutatis mutandis to contracting parties to the GATT 1947 interested in accession, and the tasks assigned to the Director-General of the WTO would be carried out by the Director-General to the CONTRACTING PARTIES to the GATT 1947.

2. It is noted that Committee decisions are arrived at on the basis of consensus. It is also noted that the non-application clause of paragraph 11 of Article XXIV is available to any Party.”

B. Interpretation and Application of the Decision

No jurisprudence or decision of a competent WTO body.

XXVIII. Notes

A. Text of the Notes

NOTES

The terms 'country' or 'countries' as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.
In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term 'national', such expression shall be read as pertaining to that customs territory, unless otherwise specified.

*Article 1, paragraph 1*

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.

**B. INTERPRETATION AND APPLICATION OF THE NOTES**

*No jurisprudence or decision of a competent WTO body.*
International Dairy Agreement

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I. PREAMBLE

A. TEXT OF THE PREAMBLE

The Parties to this Agreement,

Recognizing the importance of milk and dairy products to the economy of many countries in terms of production, trade and consumption;

(footnote original) In this Agreement and in the Annex thereto, the term "country" is deemed to include the European Communities as well as any separate customs territory Member of the World Trade Organization.

Recognizing the need, in the mutual interests of producers and consumers, and of exporters and importers, to avoid surpluses and shortages, and to maintain prices at an equitable level;

Noting the diversity and interdependence of dairy products;

Noting the situation in the dairy products market, which is characterized by very wide fluctuations and the proliferation of export and import measures;

Considering that improved cooperation in the dairy products sector contributes to the attainment of the objectives of expansion and liberalization of world trade, and the implementation of the principles and objectives concerning developing countries agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973;

Determined to respect the principles and objectives of the General Agreement on Tariffs and Trade 1994 and, in carrying out the aims of this Agreement, effectively to implement the principles and objectives agreed upon in the said Tokyo Declaration;

(footnote original) This provision shall apply only among Parties that are Members of the World Trade Organization.

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 I

Article I

Objectives

The objectives of this Agreement shall be, in accordance with the principles and objectives agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973,

– to achieve the expansion and ever greater liberalization of world trade in dairy products under market conditions as stable as possible, on the basis of mutual benefit to exporting and importing countries;

– to further the economic and social development of developing countries.
B. **INTERPRETATION AND APPLICATION OF ARTICLE I**

1. The *International Dairy Agreement* replaced the International Dairy Arrangement that had operated since 1 January 1980.

**III. ARTICLE II**

**A. TEXT OF ARTICLE II**

*Article II*

*Product Coverage*

1. This Agreement applies to the dairy products sector. For the purpose of this Agreement, the term "dairy products" is deemed to include the following products, as defined in the Harmonized Commodity Description and Coding System ("Harmonized System") established by the Customs Co-operation Council:

   *(footnote original)* For those Parties which have not yet implemented the Harmonized System, the following Customs Co-operation Council Nomenclature applies with respect to Article II of this Agreement and Article 1 of the Annex:

<table>
<thead>
<tr>
<th>CCCN</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>04.01</td>
<td>Milk and cream, fresh, not concentrated or sweetened</td>
</tr>
<tr>
<td>04.02</td>
<td>Milk and cream, preserved, concentrated or sweetened</td>
</tr>
<tr>
<td>04.03</td>
<td>Butter</td>
</tr>
<tr>
<td>04.04</td>
<td>Cheese and curd</td>
</tr>
<tr>
<td>ex 35.01</td>
<td>Casein</td>
</tr>
</tbody>
</table>

   **HS Code**

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>04.01.10-30</td>
<td>Milk and cream, not concentrated nor containing added sugar or other sweetening matter</td>
</tr>
<tr>
<td>04.02.10-99</td>
<td>Milk and cream, concentrated or containing added sugar or other sweetening matter</td>
</tr>
<tr>
<td>04.03.10-90</td>
<td>Buttermilk, curdled milk and cream, yoghurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa</td>
</tr>
<tr>
<td>04.04.10-90</td>
<td>Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included</td>
</tr>
<tr>
<td>04.05.00</td>
<td>Butter and other fats and oils derived from milk</td>
</tr>
<tr>
<td>04.06.10-90</td>
<td>Cheese and curd</td>
</tr>
<tr>
<td>35.01.10</td>
<td>Casein</td>
</tr>
</tbody>
</table>

2. The International Dairy Council, established under paragraph 1(a) of Article VII (hereinafter referred to as "the Council"), may decide that the Agreement is to apply to other products in which dairy products referred to in paragraph 1 have been incorporated, if it deems their inclusion necessary for the implementation of the objectives and provisions of this Agreement.

**B. INTERPRETATION AND APPLICATION OF ARTICLE II**

*No jurisprudence or decision of a competent WTO body.*
IV. ARTICLE III

A. TEXT OF ARTICLE III

*Article III*

*Information and Market Monitoring*

1. Each Party shall provide regularly and promptly to the Council the information required to permit the Council to monitor and assess the overall situation of the world market for dairy products and the world market situation for each individual dairy product.

2. Developing country Parties shall furnish the information available to them. In order that these Parties may improve their data collection mechanisms, developed Parties, and any developing Parties able to do so, shall consider sympathetically any request to them for technical assistance.

3. The information that the Parties undertake to provide pursuant to paragraph 1, according to the modalities that the Council shall establish, shall include data on past performance, current situation and outlook regarding production, consumption, prices, stocks and trade, including transactions other than normal commercial transactions, in respect of the products referred to in Article II, and any other information deemed necessary by the Council. Parties shall also provide information on their domestic policies and trade measures, and on their bilateral, plurilateral or multilateral commitments, in the dairy sector and shall make known, as early as possible, any changes in such policies and measures that are likely to affect international trade in dairy products. The provisions of this paragraph shall not require any 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.

4. The Secretariat of the World Trade Organization (hereinafter referred to as "the Secretariat"), shall draw up, and keep up to date, an inventory of all measures affecting trade in dairy products, including commitments resulting from bilateral, plurilateral and multilateral negotiations.

B. INTERPRETATION AND APPLICATION OF ARTICLE III

1. Notification requirements

2. At its meeting of 20-21 March 1995, the International Dairy Council adopted the notification requirements for information to be provided by the Parties and for the inventory of measures to be kept by the WTO Secretariat under Article III.

V. ARTICLE IV

A. TEXT OF ARTICLE IV

*Article IV*

*Functions of the International Dairy Council and Cooperation between the Parties*

1. The Council shall meet in order to:

   (a) make an evaluation of the situation in and outlook for the world market for dairy products, on the basis of a status report prepared by the Secretariat with the documentation furnished by Parties in accordance with Article III, information arising from the operation of the Annex to this Agreement on Certain Milk Products

---

1 IDA/1, Rule 23.
2 IDA/1, Rule 30.
INTERNATIONAL DAIRY AGREEMENT

1. Paragraph 1(a)

(a) Preparation of status report

3. At its meeting of 20-21 March 1995, the International Dairy Council adopted procedural requirements for the status reports to be distributed by the Secretariat under Article IV:1(a).3

2. Paragraph 1(b)

(a) Review of the functioning of the Agreement

4. Pursuant to Article IV:1(b), at its meeting on 17 October 1995, the International Dairy Council adopted a decision suspending the Annex on Certain Milk Products, with effect from 18 October 1995.4

3 IDA/1, Rule 24.
VI. ARTICLE V

A. TEXT OF ARTICLE V

**Article V**

*Food Aid and Transactions other than Normal Commercial Transactions*

1. The Parties agree:

   (a) In cooperation with FAO and other interested organizations, to foster recognition of the value of dairy products in improving nutritional levels and of ways and means through which they may be made available for the benefit of developing countries.

   (b) In accordance with the objectives of this Agreement, to furnish, within the limits of their possibilities, dairy products by way of food aid. Parties should notify the Council in advance each year, as far as practicable, of the scale, quantities and destinations of their proposed contributions of such food aid. Parties should also give, if possible, prior notification to the Council of any proposed amendments to the notified food-aid contributions. It is understood that contributions could be made bilaterally or through joint projects or through multilateral programmes, particularly the World Food Programme.

   (c) Recognizing the desirability of harmonizing their efforts in this field, as well as the need to avoid harmful interference with normal patterns of production, consumption and international trade, to exchange views in the Council on their arrangements for the supply and requirements of dairy products as food aid or on concessional terms.

2. Donated exports, exports destined for relief purposes or welfare purposes, and other transactions which are not normal commercial transactions shall be effected in accordance with Article 10 of the Agreement on Agriculture. The Council shall cooperate closely with the FAO Consultative Sub-Committee on Surplus Disposal.

3. The Council shall, in accordance with conditions and modalities that it will establish, upon request, discuss and consult on all transactions other than normal commercial transactions and other than those covered by the Agreement on Subsidies and Countervailing Measures.

B. INTERPRETATION AND APPLICATION OF ARTICLE V

1. **Paragraph 3**

   (a) Information on transactions

5. At its meeting of 20-21 March 1995, the International Dairy Council defined the procedural requirements in respect of parties requested to furnish information on the transactions defined in Article V:3

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5 IDA/1, Rule 25.
VII. ARTICLE VI

A. TEXT OF ARTICLE VI

Article VI

Annex

Without prejudice to the provisions of Articles I to V, the products listed below shall be subject to the provisions of the Annex:

Milk powder and cream powder, excluding whey powder
Milk fat
Certain cheeses

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

1. Annex

(a) Paragraph 3

6. At its meeting of 2-3 May 1994, the Management Committee established by the participants to the Protocol Relating to Milk Fat as of 2 April 1973, decided to suspend under the previous International Dairy Arrangement the minimum prices for butter and anhydrous milk fat contained in Article 3:2(b) of the Protocol for a period of 12 months.8

(b) Paragraph 4

7. At its meeting of 20-21 March 1995, the International Dairy Council adopted notification requirements for cases where prices in international trade of the products covered approached the minimum prices mentioned in Article 4 of the Annex.9

VIII. ARTICLE VII

A. TEXT OF ARTICLE VII

Article VII

Administration

1. International Dairy Council

(a) An International Dairy Council shall be established within the framework of the World Trade Organization (hereinafter referred to as the "WTO"). The Council shall comprise representatives of all Parties to the Agreement and shall carry out all the functions which are necessary to implement the provisions of the Agreement. The Council shall be serviced by the Secretariat. The Council shall establish its own rules of procedure. The Council may, as appropriate, establish subsidiary working groups or other bodies.

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6 See Section X.
7 L/3835, BISD 20S/11, Article VII:1.
8 DPC/PTL/40, para. 4.
9 IDA/1, Rule 26.
(b) Regular and special meetings

The Council shall normally meet as appropriate, but not less than twice each year. The Chairman may call a special meeting of the Council either on his own initiative, at the request of the Committee established under paragraph 2(a), or at the request of a Party to this Agreement.

(c) Decisions

The Council shall reach its decisions by consensus. The Council shall be deemed to have decided on a matter submitted for its consideration if no member of the Council formally objects to the acceptance of a proposal.

(d) Cooperation with other organizations

The Council shall make whatever arrangements are appropriate for consultation or cooperation with intergovernmental and non-governmental organizations.

(e) Admission of observers

(i) The Council may invite any non-Party government to be represented at any meeting as an observer and may determine rules on the rights and obligations of observers, in particular with respect to the provision of information.

(ii) The Council may also invite any of the organizations referred to in paragraph 1(d) to attend any meeting as an observer.

2. Committee on Certain Milk Products

(a) The Council shall establish a Committee on Certain Milk Products (hereinafter referred to as "the Committee") to carry out all the functions which are necessary to implement the provisions of the Annex. This Committee shall comprise representatives of all Parties. The Committee shall be serviced by the Secretariat. It shall report to the Council on the exercise of its functions.

(b) Examination of the market situation

The Council shall make the necessary arrangements, determining the modalities for the information to be furnished under Article III, so that the Committee may keep under constant review the situation in and the evolution of the international market for the products covered by the Annex, and the conditions under which the provisions of the Annex are applied by Parties, taking into account the evolution of prices in international trade in each of the other dairy products having implications for the trade in products covered by the Annex.

(c) Regular and special meetings

The Committee shall normally meet once each quarter. However, the Chairman of the Committee may call a special meeting of the Committee on his own initiative or at the request of any Party.

(d) Decisions

The Committee shall reach its decisions by consensus. The Committee shall be deemed to have decided on a matter submitted for its consideration if no member of the Committee formally objects to the acceptance of a proposal.
B. **INTERPRETATION AND APPLICATION OF ARTICLE VII**

1. **Paragraph 1(a)**

8. The International Dairy Council was established under the GATT framework according to Article VII:1(a) of the International Dairy Agreement of 1979.  


2. **Paragraph 2(a)**

10. At its meeting on 17 October 1995, the International Diary Council decided to suspend the Application of the Annex on Certain Milk Products and the functioning of the Committee on Certain Milk Products, whose rules of procedures were set out in Rules 15 to 22, with effect from 18 October 1995.

**IX. ARTICLE VIII**

A. **TEXT OF ARTICLE VIII**

*Article VIII*  
*Final Provisions*

1. **Acceptance**

(a) This Agreement is open for acceptance, by signature or otherwise, by 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 the Agreement Establishing the WTO (hereinafter referred to as the "WTO Agreement"), and by the European Communities.

(b) Any government accepting this Agreement may at the time of its acceptance make a reservation with regard to the application of the Annex with respect to any product(s) specified therein. Reservations may not be entered in respect of any of the provisions of the Annex without the consent of the other Parties.

(footnote original) For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

(c) Acceptance of this Agreement shall carry denunciation of the International Dairy Arrangement done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted that Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

2. **Entry into force**

(a) This Agreement shall enter into force, for those Parties having accepted it, on the date of entry into force of the WTO Agreement. For Parties accepting this Agreement after that date, it shall be effective from the date of their acceptance.

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10 BISD 26S/91.  
11 IDA/1.  
12 IDA/1.  
13 IDA/3.
3. **Validity**

This Agreement shall remain in force for three years. The duration of this Agreement shall be extended for further periods of three years at a time, unless the Council, at least eighty days prior to each date of expiry, decides otherwise.

4. **Amendment**

Except where provision for modification is made elsewhere in this Agreement, the Council may recommend an amendment to the provisions of this Agreement. The proposed amendment shall enter into force upon acceptance by all Parties.

5. **Relationship between the Agreement and the Annex and Attachments**

The following shall be deemed to be an integral part of this Agreement, subject to the provisions of paragraph 1(b):

- the Annex mentioned in Article VI;
- the lists of reference points mentioned in Article 2 of the Annex and contained in Attachment A;
- the schedules of price differentials according to milk fat content mentioned in paragraph 4 of Article 3 of the Annex and contained in Attachment B;
- the register of processes and control measures referred to in paragraph 5 of Article 3 of the Annex and contained in Attachment C.

6. **Relationship between the Agreement and Other Agreements**

Nothing in this Agreement shall affect the rights and obligations of Parties under the General Agreement on Tariffs and Trade and the WTO Agreement.\(^6\)

\(^6\) This provision shall apply only among Parties that are Members of the WTO or GATT.

7. **Withdrawal**

(a) Any Party may withdraw from this Agreement. Such withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

(b) Subject to such conditions as may be agreed upon by the Parties, any Party may withdraw its acceptance of the application of the provisions of the Annex with respect to any product(s) specified therein. Such withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

8. **Deposit**

Until the entry into force of the WTO Agreement, the text of this Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each Party. The texts of this Agreement in the English, French and Spanish languages shall all be equally authentic. This Agreement, and any amendments thereto, shall, upon the entry into force of the WTO Agreement, be deposited with the Director-General of the WTO.
9. **Registration**

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

*Done at Marrakesh this fifteenth day of April nineteen hundred and ninety-four.*

B. **INTERPRETATION AND APPLICATION OF ARTICLE VIII**

1. **Paragraph 2**

11. On 12 December 1994, the parties to the *International Dairy Agreement*\(^{14}\) agreed:

"[A]ll decisions and procedures currently in effect in the International Dairy Agreement will be applied on a *de facto* basis during the period following the period following entry into force of the International Dairy Agreement until such time as the International Dairy Council adopts a definitive decision on these matters."\(^{15}\)

2. **Paragraph 3**

12. Following a decision of the Parties to the *International Dairy Agreement* on 30 September 1997,\(^{16}\) the General Council, at its meeting of 10 December 1997, decided to delete the *International Dairy Agreement* from Annex 4 of the *WTO Agreement*, with effect from 1 January 1998.\(^{17}\)

X. **ANNEX**

A. **TEXT OF ANNEX**

**ANNEX ON CERTAIN MILK PRODUCTS**

*Article 1*

*Product Coverage*

1. This Annex applies to:

(a) milk powder and cream powder falling under HS heading Nos. 04.02.10-99 and 04.03.10-90;

(b) milk fat falling under HS heading No. 04.05.00, having a milk fat content equal to or greater than 50 per cent by weight; and

(c) cheeses falling under HS heading No. 04.06.10-90, having a fat content in dry matter, by weight, equal to or more than 45 per cent and a dry matter content, by weight, equal to or more than 50 per cent.

*Field of application*

2. For each Party, this Annex is applicable to exports of the products specified in paragraph 1 manufactured or repacked inside its own customs territory.

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\(^{14}\) Argentina, Australia, Bulgaria, Egypt, the European Communities, Hungary, Japan, New Zealand, Norway, Poland, Romania, Switzerland and Uruguay.

\(^{15}\) L/7568.

\(^{16}\) IDA/1.

\(^{17}\) WT/L/251.
Article 2

Pilot Products

The minimum export prices established under Article 3 shall be established with respect to the pilot products of the following specifications:

(a) Designation: Skimmed milk powder
   Milk fat content: less than or equal to 1.5 per cent by weight
   Water content: less than or equal to 5 per cent by weight

(b) Designation: Whole milk powder
   Milk fat content: 26 per cent by weight
   Water content: less than or equal to 5 per cent by weight

(c) Designation: Buttermilk powder
   Milk fat content: less than or equal to 11 per cent by weight
   Water content: less than or equal to 5 per cent by weight

(d) Designation: Anhydrous milk fat
   Milk fat content: 99.5 per cent by weight

(e) Designation: Butter
   Milk fat content: 80 per cent by weight

(f) Designation: Cheese

Packaging:

In packages normally used in the trade, of a net content by weight of not less than 25 kgs. or 50 lbs., except for cheese, of 20 kgs. or 40 lbs., respectively, as appropriate.

Terms of sale:

F.o.b. from the exporting Party or free-at-frontier exporting Party.

By derogation from this provision, reference points for the Parties listed in Attachment A may be as provided therein.

Prompt payment against documents.

Article 3

Minimum Prices

Level and observance of minimum prices

1. Each Party shall take the steps necessary to ensure that the export prices of the products defined in Article 2 shall not be less than the minimum prices applicable under this Annex. If the products are exported in the form of goods in which they have been incorporated, Parties shall take the steps necessary to avoid circumvention of the price provisions of this Annex.

2. (a) The minimum price levels set out in this Article take account, in particular, of the current market situation, dairy prices in producing Parties, the need to ensure an appropriate
relationship between the minimum prices established in the Annex, the need to ensure equitable prices to consumers, and the desirability of maintaining a minimum return to the most efficient producers in order to ensure stability of supply over the longer term.

(b) The minimum prices provided for in paragraph 1 applicable at the date of entry into force of this Agreement are fixed at:

(i) US$1,200 per metric ton for the skimmed milk powder defined in Article 2(a);
(ii) US$1,250 per metric ton for the whole milk powder defined in Article 2(b);
(iii) US$1,200 per metric ton for the buttermilk powder defined in Article 2(c);
(iv) US$1,625 per metric ton for the anhydrous milk fat defined in Article 2(d);
(v) US$1,350 per metric ton for the butter defined in Article 2(e);
(vi) US$1,500 per metric ton for the cheese defined in Article 2(f).

3. (a) The levels of the minimum prices specified in this Article may be modified by the Committee, taking into account, on the one hand, the results of the operation of the Annex and, on the other hand, the evolution of the situation of the international market.

(b) The levels of the minimum prices specified in this Article shall be subject to review at least once a year by the Committee. In undertaking this review the Committee shall take account in particular, to the extent relevant and necessary, of costs faced by producers, other relevant economic factors of the world market, the need to maintain a long-term minimum return to the most economic producers, the need to maintain stability of supply and to ensure acceptable prices to consumers, and the current market situation and shall have regard to the desirability of improving the relationship between the levels of the minimum prices set out in paragraph 2(b) and the dairy support levels in the major producing Parties.

Adjustment of minimum prices

4. If the products actually exported differ from the pilot products in respect of the fat content, packaging or terms of sale, the minimum prices shall be adjusted so as to protect the minimum prices established in this Annex for the products specified in Article 2 of this Annex, according to the following provisions:

Milk fat content:

Milk powders. If the milk fat content of the milk powders falling under Article 1(a), excluding buttermilk powder, differs from the milk fat content of the pilot products as specified in Article 2(a) and Article 2(b), then for each full percentage point of milk fat as from 2 per cent, the minimum price shall be adjusted in proportion to the difference between the minimum prices in force for the pilot products as specified in Article 2(a) and Article 2(b).\(^8\)

\(^8\) As defined in Article 2(c) of this Annex.

Milk fats. If the milk fat content of the milk falling under Article 1(b) differs from the milk fat content of the pilot products as specified in Article 2(d) or Article 2(e) then, if the milk fat content is equal to or greater than 82 per cent or less than 80 per cent, the minimum price of this product shall be, for each full percentage point by which the milk fat content is more than or less than 80 per cent, increased or reduced in proportion to the difference between the minimum prices in force for the pilot products as specified in Article 2(d) or Article 2(e), respectively.

\(^9\) See Attachment B, "Schedule of Price Differentials According to Milk Fat Content".
Packaging:

If the products are offered otherwise than in packages normally used in the trade, of a net content by weight of not less than 25 kgs. or 50 lbs., or for cheese, of not less than 20 kgs. or 40 lbs., respectively, as appropriate, the minimum prices shall be adjusted so as to reflect the difference in the cost of packaging relative to the cost of the type of package specified above.

Terms of sale:

If sold on terms other than f.o.b. from the exporting Party or free-at-frontier exporting Party, the minimum prices shall be calculated on the basis of the minimum f.o.b. prices specified in paragraph 2(b), plus the real and justified costs of the services provided; if the terms of the sale include credit, this shall be charged for at the prevailing commercial rates in the exporting Party concerned.

(footnote original) See Article 2 of this Annex.

Exports and imports of skimmed milk powder and buttermilk powder for purposes of animal feed

5. By derogation from the provisions of paragraphs 1 to 4, a Party may, under the conditions defined below, export or import, as the case may be, skimmed milk powder and buttermilk powder for purposes of animal feed at prices below the minimum prices provided for in this Annex for these products. A Party may make use of this possibility only to the extent that it ensures that the products exported or imported are subjected to the processes and control measures which will be applied in the country of export or destination so as to ensure that the skimmed milk powder and buttermilk powder thus exported or imported are used exclusively for animal feed. These processes and control measures shall have been approved by the Committee and recorded in a register established by it. A Party wishing to make use of the provisions of this paragraph shall give advance notification of its intention to do so to the Committee which shall meet, at the request of any Party, to examine the market situation. The Parties shall furnish the necessary information concerning their transactions in respect of skimmed milk powder and buttermilk powder for purposes of animal feed, so that the Committee may follow developments in this sector and periodically make forecasts concerning the evolution of this trade.

(footnote original) See Attachment C, "Register of Processes and Control Measures". It is understood that exporters would be permitted to ship skimmed milk powder and buttermilk powder for animal feed purposes in an unaltered state to importers which have had their processes and control measures inserted in the Register. In this case, exporters shall so inform the Committee.

Special conditions of sales

6. Parties undertake, within the limit of their institutional possibilities, to ensure that practices such as those referred to in Article 4 do not have the effect of directly or indirectly bringing the export prices of the products subject to the minimum price provisions below the agreed minimum prices.

Transactions other than normal commercial transactions

7. The provisions of paragraphs 1 to 6 shall not be regarded as applying to donated exports or to exports destined for relief purposes or food-related development purposes or welfare purposes, provided these have been notified to the Council as provided for in Article V of the Agreement.

Article 4

Provision of Information

In cases where prices in international trade of the products covered by Article 1 are approaching the minimum prices mentioned in paragraph 2(b) of Article 3, and without prejudice to the provisions of Article III of the Agreement, Parties shall notify to the Committee all the relevant elements for evaluating
their own market situation and, in particular, credit or loan practices, twinning with other products, barter or three-sided transactions, refunds or rebates, exclusivity contracts, packaging costs and details of the packaging, so that the Committee can make a verification.

*Article 5*

**Obligations of Exporting Parties**

Exporting Parties agree to use their best endeavours, in accordance with their institutional possibilities, to supply on a priority basis the normal commercial requirements of developing importing Parties, especially those used for food-related development purposes and welfare purposes.

*Article 6*

**Cooperation of Importing Parties**

1. Parties which import products covered by Article 1 undertake in particular:

   (a) to cooperate in implementing the minimum price objective of this Annex and to ensure, as far as possible, that the products covered by Article 1 are not imported at less than the appropriate customs valuation equivalent to the prescribed minimum prices;

   (b) without prejudice to the provisions of Article III of the Agreement and Article 4 of this Annex, to supply information concerning imports of products covered by Article 1 from non-Parties;

   (c) to consider sympathetically proposals for appropriate remedial action if imports at prices inconsistent with the minimum prices threaten the operation of this Annex.

2. Paragraph 1 shall not apply to imports of skimmed milk powder and buttermilk powder for purposes of animal feed, provided that such imports are subject to the measures and procedures provided for in paragraph 5 of Article 3.

*Article 7*

**Derogations**

1. Upon request by a Party, the Committee shall have the authority to grant derogations from the provisions of paragraphs 1 to 5 of Article 3 in order to remedy difficulties which observance of minimum prices could cause certain Parties. The Committee shall take a decision on such a request within three months from the date of the request.

2. The provisions of paragraphs 1 to 4 of Article 3 shall not apply to exports, in exceptional circumstances, of small quantities of natural unprocessed cheese which would be below normal export quality as a result of deterioration or production faults. Parties exporting such cheese shall notify the Secretariat in advance of their intention to do so. Parties shall also notify the Committee quarterly of all sales of cheese effected under this provision, specifying in respect of each transaction the quantities, prices and destinations involved.

*Article 8*

**Emergency Action**

Any Party which considers that its interests are seriously endangered by a country not bound by this Annex can request the Chairman of the Committee to convene an emergency meeting of the
Committee within two working days to determine and decide whether measures would be required to meet the situation. If such a meeting cannot be arranged within the two working days and the commercial interests of the Party concerned are likely to be materially prejudiced, that Party may take unilateral action to safeguard its position, on the condition that any other Parties likely to be affected are immediately notified. The Chairman of the Committee shall also be formally advised immediately of the full circumstances of the case and shall call a special meeting of the Committee at the earliest possible moment.
International Bovine Meat Agreement

I. PREAMBLE

A. TEXT OF THE PREAMBLE

The Parties to this Agreement,

Convinced that increased international cooperation should be carried out in such a way as to contribute to the achievement of greater liberalization, stability and expansion in international trade in meat and live animals;

Taking into account the need to avoid serious disturbances in international trade in bovine meat and live animals;

Recognizing the importance of production and trade in bovine meat and live animals for the economies of many countries, especially for certain developed and developing countries;

Mindful of their obligations to the principles and objectives of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "GATT 1994");

(footnote original) 1 This provision shall apply only among Parties that are Members of the World Trade Organization.
Determined, in carrying out the aims of this Agreement to implement the principles and objectives agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973, in particular as concerns special and more favourable treatment for developing countries;

Hereby agree as follows:

B. INTERPRETATION AND APPLICATION OF THE PREAMBLE

No jurisprudence or decision of a competent WTO body.

II. ARTICLE I

A. TEXT OF ARTICLE I

Article I

Objectives

The objectives of this Agreement shall be:

1. to promote the expansion, ever greater liberalization and stability of the international meat and livestock market by facilitating the progressive dismantling of obstacles and restrictions to world trade in bovine meat and live animals, including those which compartmentalize this trade, and by improving the international framework of world trade to the benefit of both consumer and producer, importer and exporter;

2. to encourage greater international cooperation in all aspects affecting the trade in bovine meat and live animals with a view in particular to greater rationalization and more efficient distribution of resources in the international meat economy;

3. to secure additional benefits for the international trade of developing countries in bovine meat and live animals through an improvement in the possibilities for these countries to participate in the expansion of world trade in these products by means of inter alia:

   (a) promoting long-term stability of prices in the context of an expanding world market for bovine meat and live animals; and

   (b) promoting the maintenance and improvement of the earnings of developing countries that are exporters of bovine meat and live animals;

the above with a view thus to deriving additional earnings, by means of securing long-term stability of markets for bovine meat and live animals;

4. to further expand trade on a competitive basis taking into account the traditional position of efficient producers.

B. INTERPRETATION AND APPLICATION OF ARTICLE I

1. General

1. The International Bovine Meat Agreement replaced the Arrangement Regarding Bovine Meat that had operated since 1 January 1980.
III. ARTICLE II

A. TEXT OF ARTICLE II

Article II

Product Coverage

This Agreement applies to the products listed in the Annex 1 and to any other product that may be added by the International Meat Council (hereinafter also referred to as "the Council"), as established under the terms of Article V, in order to accomplish the objectives and provisions of this Agreement.

B. INTERPRETATION AND APPLICATION OF ARTICLE II

No jurisprudence or decision of a competent WTO body.

IV. ARTICLE III

A. TEXT OF ARTICLE III

Article III

Information and Market Monitoring

1. Each Party shall provide regularly and promptly to the Council the information which will permit the Council to monitor and assess the overall situation of the world market for meat and the situation of the world market for each specific meat.

2. Developing country Parties shall furnish the information available to them. In order that these Parties may improve their data collection mechanism, developed country 2 Parties and any developing country Parties able to do so, shall consider sympathetically any request to them for technical assistance.

(footnote original) 2 In this Agreement the term "country" is deemed to include the European Communities as well as any separate customs territory Member of the World Trade Organization.

3. The information that the Parties undertake to provide pursuant to paragraph 1, according to the modalities that the Council shall establish, shall include data on past performance and current situation and an assessment of the outlook regarding production (including the evolution of the composition of herds), consumption, prices, stocks of and trade in the products referred to in Article II, and any other information deemed necessary by the Council, in particular on competing products. Parties shall also provide information on their domestic policies and trade measures including bilateral and plurilateral commitments in the bovine sector, and shall notify as early as possible any changes in such policies and measures that are likely to affect international trade in bovine meat and live animals. The provisions of this paragraph shall not require any 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.

4. The Secretariat of the World Trade Organization (hereinafter referred to as "Secretariat") shall monitor variations in market data, in particular herd sizes, stocks, slaughtering and domestic and international prices, so as to permit early detection of the symptoms of any serious imbalance in the supply and demand situation. The Secretariat shall keep the Council apprised of significant developments on world markets, as well as prospects for production, consumption, exports and imports. The Secretariat shall draw up and keep up to date an inventory of all measures affecting trade

1 See Section VIII.
in bovine meat and live animals, including commitments resulting from bilateral, plurilateral and multilateral negotiations.

B. **INTERPRETATION AND APPLICATION OF ARTICLE III**

1. **Notification requirements**

2. At its meeting on 20-21 June 1995, the International Meat Council adopted the procedural and notification requirements for the information concerning domestic policies, statistics and trade measures including bilateral and plurilateral commitments in the bovine meat sector to be furnished by the parties under Article III (Rules 15 to 18).\(^2\)

V. **ARTICLE IV**

A. **TEXT OF ARTICLE IV**

*Article IV*

*Functions of the International Meat Council and Cooperation between the Parties*

1. The Council shall meet in order to:
   
   (a) evaluate the world supply and demand situation and outlook on the basis of an interpretative analysis of the present situation and of probable developments drawn up by the Secretariat, on the basis of documentation provided in conformity with Article III, including that relating to the operation of domestic and trade policies and of any other information available to the Secretariat;
   
   (b) proceed to a comprehensive examination of the functioning of this Agreement;
   
   (c) provide an opportunity for regular consultation on all matters affecting international trade in bovine meat.

2. If after evaluation of the world supply and demand situation referred to in paragraph 1 (a), or after examination of all relevant information pursuant to paragraph 3 of Article III, the Council finds evidence of a serious imbalance or a threat thereof in the international meat market, the Council will proceed by consensus, taking particular account of the situation in developing countries, to identify for consideration by governments\(^3\) possible solutions to remedy the situation consistent with the principles and rules of GATT 1994.

\(^3\) For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.

3. Depending on whether the Council considers that the situation defined in paragraph 2 is temporary or more durable, the measures referred to in paragraph 2 could include short-, medium-, or long-term measures taken by importers as well as exporters to contribute to improve the overall situation of the world market consistent with the objectives and aims of this Agreement, in particular the expansion, ever greater liberalization, and stability of the international meat and livestock markets.

4. When considering the suggested measures pursuant to paragraphs 2 and 3, due consideration shall be given to special and more favourable treatment to developing countries, where this is feasible and appropriate.

\(^2\) IMA/1. In the questionnaires to be filled out by parties, the parties were to provide the document reference for any policies or measures notified under the notification procedures of the Committees on Agriculture and Sanitary and Phytosanitary Measures (IMA/2).
5. The Parties undertake to contribute to the fullest possible extent to the implementation of the objectives of this Agreement set forth in Article I. To this end, and consistent with the principles and rules of the GATT 1994, Parties shall, on a regular basis, enter into the discussions provided in paragraph 1 (c) with a view to exploring the possibilities of achieving the objectives of this Agreement, in particular the further dismantling of obstacles to world trade in bovine meat and live animals. Such discussions should prepare the way for subsequent consideration of possible solutions of trade problems consistent with the rules and principles of the GATT 1994, which could be jointly accepted by all the Parties concerned, in a balanced context of mutual advantages.

6. Any Party may raise before the Council any matter\(^4\) affecting this Agreement, \emph{inter alia}, for the same purposes provided for in paragraph 2. In a footnote, any matter includes ones covered by Multilateral Trade Agreements annexed to the Agreement Establishing the WTO, in particular those bearing on export and import measures. The Council shall, at the request of a Party, meet within a period of not more than fifteen days to consider any matter affecting this Agreement.

\(^{footnote original}\)\footnote{It is confirmed that the term "matter" in this paragraph includes any matter which is covered by the Multilateral Trade Agreements annexed to the Agreement Establishing the WTO, in particular those bearing on export and import measures.}

\section*{B. \textbf{INTERPRETATION AND APPLICATION OF ARTICLE IV}}

3. Pursuant to Article IV:1, at its meeting of 2 June 1997, the International Meat Council completed its evaluation of the world supply and demand situation and outlook in the bovine meat sector.\(^3\)

\section*{VI. \textbf{ARTICLE V}}

\section*{A. \textbf{TEXT OF ARTICLE V}}

\textit{Article V}

\textit{Administration}

1. \textit{International Meat Council}

An International Meat Council shall be established within the framework of the World Trade Organization (hereinafter referred to as "the WTO"). The Council shall comprise representatives of all Parties to the Agreement and shall carry out all the functions which are necessary to implement the provisions of the Agreement. The Council shall be serviced by the Secretariat. The Council shall establish its own rules of procedure. The Council may, as appropriate, establish subsidiary working groups or other bodies.

2. \textit{Regular and special meetings}

The Council shall normally meet as appropriate, but not less than twice each year. The Chairman may call a special meeting of the Council either on his own initiative or at the request of a Party to this Agreement.

3. \textit{Decisions}

The Council shall reach its decisions by consensus. The Council shall be deemed to have decided on a matter submitted for its consideration if no member of the Council formally objects to the acceptance of a proposal.

4. \textit{Cooperation with other organizations}

\footnote{IMA/W/11. See also IMA/W/1, IMA/W/7 and IMA/W/7/Corr. 1.}
The Council shall make arrangements as appropriate for consultation or cooperation with intergovernmental and non-governmental organizations.

5. Admission of observers

(a) The Council may invite any non-Party government to be represented at any of its meetings as an observer and may determine rules on the rights and obligations of observers, in particular with respect to the provision of information.

(b) The Council may also invite any of the organizations referred to in paragraph 4 to attend any meeting as an observer.

B. Interpretation and Application of Article V


5. Pursuant to Article V:5(b), at its meeting of 21-22 June 1995, the International Meat Council issued a standing invitation to the United Nations Economic Commission for Europe (ECE), FAO, the International Trade Centre (ITC), OECD and UNCTAD.

VII. Article VI

A. Text of Article VI

Article VI

Final provisions

1. Acceptance

(a) This Agreement is open for acceptance, by signature or otherwise, by 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 the Agreement Establishing the WTO (hereinafter referred to as "WTO Agreement"), and by the European Communities.

(b) Reservations may not be entered without the consent of the other Parties.

(c) Acceptance of this Agreement shall carry denunciation of the Arrangement Regarding Bovine Meat, done at Geneva on 12 April 1979, which entered into force on 1 January 1980, for Parties having accepted that Arrangement. Such denunciation shall take effect on the date of entry into force of this Agreement for that Party.

2. Entry into force

This Agreement shall enter into force for those Parties having accepted it, on the date of entry into force of the WTO Agreement. For Parties accepting this Agreement after that date, it shall be effective from the date of their acceptance.

3. Validity

This Agreement shall remain in force for three years. The duration of this Agreement shall be extended for further periods of three years at a time, unless the Council, at least eighty days prior to each date of expiry, decides otherwise.

IMA/1.  
IMA/4, para. 8.
4. Amendment

Except where provision for modification is made elsewhere in this Agreement, the Council may recommend an amendment to the provisions of this Agreement. The proposed amendment shall enter into force upon acceptance by all Parties.

5. Relationship between the Agreement and other Agreements

Nothing in this Agreement shall affect the rights and obligations of Parties under the General Agreement on Tariffs and Trade or the WTO Agreement.\(^5\)

\(^5\) This provision shall apply only among Parties that are Members of the WTO or the GATT

6. Withdrawal

Any Party may withdraw from this Agreement. Such withdrawal shall take effect upon the expiration of sixty days from the date on which written notice of withdrawal is received by the Director-General of the WTO.

7. Deposit

Until the entry into force of the WTO Agreement, the text of this Agreement shall be deposited with the Director-General to the CONTRACTING Parties to GATT who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each Party. The texts of this Agreement in the English, French and Spanish languages shall all be equally authentic. This Agreement, and any amendments thereto, shall, upon the entry into force of the WTO Agreement, be deposited with the Director-General of the WTO.

8. Registration

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

Done at Marrakesh on this fifteenth day of April nineteen hundred and ninety four.

B. INTERPRETATION AND APPLICATION OF ARTICLE VI

6. At its meeting of 30 September 1997 the International Meat Council decided to terminate the International Bovine Meat Agreement.\(^6\) Pursuant to Article X:9 of the WTO Agreement, the General Council deleted the International Bovine Meat Agreement from Annex 4 of the WTO Agreement with its termination effective as of 1 January 1998.\(^7\)

VIII. ANNEX

A. TEXT OF THE ANNEX

ANNEX

PRODUCT COVERAGE

This Agreement applies to bovine meat. For the purpose of this Agreement, the term "bovine meat" is considered to include the following products, as defined by the Harmonized Commodity

\(^6\) IMA/8.

\(^7\) WT/L/252.
Description and Coding System ("Harmonized System") established by the Customs Co-operation Council:

(description)

For those Parties which have not yet implemented the Harmonized System, the following Customs Co-operation Council Nomenclature applies with respect to Article II:

(a) Live bovine animals 01.02

(b) Meat and edible offals of bovine animals, fresh, chilled or frozen ex 02.01

(c) Meat and edible offals of bovine animals, salted, in brine, dried or smoked ex 02.06

(d) Other prepared or preserved meat or offal of bovine animals ex 16.02

HS code

01.02 - Live bovine animals:
- 0102.10 - Pure-bred breeding animals
- 0102.90 - Other

02.01 - Meat of bovine animals, fresh or chilled:
- 0201.10 - Carcasses and half-carcasses
- 0201.20 - Other cuts with bone-in
- 0201.30 - Boneless

02.02 - Meat of bovine animals, frozen:
- 0202.10 - Carcasses and half-carcasses
- 0202.20 - Other cuts with bone-in
- 0202.30 - Boneless

02.06 - Edible offal of bovine animals, fresh, chilled or frozen:
- 0206.10 - Of bovine animals, fresh or chilled
- 0206.20 - Of bovine animals, frozen:
  - 0206.21 - Tongues
  - 0206.22 - Livers
  - 0206.29 - Other

02.10 - Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal:
- 0210.20 - Meat of bovine animals
- 0210.90 - Edible offal of bovine animals

16.02 - Other prepared or preserved meat, meat offal or blood:
- 1602.50 - Of bovine animals

B. INTERPRETATION AND APPLICATION OF THE ANNEX

No jurisprudence or decision of a relevant WTO body.
The following index covers the body text of this book but not the text of the WTO Agreements. Disputes have been indexed under the name of the WTO Member respondent in the dispute and under the subject matter. References in the index are to the relevant chapter and paragraph number. The table below shows abbreviations of the Agreements as used in the index.

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